AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 81 Friday,

No. 232 December 2, 2016

Pages 86905–87408

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 81 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**

General online information **202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

Printed on recycled paper.

Contents

Federal Register

Vol. 81, No. 232

Friday, December 2, 2016

Agriculture Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 87017–87018
Meetings:
Council for Native American Farming and Ranching, 87017

Alcohol and Tobacco Tax and Trade Bureau
PROPOSED RULES
Viticultural Areas:
Dahlonega Plateau; Establishment, 86980–86987

Army Department
NOTICES
Environmental Assessments; Availability, etc.:
Construction and Operation of Solar Photovoltaic Renewable Energy Projects on Army Installations, 87025–87026

Centers for Disease Control and Prevention
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 87037–87039

Centers for Medicare & Medicaid Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 87039–87041

Civil Rights Commission
NOTICES
Meetings:
Nevada State Advisory Committee, 87018

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration

Comptroller of the Currency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Guidance on Sound Incentive Compensation Practices, 87126–87127

Consumer Product Safety Commission
NOTICES
Meetings; Sunshine Act, 87025
Private Civil Litigations:
Litigation Guidance, Recommended Best Practices for Protective Orders and Settlement Agreements, 87023–87025

Defense Department
See Army Department

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Student Assistance General Provisions—Approval of Independently Administered Tests, 87027
William D. Ford Federal Direct Loan Program—150 Percent Limitation, 87026–87027

Employment and Training Administration
NOTICES
Worker Adjustment Assistance Eligibility; Amended Certifications:
CTS Corporation, Including On-site Leased Workers from Specialized Staffing, Manpower, Aerotek, Personnel Partners, Talent Source Staffing, and Tech USA, Elkhart, IN, 87080
Worker Adjustment Assistance Eligibility; Determinations, 87071–87074, 87076–87080
Worker Adjustment Assistance Eligibility; Investigations, 87080–87082
Worker Adjustment Assistance Eligibility; Reconsiderations:
GrafTech International Holdings Inc., Engineered Solutions Division, a subsidiary of Brookfield Asset Management Inc., Anmoore, WV, 87074
Halliburton Energy Services, Inc., Technology, Duncan, OK, 87075
Worker Adjustment Assistance; Investigations, 87075–87076

Energy Department
See Energy Efficiency and Renewable Energy Office
See Federal Energy Regulatory Commission
See Western Area Power Administration

Energy Efficiency and Renewable Energy Office
NOTICES
Petitions for Waivers:
Miele Inc., Dishwashers Test Procedures, 87027–87030
Samsung Electronics America, Inc., Clothes Washer Test Procedure, 87030–87034

Environmental Protection Agency
RULES
Pesticide Tolerances:
Bicyclopyrone, 86960–86966
PROPOSED RULES
Field Validation of Pollutant Measurement Methods:
Method 301 Revisions, 87003–87016
Tribal Implementation Plans and Designations of Air Quality Planning Areas:
Source-Specific Federal Implementation Plan for Four Corners Power Plant, Navajo Nation, 86988–87003
NOTICES
Environmental Impact Statements; Availability, etc., 87036–87037

Federal Aviation Administration
RULES
Airworthiness Directives:
The Boeing Company Airplanes, 86912–86914
Special Conditions:
Gulfstream Aerospace Corporation Model GVII–G500 Airplanes; Electronic Flight-Control-System Mode Annunciation, 86910–86912
PROPOSED RULES
Airworthiness Directives:
Airbus Airplanes, 86975–86977

The Boeing Company Airplanes, 86977–86979
NOTICES
Meetings:
Sixth Radio Technical Commission for Aeronautics SC–235 Non-Rechargeable Lithium Batteries Plenary, 87123–87124

Federal Communications Commission
RULES
Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 87274–87346

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 87034–87035

Federal Highway Administration
RULES
Construction Manager/General Contractor Contracting, 86928–86947
NOTICES
Buy America Waivers, 87124–87125

Federal Trade Commission
RULES
Automotive Fuel Ratings, Certification and Posting, 86914–86915

Fish and Wildlife Service
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
Review of Native Species that are Candidates for Listing as Endangered or Threatened, etc., 87246–87272

Food and Drug Administration
NOTICES
Determinations of Regulatory Review Periods for Purposes of Patent Extensions:
OPDIVO, 87044–87045
TRESIBA, 87045–87047
TRUMENBA, 87041–87042
Guidance:
Physiologically Based Pharmacokinetic Analyses—Format and Content, 87043–87044

General Services Administration
NOTICES
Meetings:
World War One Centennial Commission, 87037

Health and Human Services Department
See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Food and Drug Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration

Homeland Security Department
See U.S. Customs and Border Protection

Housing and Urban Development Department
RULES
HOME Investment Partnerships Program; Changes:
Commitment Requirement, 86947–86953
NOTICES
Federal Properties Suitable as Facilities to Assist the Homeless, 87049–87051

Indian Affairs Bureau
RULES
Civil Penalties Inflation Adjustments, 86953

Interior Department
See Fish and Wildlife Service
See Indian Affairs Bureau
See National Park Service

Internal Revenue Service
RULES
Consistent Basis Reporting Between Estate and Person Acquiring Property from Decedent, 86953–86955
User Fees for Installment Agreements, 86955–86960
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 87127–87128

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Stainless Steel Bar from Spain, 87021–87022
Determinations of Sales at Less than Fair Value:
Certain Carbon and Alloy Steel Cut-To-Length Plate From France, 87019–87021

International Trade Commission
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Softwood Lumber Products from Canada, 87069–87070

Justice Department
RULES
Nondiscrimination on the Basis of Disability by Public Accommodations:
Movie Theaters; Movie Captioning and Audio Description, 87348–87387
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Office of Juvenile Justice and Delinquency Prevention National Training and Technical Assistance Center Feedback Form Package, 87070–87071

Labor Department
See Employment and Training Administration
See Occupational Safety and Health Administration
RULES
Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act, 87130–87243
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Cascades Job Corps College and Career Academy Pilot Evaluation, 87082

Maritime Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 87125–87126

National Aeronautics and Space Administration
NOTICES
Federal Advisory Committees; Establishments, 87082–87083

National Institutes of Health
NOTICES
Meetings:
National Institute of Diabetes and Digestive and Kidney Diseases, 87047
National Institute of Neurological Disorders and Stroke, 87047

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:
2016 Commercial Accountability Measures and Closure for Atlantic Migratory Group Cobia, 86973–86974
Reef Fish Fishery of the Gulf of Mexico; Red Snapper Management Measures, 86971–86973
Re-opening of Recreational Sector for the South Atlantic Other Jacks Complex, 86970
International Fisheries:
Tuna and Tuna-like Species in the Eastern Pacific Ocean; Silky Shark Fishing Restrictions and Fish Aggregating Device Data Collection and Identification, 86966–86970
NOTICES
Fishing Capacity Reduction Programs:
Bering Sea and Aleutian Islands King and Tanner Crab Fisheries, 87022
Meetings:
Pacific Fishery Management Council, 87022–87023

National Park Service
NOTICES
Environmental Impact Statements; Availability, etc.:
Recirculation and Adoption of the Central Everglades Planning Project, 87053–87054
Inventory Completions:
Department of Anthropology at Indiana University, Bloomington, IN, 87060–87061
Glenn A. Black Laboratory of Archaeology at Indiana University, Bloomington, IN, 87065–87066
Indiana University, Bloomington, IN, 87052–87053, 87064–87065
Peabody Museum of Natural History, Yale University, New Haven, CT, 87054–87056, 87059–87062
U.S. Army Corps of Engineers, Huntington District, Huntington, WV, 87067–87069
U.S. Department of Agriculture, Forest Service, Bighorn National Forest, Sheridan, WY, 87056–87057
U.S. Department of Agriculture, Forest Service, Tongass National Forest, Craig Ranger District, Craig, AK, 87051–87052
U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Arizona State Museum, University of Arizona, Tucson, AZ, 87057–87059, 87063–87064
Repatriation of Cultural Items:
Peabody Museum of Natural History, Yale University, New Haven, CT, 87055–87056
U.S. Army Corps of Engineers, Huntington District, Huntington, WV, 87066–87067

National Science Foundation
NOTICES
Antarctic Conservation Act Permits, 87083

Nuclear Regulatory Commission
RULES
Miscellaneous Corrections, 86906–86910
NOTICES
Guidance:
Advanced Light-Water Reactor Probabilistic Risk Assessment, 87083–87085

Occupational Safety and Health Administration
PROPOSED RULES
Standards Improvement Project—Phase IV, 86987–86988

Personnel Management Office
RULES
Federal Employees Health Benefits and Federal Employees Dental and Vision Insurance Programs:
Coverage Exception For Children of Same-Sex Domestic Partners, 86905–86906
NOTICES
Meetings:
Federal Prevailing Rate Advisory Committee, 87085

Postal Regulatory Commission
NOTICES
New Postal Products, 87085–87086

Presidential Documents
PROCLAMATIONS
Special Observances:
National Impaired Driving Prevention Month (Proc. 9547), 87395–87398
World AIDS Day (Proc. 9548), 87399–87400
Trade:
Harmonized Tariff Schedule of the U.S.; Modifications (Proc. 9549), 87401–87407
EXECUTIVE ORDERS
Government Agencies and Employees:
Competitive Service; Appointments of the Fulbright U.S. Student Program, the Gilman International Scholarship Program, and the Critical Language Scholarship Program (EO 13750), 87393–87394
Foreign Service; Competitive Service Appointments of Certain Employees (EO 13749), 87389–87392

Securities and Exchange Commission
NOTICES
Applications:
Deregistration under the Investment Company Act, 87109
Joint Industry Plans:
Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Bats EDGA Exchange, Inc., et al., 87114–87119
Self-Regulatory Organizations; Proposed Rule Changes:
Bats EDGA Exchange, Inc., 87112–87113
Bats EDGX Exchange, Inc., 87109–87112
Chicago Board Options Exchange, Inc., 87102–87106
Financial Industry Regulatory Authority, Inc.; Correction, 87111
Miami International Securities Exchange LLC, 87086–87089
NASDAQ BX, Inc., 87091–87094
NASDAQ PHLX LLC, 87089–87091
NYSE Arca, Inc., 87094–87102
The NASDAQ Stock Market LLC, 87106–87109

Social Security Administration
RULES
Revised Medical Criteria:
Evaluating Human Immunodeficiency Virus Infection and for Evaluating Functional Limitations in Immune System Disorders, 86915–86928
Revised Medical Criteria; Correction:
Evaluating Mental Disorders, 86928

PROPOSED RULES
Anti-Harassment and Hostile Work Environment Case Tracking and Records System, 86979–86980
NOTICES
Privacy Act; Systems of Records, 87119–87121

Substance Abuse and Mental Health Services Administration

NOTICES
Certified Laboratories and Instrumented Initial Testing Facilities:
List of Facilities that Meet Minimum Standards to Engage in Urine Drug Testing for Federal Agencies, 87047–87049

Surface Transportation Board
NOTICES
Acquisition and Operation; Exemptions:
Kokomo Rail, LLC; Rail Line of Indian Creek Railroad Company, 87122–87123
Continuance in Control; Exemptions:
Carload Express, Inc.; Delmarva Central Railroad Co., 87123
Lease Exemptions Containing Interchange Commitments:
Delmarva Central Railroad Co.; Norfolk Southern Railway Co., 87122

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Maritime Administration

Treasury Department
See Alcohol and Tobacco Tax and Trade Bureau
See Comptroller of the Currency
See Internal Revenue Service
NOTICES
Countries Requiring Cooperation with an International Boycott, 87128

U.S. Customs and Border Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 87049

Western Area Power Administration
NOTICES
Meetings:
Proposed 2018 Olmsted Power Marketing Plan, 87035–87036

Separate Parts In This Issue

Part II
Labor Department, 87130–87243

Part III
Interior Department, Fish and Wildlife Service, 87246–87272

Part IV
Federal Communications Commission, 87274–87346

Part V
Justice Department, 87348–87387

Part VI
Presidential Documents, 87389–87394

Part VII
Presidential Documents, 87395–87407

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Proclamations:

9547 87397
9548 87399
9549 87401

Executive Orders:

13749 87391
13750 87393

5 CFR

890 86905
894 86905

10 CFR

2 86906
10 86906
26 86906
30 86906
40 86906
50 86906
55 86906
61 86906
63 86906
70 86906
71 86906
72 86906
73 86906
74 86906
100 86906

14 CFR

25 86910
39 86912

Proposed Rules:

39 (2 documents) 86975, 86977

16 CFR

306 86914

20 CFR

404 (2 documents) 86915, 86928

Proposed Rules:

401 86979

23 CFR

630 86924
635 86924

24 CFR

91 86947
92 86947

25 CFR

140 86953
141 86953
211 86953
213 86953
225 86953
226 86953
227 86953
243 86953
249 86953

26 CFR

1 86953
300 86955

27 CFR

Proposed Rules:

9 86980

28 CFR

36 87348

29 CFR

38 87130

Proposed Rules:

1904 86987
1910 86987
1915 86987
1926 86987

40 CFR

180 86960

Proposed Rules:

49 86988
63 87003

47 CFR

64 87274

50 CFR

300 86966
622 (3 documents) 86970, 86971, 86973

Proposed Rules:

17 87246

Rules and Regulations

Federal Register
Vol. 81, No. 232
Friday, December 2, 2016

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

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 890 and 894

RIN 3206–AN34

Federal Employees Health Benefits and Federal Employees Dental and Vision Insurance Programs' Coverage Exception for Children of Same-Sex Domestic Partners

AGENCY: U.S. Office of Personnel Management.

ACTION: Interim final rule.

SUMMARY: This action amends the rule to create a regulatory exception that allows children of same-sex domestic partners living overseas to maintain their Federal Employees Health Benefits (FEHB) and Federal Employees Dental and Vision Program (FEDVIP) coverage until September 30, 2018. Due to a recent Supreme Court decision, as of January 1, 2016, coverage of children of same-sex domestic partners under the FEHB Program and FEDVIP will generally only be allowed if the couple is married, as discussed in Benefits Administration Letter (BAL) 15–207 dated October 5, 2015. OPM recognizes there are additional requirements placed on overseas federal employees that may not apply to other civilian employees with duty stations in the United States making it difficult to travel to the United States to marry same-sex partners.

DATES: This rule is effective on December 2, 2016.

FOR FURTHER INFORMATION CONTACT: Michael W. Kaszynski, Senior Policy Analyst at *Michael.Kaszynski@opm.gov* or (202) 606–0004. You may also submit comments using the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

SUPPLEMENTARY INFORMATION:

I. Background

Effective January 1, 2014, the Office of Personnel Management (OPM) published the ''Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children; Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums: Conforming Amendments'' final rule (78 FR 64873) to extend FEHB and FEDVIP coverage to children of same-sex domestic partners of Federal employees and annuitants who would marry their partners but live in states that do not allow same-sex couples to marry. As the result of the June 26, 2015, Supreme Court *Obergefell* v. *Hodges* decision, all U.S. states now allow same-sex couples to marry. Accordingly, as of January 2016, coverage of an enrollee's stepchild(ren) is only allowed if the couple is married.

II. Discussion of Interim Rule

This rule amends §§ 890.302 and 894.101 of title 5, Code of Federal Regulations. The amendments will allow an employing agency to request, and for OPM to grant, a continued coverage exception for children of an employee's same-sex domestic partner living outside the United States. Any coverage under such an exception will not extend beyond September 30, 2018. The OPM recognizes there are additional requirements placed on overseas employees that may not apply to other civilian employees with duty stations in the United States making it difficult to travel to the United States to marry same-sex partners. Therefore, OPM is creating the authority to allow an exception for Federal employees in a domestic partnership and living outside of the United States. If requested by an enrollees' agency, coverage of children of same-sex domestic partners can be continued under self and family or self plus one enrollment in the FEHB and FEDVIP Programs. This continued coverage exception will be available to overseas employees until September 30, 2018.

Under Section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*) a general notice of proposed rulemaking is required unless an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. In addition, the APA exempts interpretative rules from proposed rulemaking procedures. This rule continues benefit eligibility past January 1, 2016, for children of same-sex domestic partners of employees living abroad, which require OPM to amend current regulations in an expeditious manner. Therefore, OPM has concluded that delaying implementation of this rule due to a full notice and public comment period would be impracticable and contrary to the public interest since the time it would have taken to issue proposed and final rules would have significantly delayed the implementation of this important regulatory change. For the foregoing reasons, OPM asserts that good cause exists to implement this rule as an interim rule under the APA, 5 U.S.C. 553(b) and accordingly, adopts this rule on that basis.

Regulatory Impact Analysis

OPM has examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of $100 million or more in any one year. This rule is not considered a major rule because OPM estimates there are a relatively small number of overseas enrollments that will be affected. Premium cost increases for this regulatory change will not equal or exceed $100 million.

Paperwork Reduction Act

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale

of the businesses, organizations, and governmental jurisdictions subject to regulation.'' To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to overseas Federal employees, annuitants and their former spouses who are in same-sex domestic partnerships and are not married.

List of Subjects

5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

5 CFR Part 894

Administrative practice and procedure, Civil rights, Government employees, Individuals with disabilities, Intergovernmental relations.

Beth F. Cobert,

Acting Director, U.S. Office of Personnel Management.

Accordingly, OPM is amending 5 CFR parts 890 and 894 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061; Pub. L. 111–148, as amended by Pub. L. 111–152.

■ 2. In § 890.302, revise paragraph (b)(2) to read as follows:

§ 890.302 Coverage of family members.

* * * * *

(b)* * *

(2) *Meaning of stepchild.* Except as provided in paragraph (b)(5) of this section, for purposes of this part, the term ''stepchild'' refers to the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship. Coverage of children of domestic partners terminates on January 1, 2016, unless an agency requests, and OPM grants, the agency a continued coverage exception for enrollees living overseas. This continued coverage exception will be available to overseas employees and all coverage, under such an exception, will end on September 30, 2018.

* * * * *

PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM

■ 3. The authority citation for part 894 continues to read as follows:

Authority: 5 U.S.C. 8962; 5 U.S.C. 8992; subpart C also issued under sec. 1 of Pub. L. 110–279, 122 Stat. 2604.

■ 4. In § 894.101, the definition of ''Stepchild'' is revised to read as follows:

§ 894.101 Definitions.

* * * * *

Stepchild means:

(1) Except as provided in paragraph (2), the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship.

(2) The child of an enrollee and a domestic partner who otherwise meet the requirements of paragraphs (1) through (8) of the definition of *Domestic partnership* in this section, but live in a state that has authorized marriage by same-sex couples prior to the first day of Open Season, shall not be considered a stepchild who is the child of a domestic partner in the following plan year. The determination of whether a state's marriage laws render a child ineligible for coverage as a stepchild who is the child of a domestic partner shall be made once annually, based on the law of the state where the same-sex couple lives on the last day before Open Season begins for enrollment for the following year. A child's eligibility for coverage as a stepchild who is the child of a domestic partner in a particular plan year shall not be affected by a mid-year change to a state's marriage law or by the couple's relocation to a different state. For midyear enrollment changes involving the addition of a new stepchild, as defined by this regulation, outside of Open Season, the determination of whether a state's marriage laws render the child ineligible for coverage shall be made at the time the employee notifies the employing office of his or her desire to cover the child. Coverage of children of domestic partners terminates on January 1, 2016, unless an agency requests, and OPM grants, the agency a continued coverage exception for enrollees living overseas. Continued coverage exceptions will only be granted to children of domestic partners living overseas and all coverage exceptions will end on September 30, 2018.

* * * * *

[FR Doc. 2016–28789 Filed 12–1–16; 8:45 am]

BILLING CODE 6325–63–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 10, 26, 30, 40, 50, 55, 61, 63, 70, 71, 72, 73, 74, and 100

RIN 3150–AJ87

[NRC–2016–0229]

Miscellaneous Corrections

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to make miscellaneous corrections. The amendments include correcting a senior NRC management position title; correcting terminology for consistency in NRC regulations; and correcting contact information, references, typographical errors, and misspellings. This document is necessary to inform the public of these non-substantive amendments to the NRC's regulations.

DATES: This rule is effective December 30, 2016.

ADDRESSES: Please refer to Docket ID NRC–2016–0229 when contacting the NRC about the availability of information for this final rule. You may obtain publicly-available information related to this final rule by any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0229. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, please contact the individual listed in the **FOR FURTHER**

INFORMATION CONTACT section of this final rule.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available NRC documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* There are no NRC documents referenced in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Leslie S. Terry, Office of Administration, telephone: 301–415–1167, email: *Leslie.Terry@nrc.gov;* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is amending its regulations in parts 2, 10, 26, 30, 40, 50, 55, 61, 63, 70, 71, 72, 73, 74, and 100 of title 10 of the *Code of Federal Regulations* (10 CFR) to make miscellaneous corrections. The amendments include correcting a senior NRC management position title; correcting terminology for consistency in NRC regulations; and correcting contact information, references, typographical errors, and misspellings. This document is necessary to inform the public of these non-substantive amendments to the NRC's regulations.

II. Summary of Changes

10 CFR Part 2

Contact Information Correction. This final rule changes the facsimile number for service of documents made upon the NRC staff from ''301–415–3725'' to 301–415–3200.''

10 CFR Part 10

Position Title Correction. This final rule removes all references to the incorrect position title ''Deputy Executive Director for Corporate Management and Chief Information Officer'' and replaces them with the correct position title ''Deputy Executive Director for Materials, Waste, Research, State, Tribal, Compliance, Administration, and Human Capital Programs.''

10 CFR Part 26

Correct Terminology. This final rule removes all references to ''blind samples'' and ''blind performance specimens'' and replaces them with ''blind performance test samples.''

10 CFR Parts 30, 40, 61, 63, 70, 72, and 100

Correct Terminology. This final rule removes all references to ''ground water'' and ''ground-water'' and replaces them with ''groundwater.''

10 CFR Part 50

Correct Reference. In § 50.23, this final rule removes the incorrect reference ''§ 50.91'' and replaces it with the correct reference ''§ 50.92.''

Correct Typographical Error. In § 50.34(a)(3)(i), this final rule capitalizes ''Appendix'' at the beginning of the second sentence.

Correct Misspelling. In section IV of appendix C, this final rule removes the misspelled term ''Commiasion'' and replaces it with the correct term ''Commission.''

Correct Reference. In section II.A of appendix J, this final rule removes the incorrect reference ''§ 50.2(v)'' and replaces it with the correct reference ''§ 50.2.''

10 CFR Part 55

Correct Misspelling. In § 55.59(c)(3)(i)(G)(*3*), this final rule removes the misspelled term ''lead-rate'' and replaces it with the correct term ''leak-rate.''

10 CFR Part 71

Correct Typographical Error. In § 71.71(c)(1), this final rule changes the second column heading in the table from ''Total insolation for a 12-hour period (g cal/cm^2'' to ''Total insolation for a 12-hour period (g cal/cm^2).''

10 CFR Part 72

Correct Reference. In § 72.74(b), this final rule removes the incorrect reference ''§ 73.21(g)(3)'' and replaces it with the correct reference ''§ 73.22(f)(3).''

10 CFR Part 73

Correct Misspelling. In § 73.56(o)(2)(i), this final rule removes the misspelled term ''rtifying'' and replaces it with the correct term ''certifying.''

10 CFR Part 74

Correct Reference. In § 74.11(b), this final rule removes the incorrect reference ''§ 73.21(g)(3)'' and replaces it with the correct reference ''§ 73.22(f)(3).''

III. Rulemaking Procedure

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive publication in the **Federal Register** of a notice of proposed rulemaking and opportunity for comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), the NRC finds good cause to waive notice and opportunity for comment on these amendments, because notice and opportunity for comment are unnecessary. The amendments will have no substantive impact and are of a minor and administrative nature dealing with corrections to certain CFR sections related only to management, organization, procedure, and practice. Specifically, the revisions include correcting a senior NRC management position title; correcting terminology for consistency in NRC regulations; and correcting contact information, references, typographical errors, and misspellings. The amendments do not require action by any person or entity regulated by the NRC, and do not change the substantive responsibilities of any person or entity regulated by the NRC.

IV. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in 10 CFR 51.22(c)(2), which categorically excludes from environmental review rules that are corrective or of a minor, nonpolicy nature and do not substantially modify existing regulations. Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rule.

V. Paperwork Reduction Act Statement

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the document requesting or requiring the collection displays a currently valid OMB control number.

VI. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has

written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883).

VII. Backfitting and Issue Finality

The NRC has determined that the amendments in this final rule do not constitute backfitting and are not inconsistent with any of the issue finality provisions in 10 CFR part 52. The amendments are non-substantive in nature, including correcting a senior NRC management position title; correcting terminology for consistency in NRC regulations; and correcting contact information, references, typographical errors, and misspellings. They impose no new requirements and make no substantive changes to the regulations. The amendments do not involve any provisions that would impose backfits as defined in 10 CFR chapter I, or would be inconsistent with the issue finality provisions in 10 CFR part 52. For these reasons, the issuance of the rule in final form would not constitute backfitting or represent a violation of any of the issue finality provisions in 10 CFR part 52. Therefore, the NRC has not prepared any additional documentation for this correction rulemaking addressing backfitting or issue finality.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Confidential business information, Freedom of information, Environmental protection, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 10

Administrative practice and procedure, Classified information, Government employees, Security measures.

10 CFR Part 26

Administrative practice and procedure, Alcohol abuse, Alcohol testing, Appeals, Chemical testing, Drug abuse, Drug testing, Employee assistance programs, Fitness for duty, Management actions, Nuclear power plants and reactors, Privacy, Protection of information, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear energy, Nuclear materials, Penalties, Radiation protection, Reporting and recordkeeping requirements, Whistleblowing.

10 CFR Part 40

Criminal penalties, Exports, Government contracts, Hazardous materials transportation, Hazardous waste, Nuclear energy, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Source material, Uranium, Whistleblowing.

10 CFR Part 50

Administrative practice and procedure, Antitrust, Classified information, Criminal penalties, Education, Fire prevention, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalties, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements, Whistleblowing.

10 CFR Part 55

Criminal penalties, Manpower training programs, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements.

10 CFR Part 61

Criminal penalties, Hazardous waste, Indians, Intergovernmental relations, Low-level waste, Nuclear energy, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Waste treatment and disposal, Whistleblowing.

10 CFR Part 63

Criminal penalties, Hazardous waste, High-level waste, Indians, Intergovernmental relations, Nuclear energy, Nuclear power plants and reactors, Penalties, Radiation protection, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Classified information, Criminal penalties, Emergency medical services, Hazardous materials transportation, Material control and accounting, Nuclear energy, Nuclear materials, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material, Whistleblowing.

10 CFR Part 71

Criminal penalties, Hazardous materials transportation, Incorporation by reference, Intergovernmental relations, Nuclear materials, Packaging and containers, Penalties, Radioactive materials, Reporting and recordkeeping requirements.

10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Hazardous waste, Indians, Intergovernmental relations, Manpower training programs, Nuclear energy, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

10 CFR Part 73

Criminal penalties, Exports, Hazardous materials transportation, Incorporation by reference, Imports, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 74

Accounting, Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear energy, Nuclear materials, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Special nuclear material.

10 CFR Part 100

Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 2, 10, 26, 30, 40, 50, 55, 61, 63, 70, 71, 72, 73, 74, and 100:

PART 2—AGENCY RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 2 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note.

Section 2.205(j) also issued under 28 U.S.C. 2461 note.

§ 2.305 [Amended]

■ 2. In § 2.305, paragraph (g)(1), remove the number ''301–415–3275'' and add in its place the number ''301–415–3200''.

PART 10—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO RESTRICTED DATA OR NATIONAL SECURITY INFORMATION OR AN EMPLOYMENT CLEARANCE

■ 3. The authority citation for part 10 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 145, 161 (42 U.S.C. 2165, 2201); Energy Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); E.O. 10450, 18 FR 2489, 3 CFR, 1949–1953 Comp., p. 936, as amended; E.O. 10865, 25 FR 1583, 3 CFR, 1959–1963 Comp., p. 398, as amended; E.O. 12968, 60 FR 40245, 3 CFR, 1995 Comp., p. 391.

■ 4. In part 10, wherever it may occur, remove the phrase ''Deputy Executive Director for Corporate Management and Chief Information Officer'' and add in its place the phrase ''Deputy Executive Director for Materials, Waste, Research, State, Tribal, Compliance, Administration, and Human Capital Programs''.

PART 26—FITNESS FOR DUTY PROGRAMS

■ 5. The authority citation for part 26 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 103, 104, 107, 161, 223, 234, 1701 (42 U.S.C. 2073, 2133, 2134, 2137, 2201, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

■ 6. In part 26, wherever they may occur, remove the phrases ''blind samples'' and ''blind performance specimens'' and add in their place the phrase ''blind performance test samples''.

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

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

Authority: Atomic Energy Act of 1954, secs. 11, 81, 161, 181, 182, 183, 184, 186, 187, 223, 234, 274 (42 U.S.C. 2014, 2111, 2201, 2231, 2232, 2233, 2234, 2236, 2237, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); 44 U.S.C. 3504 note.

■ 8. In part 30, wherever it may occur, remove the term ''ground-water'' and add in its place the term ''groundwater''.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

■ 9. The authority citation for part 40 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 62, 63, 64, 65, 69, 81, 83, 84, 122, 161, 181, 182, 183, 184, 186, 187, 193, 223, 234, 274, 275 (42 U.S.C. 2092, 2093, 2094, 2095, 2099, 2111, 2113, 2114, 2152, 2201, 2231, 2232, 2233, 2234, 2236, 2237, 2243, 2273, 2282, 2021, 2022); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Uranium Mill Tailings Radiation Control Act of 1978, sec. 104 (42 U.S.C. 7914); 44 U.S.C. 3504 note.

■ 10. In part 40, wherever they may occur, remove the terms ''ground water'' and ''ground-water'' and add in their place the term ''groundwater''.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 11. The authority citation for part 50 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 101, 102, 103, 104, 105, 108, 122, 147, 149, 161, 181, 182, 183, 184, 185, 186, 187, 189, 223, 234 (42 U.S.C. 2014, 2131, 2132, 2133, 2134, 2135, 2138, 2152, 2167, 2169, 2201, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2239, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act of 1982, sec. 306 (42 U.S.C. 10226); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note; Sec. 109, Pub. L. 96–295, 94 Stat. 783.

§ 50.23 [Amended]

■ 12. In § 50.23, remove the reference ''§ 50.91'' and add in its place the reference ''§ 50.92''.

■ 13. In § 50.34, paragraph (a)(3)(i), revise the last sentence to read as follows:

§ 50.34 Contents of applications; technical information.

(a) * * *

(3) * * *

(i) * * * Appendix A, General Design Criteria for Nuclear Power Plants, establishes minimum requirements for the principal design criteria for water-cooled nuclear power plants similar in design and location to plants for which construction permits have previously been issued by the Commission and provides guidance to applicants for construction permits in establishing principal design criteria for other types of nuclear power units;

* * * * *

Appendix C to Part 50 [Amended]

■ 14. In section IV of appendix C to part 50, remove the term ''Commiasion'' and add in its place the term ''Commission''.

Appendix J to Part 50 [Amended]

■ 15. In section II.A of appendix J to part 50, remove the reference ''§ 50.2(v)'' and add in its place the reference ''§ 50.2''.

PART 55—OPERATORS' LICENSES

■ 16. The authority citation for part 55 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 107, 161, 181, 182, 183, 186, 187, 223, 234 (42 U.S.C. 2137, 2201, 2231, 2232, 2233, 2236, 2237, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); Nuclear Waste Policy Act of 1982, sec. 306 (42 U.S.C. 10226); 44 U.S.C. 3504 note.

§ 55.59 [Amended]

■ 17. In § 55.59(c)(3)(i)(G)(*3*) remove the term ''lead-rate'' and add in its place the term ''leak-rate''.

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

■ 18. The authority citation for part 61 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 57, 62, 63, 65, 81, 161, 181, 182, 183, 223, 234 (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2231, 2232, 2233, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 206, 211 (42 U.S.C. 5841, 5846, 5851); Low-Level Radioactive Waste Policy Amendments Act of 1985, sec. 2 (42 U.S.C. 2021b); 44 U.S.C. 3504 note.

■ 19. In part 61, wherever it may occur, remove the term ''ground water'' and add in its place the term ''groundwater''.

PART 63—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN A GEOLOGIC REPOSITORY AT YUCCA MOUNTAIN, NEVADA

■ 20. The authority citation for part 63 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 223, 234 (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); 42 U.S.C. 2021a; National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 114, 117, 121 (42 U.S.C. 10134, 10137, 10141); 44 U.S.C. 3504 note.

■ 21. In part 63, wherever they may occur, remove the terms ''ground water'' and ''ground-water'' and add in their place the term ''groundwater''.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

■ 22. The authority citation for part 70 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57(d), 108, 122, 161, 182, 183, 184, 186, 187, 193, 223, 234, 274, 1701 (42 U.S.C. 2071, 2073, 2077(d), 2138, 2152, 2201, 2232, 2233, 2234, 2236, 2237, 2243, 2273, 2282, 2021, 2297f); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

■ 23. In part 70, wherever it may occur, remove the term ''ground-water'' and add in its place the term ''groundwater''.

PART 71—PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

■ 24. The authority citation for part 71 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 57, 62, 63, 81, 161, 182, 183, 223, 234, 1701 (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201, 2232, 2233, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act of 1982, sec. 180 (42 U.S.C. 10175); 44 U.S.C. 3504 note.

■ 25. In § 71.71, paragraph (c)(1), revise the second column heading of the table to read as follows:

§ 71.71 Normal conditions of transport.

* * * * *

(c) * * *

(1) * * *

INSOLATION DATA

*	*	*	*	*	Total insolation for a 12-hour period (g cal/cm^2)
*	*	*	*	*	* *

* * * * *

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

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

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2210e, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 117(a), 132, 133, 134, 135, 137, 141, 145(g), 148, 218(a) (42 U.S.C. 10137(a), 10152, 10153, 10154, 10155, 10157, 10161, 10165(g), 10168, 10198(a)); 44 U.S.C. 3504 note.

■ 27. In part 72, wherever it may occur, remove the term ''ground-water'' and add in its place the term ''groundwater''.

§ 72.74 [Amended]

■ 28. In § 72.74(b), remove the reference ''§ 73.21(g)(3)'' and add in its place the reference ''§ 73.22(f)(3)''.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

■ 29. The authority citation for part 73 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 147, 149, 161, 170D, 170E, 170H, 170I, 223, 229, 234, 1701 (42 U.S.C. 2073, 2167, 2169, 2201, 2210d, 2210e, 2210h, 2210i, 2273, 2278a, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note. Section 73.37(b)(2) also issued under Sec. 301, Public Law 96–295, 94 Stat. 789 (42 U.S.C. 5841 note).

§ 73.56 [Amended]

■ 30. In § 73.56(o)(2)(i), remove the term ''rtifying'' and add in its place the term ''certifying''.

PART 74—MATERIAL CONTROL AND ACCOUNTING OF SPEICAL NUCLEAR MATERIAL

■ 31. The authority citation for part 74 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 57, 161, 182, 223, 234, 1701 (42 U.S.C. 2073, 2077, 2201, 2232, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

§ 74.11 [Amended]

■ 32. In § 74.11(b), remove the reference ''§ 73.21(g)(3)'' and add in its place the reference ''§ 73.22(f)(3)''.

PART 100—REACTOR SITE CRITERIA

■ 33. The authority citation for part 100 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 103, 104, 161, 182 (42 U.S.C. 2133, 2134, 2201, 2232); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

■ 34. In part 100, wherever it may occur, remove the term ''ground water'' and add in its place the term ''groundwater''.

Dated at Rockville, Maryland, this 23rd day of November, 2016.

For the Nuclear Regulatory Commission.

Leslie S. Terry,

Acting Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 2016–28684 Filed 11–30–16; 12:00 pm]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2015–1495; Special Conditions No. 25–641–SC]

Special Conditions: Gulfstream Aerospace Corporation Model GVII–G500 Airplanes; Electronic Flight-Control-System Mode Annunciation

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Gulfstream Aerospace Corporation (Gulfstream) Model GVII–G500 airplane. This airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is electronic flight-control-system (EFCS) mode annunciation. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on Gulfstream on December 2, 2016. We must receive your comments by January 17, 2017.

ADDRESSES: Send comments identified by docket number FAA–2015–1495 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/*and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 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.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to 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.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane and Flightcrew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2011; facsimile 425–227–1320.

SUPPLEMENTARY INFORMATION: The FAA has determined that the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon publication in the **Federal Register**.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On March 29, 2012, Gulfstream applied for a type certificate for their new Model GVII–G500 airplane. The Model GVII–G500 airplane will be a business jet capable of accommodating up to 19 passengers. It will incorporate a low, swept-wing design with winglets and a T-tail. The powerplant will consist of two aft-fuselage-mounted Pratt & Whitney turbofan engines.

Type Certification Basis

Under Title 14, Code of Federal Regulations (14 CFR) 21.17, Gulfstream must show that the Model GVII–G500 airplane meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–129.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* part 25) do not contain adequate or appropriate safety standards for the Model GVII–G500 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, Model GVII–G500 airplanes must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36. The FAA must issue a finding of regulatory adequacy under section 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Model GVII–G500 airplane will incorporate the following novel or unusual design feature:

Electronic flight-control-system mode annunciation.

Discussion

These special conditions for flight-control-system mode annunciation, applicable to the Gulfstream Model GVII–G500 airplane, require that suitable mode annunciation be provided to the flightcrew for events that significantly change the operating mode of the system but do not merit the classic ''failure warning.''

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Gulfstream Model GVII–G500 airplane. Should Gulfstream apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only a certain novel or unusual design feature on one model series of airplane. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, the FAA has determined that prior public notice and comment is unnecessary, and good cause exists for adopting these special conditions upon publication in the **Federal Register**.

The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Gulfstream Model GVII–G500 airplanes:

If the design of the flight-control system has multiple modes of operation, a means must be provided to indicate to the flightcrew any mode that significantly changes or degrades the normal handling or operational characteristics of the airplane.

Issued in Renton, Washington, on November 16, 2016.

Phil Forde,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28725 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9436; Directorate Identifier 2016–NM–197–AD; Amendment 39–18726; AD 2016–24–09]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all The Boeing Company Model 787–8 and 787–9 airplanes. This AD requires repetitive cycling of either the airplane electrical power or the power to the three flight control modules (FCMs). This AD was prompted by a report indicating that all three FCMs might simultaneously reset if continuously powered on for 22 days. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 2, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 2, 2016.

We must receive comments on this AD by January 17, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9436.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9436; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Fnu Winarto, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6659; fax: 425–917–6590; email: *fnu.winarto@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We have received reports indicating that an FCM will reset if continuously powered on for 22 days. This condition, if not corrected, could result in simultaneous resets of all three FCMs, which could result in flight control surfaces not moving in response to flight crew inputs for a short time and consequent temporary loss of controllability. We are issuing this AD to correct the unsafe condition on these products.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin B787–81205–SB270040–00, Issue 001, dated November 25, 2016. The service information describes procedures for cycling the airplane electrical power and cycling power to the three FCMs. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires accomplishing the actions specified in the service information described previously. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9436.

Interim Action

We consider this AD interim action. Boeing and its suppliers are developing a terminating solution to address the identified unsafe condition. Once this terminating solution is developed, approved, and available, we might consider additional rulemaking.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because simultaneous resets of all three FCMs could result in flight control surfaces not moving in response to flight crew inputs for a short time and consequent temporary loss of controllability. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and

was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2016–9436 and Directorate Identifier 2016–NM–197–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 99 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Cost per product	Cost on U.S. operators
Cycling of either the airplane electrical power or power to the FCMs.	1 work-hour × $85 per hour = $85 per cycle ..	$85 per cycle	$8,415 per cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–24–09 The Boeing Company: Amendment 39–18726; Docket No. FAA–2016–9436; Directorate Identifier 2016–NM–197–AD.

(a) Effective Date

This AD is effective December 2, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 787–8 and 787–9 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Unsafe Condition

This AD was prompted by a report indicating that all three flight control modules (FCMs) might simultaneously reset if continuously powered on for 22 days. We are issuing this AD to prevent simultaneous resets of all three FCMs, which could result in flight control surfaces not moving in response to flight crew inputs for a short time and consequent temporary loss of controllability.

(f) Compliance

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

(g) Reset of FCMs

Within 7 days after the effective date of this AD, do the action specified in paragraph (g)(1) or (g)(2) of this AD. Repeat the action specified in paragraph (g)(1) or (g)(2) of this AD thereafter at intervals not to exceed 21 days.

(1) Cycle the airplane electrical power, in accordance with ''Option 1'' of the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB270040–00, Issue 001, dated November 25, 2016.

(2) Cycle power to the left, center, and right FCMs, in accordance with ''Option 2'' of the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB270040–00, Issue 001, dated November 25, 2016.

(h) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g)(2) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraph (h)(1), (h)(2), or (h)(3) of this AD.

(1) Boeing Multi-Operator Message MOM–MOM–16–0711–01B, dated October 21, 2016.

(2) Boeing Multi-Operator Message MOM–MOM–16–0711–01B(R1), dated November 17, 2016.

(3) Boeing Multi-Operator Message MOM–MOM–16–0711–01B(R2), dated November 17, 2016.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may

be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (i)(4)(i) and (i)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or sub-step is labeled ''RC Exempt,'' then the RC requirement is removed from that step or sub-step. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(j) Related Information

(1) For more information about this AD, contact Fnu Winarto, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6659; fax: 425–917–6590; email: *fnu.winarto@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (k)(4) of this AD.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Service Bulletin B787–81205–SB270040–00, Issue 001, dated November 25, 2016.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on November 28, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29064 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 306

Automotive Fuel Ratings, Certification and Posting

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Grant of partial exemption from the Commission's automotive fuel ratings, certification, and posting rule.

SUMMARY: The Commission grants the petition of gasoline dispenser manufacturer Gilbarco, Inc. (''Gilbarco'') requesting permission for ethanol flex fuel retailers to post ethanol flex fuel rating labels that differ from size and shape specifications in the Commission's Rule for Automotive Fuel Ratings, Certification and Posting (''Rule''). The Commission grants the partial exemption without a notice and comment period because ''for good cause'' the Commission finds that notice and comment is unnecessary in this case. The Commission previously granted similar requests from Gilbarco and other dispenser manufacturers without notice and comment procedures.

DATES: This partial exemption is effective December 2, 2016.

FOR FURTHER INFORMATION CONTACT: R. Michael Waller, (202) 326–2902, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. The Fuel Rating Rule

The Rule provides procedures for determining, certifying, and posting, through fuel dispenser labels, a rating for automotive fuels intended for consumer sale. As originally published, the Rule required only an octane rating for automotive gasoline.[1] Pursuant to section 1501 of the Energy Policy Act of 1992, 106 Stat. 2776, the Commission then amended the Rule in 1993 to require a rating disclosure for liquid alternative fuels, including gasoline-ethanol blends above 10 percent ethanol (''Ethanol Flex Fuels'').[2] On January 14, 2016, the Commission established a new Ethanol Flex Fuel rating and label, effective July 14, 2016.[3]

Section 306.10 of the Rule requires that retailers post on automotive fuel dispensers a fuel rating label for each kind of automotive fuel sold from the dispenser. Retailers must post labels conspicuously on the dispenser in consumers' full view and as near as reasonably practical to the fuel price.

Section 306.12 of the Rule details label color scheme, shape, size, textual content, and font type and point size. Ethanol Flex Fuel labels must be orange, rectangular, and 3 inches (7.62 cm) wide x 2 ½ inches (6.35 cm) long. In addition, the percentage of ethanol content must be printed in orange font within a 1 inch (2.54 cm) deep black band across the top of the label. Below the band, the label must state ''Use Only in Flex Fuel Vehicles/May Harm Other Engines.''

II. Gilbarco's Prior Petitions

In 1988 and 1995, the Commission granted Gilbarco partial exemptions to allow retailers to post octane labels smaller than required by the Rule. As here, Gilbarco requested the exemption to allow retailers to display the labels on the buttons consumers press to select a particular automotive fuel on multi-blend fuel dispensers (''button labels'').[4] In those instances, the Commission exempted button labels that measured 3 inches (7.62 cm) wide x 2.3 inches (5.84 cm) long and 2.74 inches (6.96 cm) wide x 1.80 inches (4.57 cm) long. Furthermore, the font point size differed from Rule's requirements, and the exempted labels added the word ''Press.''

III. Gilbarco's Current Petition

Gibarco now requests an exemption for smaller label dimensions for Ethanol Flex Fuel button labels and to include the word ''Press'' in the label's black band. In addition, Gilbarco requests permission to post dome-shaped button labels in lieu of rectangular labels for certain dispenser designs. The proposed rectangular labels are 2.38 inches (6.05

[1] *See* Octane Posting and Certification Rule, 44 FR 19160 (Mar. 30, 1979).

[2] 58 FR 41356, 41372 (Aug. 3, 1993).

[3] 81 FR 2054 (Jan. 14, 2016).

[4] *See* 60 FR 57584 (Nov. 16, 1995); 53 FR 29277 (Aug. 3, 1988).

cm) wide x 2.27 inches (5.77 cm) long, and the dome-shaped labels have an outside dimension of 2.378 inches (6.04 cm) wide x 2.717 (6.90 cm) inches long. In addition, the black band across the top of the dome-shaped label is 0.277 inches (0.70 cm) wider than specified in the Rule. The labels' background and text insertions otherwise comply with the Rule's color scheme, content, and font type and point size requirements.

IV. Discussion

The Commission reviewed mock-ups of the proposed rectangular and dome-shaped labels and concludes that the proposed labels adequately meet the Rule's labeling requirements by providing clear and conspicuous disclosure of all the required information and maintaining the Rule's color scheme and font type and point size requirements. Moreover, the Commission's experience with similar exemptions does not indicate that button labels confuse consumers or otherwise impede comprehension of the fuel rating. To the contrary, these labels may increase the likelihood that consumers see the fuel rating because they must choose and press the button before fueling.

Furthermore, pursuant to Rule 1.26, the Commission for good cause finds that notice and comment is unnecessary in this case because the exemption involves a technical and minor deviation from the Rule's labeling requirements and does not impose any new legal obligations on parties subject to the Rule.[5] Moreover, the Commission has previously granted similar exemptions from the Rule's labeling requirements, and this exemption is consistent with those prior determinations.[6]

V. Conclusion

Therefore, the Commission grants Gilbarco and retailers permission to use the proposed rectangular and dome-shaped button labels on Ethanol Flex Fuel dispenser buttons, provided that Gilbarco and retailers comply with the Rule's specifications in all other respects.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2016–29006 Filed 12–1–16; 8:45 am]

BILLING CODE 6750–01–P

[5] *See* 16 CFR 1.26. For these reasons, the Commission also finds good cause for making this exemption effective immediately.

[6] *See, e.g.,* Rule exemptions granted to Gilbarco, 60 FR 57584 (Nov. 16, 1995), 53 FR 29277 (Aug. 3, 1988); Dresser Industries, Inc., 56 FR 26821 (June 11, 1991); and Exxon Corporation, 54 FR 14072 (Apr. 7, 1989).

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Docket No. SSA–2007–0082]

RIN 0960–AG71

Revised Medical Criteria for Evaluating Human Immunodeficiency Virus (HIV) Infection and for Evaluating Functional Limitations in Immune System Disorders

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are revising the criteria in the Listing of Impairments (listings) that we use to evaluate claims involving human immunodeficiency virus (HIV) infection in adults and children under titles II and XVI of the Social Security Act (Act). We also are revising the introductory text of the listings that we use to evaluate functional limitations resulting from immune system disorders. The revisions reflect our program experience, advances in medical knowledge, our adjudicative experience, recommendations from a commissioned report, and comments from medical experts and the public.

DATES: These rules are effective January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Cheryl Williams, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–1020. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213, or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

We are revising and making final the rule for evaluating HIV infection we proposed in a Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on February 26, 2014 (79 FR 10730), and a correction to the proposed rule on March 25, 2014 (79 FR 16250). Even though this rule will not go into effect until January 17, 2017, for clarity, we refer to it in this preamble as the ''final'' rule. We are making several changes in this final rule from the NPRM based upon some of the public comments we received. We are also making minor editorial changes throughout this final rule. We explain these changes below in the ''Summary of Public Comments on the NPRM'' section of this preamble.

The preamble to the NPRM provided an explanation of the changes from the current rules and our reasons for proposing those changes. To the extent that we are adopting the proposed rule as published, we are not repeating that information here. You can view the NPRM by visiting *http://www.regulations.gov* and searching for document SSA–2007–0082.

Why are we revising the listings for evaluating HIV infection?

We are revising the listings for evaluating HIV infection to reflect our program experience and advances in medical knowledge since we last revised the listings related to HIV infection, recommendations from a commissioned report,[1] and a number of public comments. We received comments from medical experts and the public at an outreach policy conference, in response to an Advance Notice of Proposed Rulemaking (ANPRM),[2] and in response to the NPRM. Although we published final rules for immune system disorders on March 18, 2008, that included changes to listings 14.08 and 114.08,[3] the criteria in the current HIV infection listings are not substantively different from the criteria in the final rules we published on July 2, 1993.[4] We indicated in the preamble to those rules that we would carefully monitor these listings to ensure that they continue to meet program purposes, and that we would update them if warranted.

Other Information

In the NPRM, we proposed to remove listing 114.08H for evaluating growth disturbance with an involuntary weight loss (or failure to gain weight at an appropriate rate for age) that meets specified criteria. We proposed instead to evaluate this impairment under a growth impairment listing in 100.00 or a digestive system listing in 105.00. On April 13, 2015, we published a final rule for growth disorders and weight loss in children in 100.00 that retained a listing in 114.00 for growth failure due to HIV immune suppression.[5] We are repeating that listing here for clarity. We have redesignated the listing as 114.11I and the related introductory text as 114.00F7.

Summary of Public Comments on the NPRM

In the NPRM, we provided the public with a 60-day comment period, and we subsequently extended the comment

[1] Institute of Medicine. (2010). *HIV and Disability: Updating the Social Security Listings.* Washington, DC: The National Academies Press.

[2] 73 FR 14409.

[3] 73 FR 14570.

[4] 58 FR 36051.

[5] 80 FR 19522.

period to May 27, 2014. We received 68 comments from 22 commenters. The commenters included advocacy groups, legal services organizations, State agencies, a national group representing disability examiners in State agencies that make disability determinations for us, medical organizations, and individual members of the public.

We carefully considered all of the comments relevant to this rulemaking. We have condensed and summarized the comments below. We present the commenters' concerns and suggestions, respond to all significant issues that are within the scope of this rule, and provide our reasons for adopting or not adopting the recommendations in our responses below.

We received several comments supporting our proposed changes. We appreciate those comments; however, we did not include them. Other comments were on subjects not related to the proposed rule. Although we read and considered these comments, we did not summarize or respond to them below because they are outside the scope of this rulemaking.

Documentation

Comment: Several commenters disagreed with our proposal to remove guidance in the current introductory text that instructed our adjudicators how to consider documentation of HIV infection and manifestations of HIV infection that does not include the results of definitive laboratory testing. Two of these commenters urged us to retain language from the introductory text that explains that we will consider documentation of HIV infection and manifestations of HIV infection that is consistent with the prevailing state of medical knowledge and clinical practice. They also noted that one of the examples of a manifestation of HIV infection in 14.11I, lipodystrophy, is generally diagnosed by clinical observations instead of by a laboratory test. Another commenter requested clarification about making a disability determination when we cannot obtain definitive evidence or a persuasive report from a physician of a manifestation of an HIV infection.

Response: We agree with these comments and have retained the current language in the introductory text for non-definitive documentation of HIV infection and manifestations of HIV infection. This guidance is found in 14.00F1c(ii) and 114.00F1c(ii) for documentation of HIV infection, and 14.00F2c(ii) and 114.00F2c(ii) for manifestations of HIV infection. We have also noted in 14.00F3 and 114.00F3 that, to establish a diagnosis of the disorders that we discuss in the section, we will accept other generally acceptable methods that are consistent with the prevailing state of medical knowledge and clinical practice. Retaining this language provides adjudicators with the information needed to make a disability determination when we cannot obtain either definitive evidence or a persuasive report from a physician of HIV infection or a manifestation of HIV infection.

We have removed the statement ''we will not purchase laboratory testing to establish whether you have HIV infection'' from listing sections 14.00F1b and 114.00F1b, because it implies that we will never pay for diagnostic laboratory HIV testing. Instead, we have clarified that while we will not pay for diagnostic laboratory HIV testing as standard practice because our rules do not require claimants to have definitive laboratory testing documenting the existence of HIV to qualify for disability, we will purchase laboratory HIV testing under limited circumstances.

Specifically, if the existing evidence is not sufficient for us to make a disability determination decision, and no other acceptable documentation exists, we will purchase the examinations or laboratory tests necessary to make a determination in your claim. At times, a specific laboratory test may be necessary to make a determination in a claim, such as a CD4 count that helps to predict clinical outcomes for a person living with HIV.

Similarly, we removed the proposed language in 14.00F2b and 114.00F2b, and that indicated we would not purchase laboratory testing for manifestations of HIV infection. These sections now clarify we will purchase such laboratory tests when they are a necessary part of the disability determination process.

Comment: One commenter asked whether we will use the degree of viremia (the presence of viruses in the blood) for the HIV p24 antigen (p24Ag) test to assess the severity of infection.

Response: We did not make any changes in response to this comment. We cannot use HIV p24Ag to assess the severity of HIV infections because it is an inadequate indicator of immune suppression. In this final rule, we include criteria based on CD4 levels, which is a better measurement of immune suppression. However, we may accept a positive finding on HIV p24Ag testing as documentation of an HIV infection.

Comment: One commenter was concerned that we are making assumptions about individuals and their levels of function based on blood tests and counts.

Response: We have not made any changes in response to this comment. We do not, and will not, require blood tests in order for an HIV-related impairment to satisfy a listing or to find a person with an HIV infection to be disabled. Only listings 14.11F, 14.11G, 114.11F, and 114.11I require a CD4 count to meet the listing. We have set these criteria based on recommendations from experts in the field of HIV infection who believe that it would be appropriate to find people whose CD4 counts meet the requirements are disabled. However, these listings are not the only way that we may find a person with HIV infection to be disabled. If a person's impairment(s) does not meet or equal the severity of a listing, we may find that he or she is disabled at later steps of the sequential evaluation process.

Comment: One commenter noted that proposed listings 14.11A–E and 114.11A–E rely heavily on information located in the proposed introductory text for proper application and understanding. This commenter recommended we revise these listings to include this guidance. The commenter also provided language for these suggested revisions.

Response: We have adopted the commenter's suggested revisions. We have added the commenter's language to clarify that we only consider multicentric Castleman disease under 14.11A and 114.11A. In addition, we have also incorporated the commenter's suggestion to note that the values required by 14.11G do not have to be measured on the same date. We have also made appropriate conforming changes to the introductory text.

Comment: One commenter opined that our proposed revisions discriminate against the poor, as the criteria include medical tests, such as HIV nucleic acid tests by polymerase chain reaction and examination of cerebral spinal fluid, and hospitalizations that many individuals cannot afford and that we are not willing to purchase. The commenter notes that, ''although some of the simpler tests may be available through public health departments and charity clinics, these organizations usually cannot afford to provide any of the more expensive tests and charity clinics are not . . . available in many areas.'' The commenter also requests that we delete the hospitalization criterion from the proposed listings, as we will not pay for hospitalizations.

Response: We did not adopt this comment. The Social Security Act and our regulations require medical evidence to establish a medically determinable impairment. We use medical evidence generally accepted in the medical community and available in medical records to establish and evaluate an impairment. We look at all available evidence about all of the claimant's impairments, not just information about a particular allegation such as HIV infection. We may find a person disabled even if he or she does not have a medical diagnosis for his or her impairments when applying for benefits, as long as we are able to establish a medically determinable severe physical or mental impairment or combination of impairments that meets the duration requirement.

In response to public comments and as discussed above, we have retained the guidance in the introductory text that explains we will accept non-definitive evidence of HIV infection or manifestations of HIV infection. This will allow us to establish HIV infection and manifestations of HIV infection more easily without definitive tests. We will accept a persuasive report from a physician that a positive diagnosis of your HIV infection was confirmed by an appropriate laboratory test(s), such as those described in 14.00F1a. To be persuasive, this report must state that you had the appropriate definitive laboratory test(s) for diagnosing your HIV infection and provide the results. The report must also be consistent with the remaining evidence of record.

We may also document HIV infection by the medical history, clinical and laboratory findings, and diagnoses indicated in the medical evidence, provided that this documentation is consistent with the rest of the medical evidence and the prevailing state of medical knowledge and clinical practice. For example, we will accept a diagnosis of HIV infection without definitive laboratory evidence of the HIV infection if you have an opportunistic disease that is predictive of a defect in cell-mediated immunity (for example, toxoplasmosis of the brain or *Pneumocystis* pneumonia (PCP)), and there is no other known cause of diminished resistance to that disease (for example, long-term steroid treatment or lymphoma). In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing. In the NPRM, we had proposed to accept only definitive tests as evidence of HIV infection or manifestations of HIV infection. Many of the tests that the commenter specifically named were these definitive tests. Allowing adjudicators to establish HIV infection or manifestations of HIV infection without the requirement of a definitive test result helps to allay concerns about the accessibility of tests that we had proposed to require.

Furthermore, the hospitalization criterion is just one of multiple ways adjudicators can find a person is disabled in the sequential evaluation process.[6] The hospitalization criterion is an advantage to a person who applies for disability benefits because it adds another way we may find him or her disabled at the third step of the sequential evaluation process, but it is not the only way we can find a person with HIV infection to be disabled. If a person with HIV infection meets our requirements for disability, but has not been hospitalized to the extent required by our listings, we can find that he or she is disabled based on a finding of medical equivalence, by meeting other listings, or at a later step in our adjudication process. These other mechanisms for finding a person is disabled help to account for the variation of claimants' access to medical treatment.

CD4 Counts

Comment: A number of commenters provided suggestions related to our use of CD4 counts versus CD4 percentages in the proposed listings. One commenter requested that we provide a CD4 percentage for 14.00F1 that would be equivalent to an absolute CD4 count of 50 cells/mm^3 or less. Two commenters requested that we make changes to proposed 114.11F in order to have greater consistency between the childhood and adult HIV listings. These commenters stated that in the proposed listings, children from birth to the attainment of age 5 may rely on a CD4 percentage of less than 15 percent to establish disability under 114.11F1 or 114.11F2, while children age 5 to the attainment of age 18 may rely only on an absolute CD4 count of 50 cells/mm^3 to meet the listing. The commenters stated that they believe that children ages 5 to 18 should be able to use CD4 percentage in order to be consistent with the adult listing.

Response: We will not add a CD4 percentage that is equivalent to an absolute CD4 count of 50 cells/mm^3 or less, because there is no precise correlation between the two measurements. With regard to the commenters' concerns about consistency between the adult and childhood listings involving CD4 measurements, we believe that the commenter may have misread the proposed rule. We note that the criterion based on absolute CD4 measurement alone for adults, like that for children from age 5 to the attainment of age 18, does not include a CD4 percentage. The IOM indicated to us that CD4 levels in children correspond with adult levels by the age of 5 and that absolute CD4 count is generally the preferred metric for these age groups. Therefore, we believe that it is appropriate for the criterion for children in this older age group to mirror that for adults and require this type of measurement.

Furthermore, 14.11G for adults, which was the only current or proposed adult criterion that includes CD4 percentage, requires a CD4 measurement (either absolute count or percentage) in conjunction with either a BMI measurement of less than 18.5 or a hemoglobin measurement of less than 8.0 grams per deciliter. The final rule for evaluating growth disorders and weight loss in children, published April 13, 2015, made changes to the immune system listings, which were not in the NPRM.[7] Under current listing 114.08H for immune suppression and growth failure, we may find a child to be disabled based on a combination of CD4 measurement and growth failure (based on weight-for-length percentiles or body mass index (BMI), depending on age). For children age 5 to the attainment of age 18, the CD4 measurement may be an absolute count or a CD4 percentage. In this final rule, that listing will become 114.11I. Although 14.11G and 114.11I are not analogous (as we do not evaluate adults under listings related to growth impairments), we point this out to show the commenter that there are listings for both adults and children in which we consider CD4 percentages.

Comment: Two commenters disagreed with our proposal to require a single CD4 measurement under proposed listings 14.11F and 14.11G. One commenter remarked that this proposal is different from other listings in which we require two measurements at least 60 days apart and is inconsistent with our durational requirements. The other commenter noted that ''[a]dvances achieved with the availability of highly active antiretroviral therapy (HAART) have dramatically changed the prognosis and functional impact of HIV infection.'' Two commenters expressed concerns about establishing a 12-month

[6] See 20 CFR 404.1520 and 416.920 for the sequential evaluation process we use to determine disability for adults and 20 CFR 416.924 for the sequential evaluation process we use to determine disability for children.

[7] 80 FR 19522.

period of continuous disability based on one CD4 count alone, and one of the commenters suggested adding another CD4 count, hemoglobin level, or BMI assessment to the listing criteria.

One commenter also suggested that we provide specific guidance in relation to low CD4 counts for claimants who do not have access to medical care. The commenter noted that such claimants would be expected to have a more aggressive clinical course of infection. Three commenters stated that claimants may present for medical care with very low CD4 counts, at which point a diagnosis of HIV infection would be made and treatment initiated. With treatment, the claimant's CD4 count would be expected to rise due to the suppression of HIV infection.

Response: We have not adopted these comments. Anyone who meets the requirements in 14.11F or 14.11G occurring within the period that we are considering in connection with his or her application or continuing disability review, has an impairment of listing-level severity that will satisfy our duration requirement, whether or not he or she is receiving medical care. Even though a person's absolute CD4 count or percentage, BMI, or hemoglobin may increase with treatment, the person's immune deficiency will continue with an increased risk of morbidity and mortality for a continuous period of at least 12 months, which satisfies our duration requirement.

Comment: One commenter recommended that we explain in the introductory text that adjudicators can use the lowest values within the entire rating period for CD4 count and BMI or hemoglobin levels to evaluate an impairment. The commenter was concerned that adjudicators might misinterpret the listings to mean these findings must occur simultaneously.

Response: We adopted the comment by making changes to 14.00F5 to explain that the CD4 count and claimant BMI or hemoglobin levels evaluated under 14.11G do not have to be measured on the same date.

Comment: One commenter noted that proposed listings 14.11F and 14.11G use the lowest absolute CD4 count or CD4 percent as the basis for allowance. This commenter requested that we clarify the guidance in the proposed introductory text that these measurements ''must occur within the period we are considering in connection with [the claimant's] application or continuing disability review.''

Response: We did not adopt this comment because it is already considered by our program rules. We are generally required to develop a complete medical history for at least 12 months preceding the month of the date of application. We will remind adjudicators about periods of consideration during our training on the HIV listings.

Comment: One commenter stated that ''there are a number of HIV-infected individuals who have [a BMI of less than] 20 and are severely malnourished, but who fall short of the requirements under [proposed] 14.11G.'' This commenter asked that we ''consider adding a listing for [claimants] who have a BMI [greater than] 18.5 and [less than] 19, with a history of a documented current opportunistic infection and an absolute CD4 count of [less than] 200 in the [adjudicative timeframe].''

Response: We did not adopt the comment. The criteria in proposed 14.11G are appropriate for establishing listing-level severity when considering CD4 and BMI or hemoglobin measurements, as these data are highly predictive of an impairment that we consider disabling. We do not believe the findings proposed by the commenter will generally indicate an impairment that is severe enough to prevent an individual from doing any gainful activity. Moreover, we believe that the impact of adopting this comment would be negligible. Nevertheless, we may find that an individual who meets the criteria suggested by the commenter is disabled at steps 4 or 5 of our sequential evaluation process.

Comment: One commenter pointed out that after the publication of our NPRM, the Centers for Disease Control and Prevention (CDC) published a surveillance case definition that extended CD4 counts and percentages to children as well as adults and adolescents.[8] This updated case definition ''determines the stage of HIV infection in children age 6–12 years in the same way as adults and adolescents.'' Additionally, the commenter stated that staging is primarily based on the CD4 count, which takes precedence over the CD4 percentages; the percentage is considered only if the count is missing. The commenter requested that we make conforming changes to all instances of the listings in which we refer to a CD4 count or percentage. The commenter also wished to note that the CD4 number is the most important measurement and that the CDC made changes for the percentage ranges for immunosuppression in all age groups.

Response: We did not adopt the comment. We use CD4 measurements for a different purpose than the CDC does in their surveillance case definition for HIV infection. The CDC provides surveillance case definitions only for public health surveillance purposes. We have provided CD4 counts in our listings to correspond to a specific level of impairment, which the CDC does not take into account in its surveillance case definitions. However, we have added CD4 counts in the final rule to HIV listings 114.11F1 for children from birth to attainment of age 1 and 114.11F2 for children from age 1 to attainment of age 5.

Comment: One commenter recommended that we ''should not depend exclusively on CD4 count or [our] list of fatal or severely disabling HIV-related conditions'' when determining eligibility for benefits.'' The commenter noted that ''some people that live with HIV/[acquired immunodeficiency syndrome] (AIDS) with CD4 counts above 50 are very ill and not able to seek gainful employment,'' and asked that our ''adjudicators take into account all fatal or very debilitating conditions when determining . . . eligibility for benefits.''

Response: Although we agree that we should not depend exclusively on CD4 count in order to determine eligibility for benefits, we did not make any changes to our listings and note that our regulations include criteria reaching beyond the stated value. At step 3 of our five-step disability determination process, we consider whether the claimant's impairment(s) meets (or medically equals) any of the listings. Many listing criteria do not require a specific diagnosis or laboratory level. For example, the criteria in 14.11I allow us to consider all manifestations of HIV infection that result in significant, documented signs and symptoms and marked limitation in function. If we do not find that a claimant is disabled at step 3, we must still consider whether he or she is disabled at steps 4 or 5 of our sequential evaluation process.[9] We always consider all of a person's impairments when determining whether he or she is disabled, not just the impairments that are in our listings.

[8] Selik, R.M., Mokotoff, E.D., Branson, B., Owen, S.M., Whitmore, S., & Hall, H.I. (2014). Revised Surveillance Case Definition for HIV Infection—United States, 2014. *Morbidity and Mortality Weekly Report (MMWR), 63*(RR03), 1–10.

[9] We evaluate disability differently for children under the age of 18. If we do not find that the child's impairment(s) meet or medically equal a medical listing at step 3, we will consider whether the impairment(s) functionally equal the listings. Steps 4 and 5 do not apply. 20 CFR 416.924, 416.926a.

Complications and Manifestations

Comment: Two commenters recommended that we clarify the difference between complications of HIV infection in proposed listing 14.11H, which is based on multiple hospitalizations, and manifestations of HIV infection in proposed listing 14.11I, which is based on functional limitations. We provide examples of complications of HIV infection in the introductory text at 14.00F6 and examples of manifestations of HIV infection in listing 14.11I itself. These commenters noted that some of the conditions given as examples of complications in 14.00F6 are not provided as examples of manifestations in 14.11I, and considered this to be confusing. One of the commenters believed that ''any 'complication' severe enough to result in hospitalization could also be severe enough to cause functional limitations and thus, should be referenced in the list of manifestations in 14.11I.''

Response: We agree with the commenters and have revised listing 14.11I so that the list of manifestations includes all examples of complications given in 14.00F6.

Comment: Three commenters suggested that we consider signs or symptoms of HIV infection and adverse effects of HIV treatment instead of solely considering repeated manifestations of HIV infection when considering an impairment under proposed listing 14.11I. One commenter provided specific text for a suggested edit to this proposed listing that reflected consideration of signs and symptoms of HIV infection as well as the adverse effects of HIV treatment. Another commenter noted that, in particular, symptoms of HIV infection that are not the direct result of a manifestation of HIV infection, such as fatigue, malaise, and pain, would not be considered under 14.11I.

Response: We did not adopt the comments. We require both repeated manifestations of HIV infection as well as a functional impairment in order to satisfy the criteria under 14.11I because both are necessary to reflect a level of impairment that indicates listing-level severity. If we find that a person's impairment does not meet listing 14.11I (or any of our listings), we will continue to apply the remaining steps in our sequential evaluation process to determine whether the person is disabled. In current 14.00G, which we did not propose to change and therefore did not include in the NPRM, we provide instructions on how we consider the effects of treatment, including adverse effects, in evaluating autoimmune disorders, immune deficiency disorders, or HIV infection. In current 14.00J, which we also did not propose to change and therefore did not include in the NPRM, we provide instructions on how we evaluate immune system disorders (including HIV infection) when it does not meet one of the listings. We apply these instructions when a person manifests signs or symptoms of HIV infection that are not specifically named in the HIV listings.

Comment: One commenter was critical of the proposed listings, stating they discriminate in favor of those with only severe manifestations of HIV. The commenter stated that ''HIV infection can have a wide variety of manifestations such as diarrhea, fever, headache, thrush, skin rashes, weakness, weight loss, and dementia,'' and ''these problems can be compounded by the coexistence of a wide variety of heart, lung, orthopedic, mental and other disorders.'' The commenter noted the proposed listings do not include most of these possible combinations, and felt the proposed listings discriminate against those with combinations of manifestations of HIV infection and other disorders.

Response: We did not make any changes in our final listings in response to these comments because we consider all of a claimant's impairments, related or unrelated to HIV infection, when determining whether a person is disabled.[10] We explain in section 14.00I3 that adjudicators may consider multiple types of manifestations of HIV infection when determining whether a person's impairment meets listing 14.11I. While we do not consider impairments other than manifestations of HIV infection when evaluating whether a claimant's impairment meets listing 14.11I, the listings are only step 3 of our five step disability determination process. The purpose of these listings is to quickly identify impairments that we consider severe enough to prevent a person from doing any gainful activity, without the need to evaluate vocational factors. We may still find a person disabled later in our sequential evaluation process even if we find that his or her impairments do not meet or medically equal a listing.

Comment: One commenter requested that we add language to note that proposed listing 14.11I ''does not contain an exhaustive list of conditions that may qualify under step 3 of the sequential evaluation process.''

Response: We adopted the comment and have added wording to clarify that the examples given in 14.11I are not an exhaustive list.

Comment: A number of commenters noted that HIV infection may also accelerate or interact with impairments in other body systems. One of these commenters stated that our proposed rule ''does not account for those individuals whose HIV disease effectively accelerates the onset of conditions such as diabetes, heart disease, or kidney disease.'' Two commenters asked that we include cardiovascular conditions in the list of manifestations of HIV infection in proposed 14.11I. These commenters cited the report on HIV and disability that we commissioned from the Institute of Medicine (IOM), which states ''an increased risk for cardiovascular disease in HIV-infected populations as compared with HIV-negative populations has been well documented.''[11] These commenters noted that the IOM report states, ''[cardiovascular disease] is also a leading cause of death in those infected with HIV, with an analysis of the Data Collection on Adverse Events of Anti-HIV Drugs Study finding that 11 percent of HIV-positive people die of a cardiovascular condition.''[12]

Two other commenters recommended that we include a cross-reference to the cardiovascular listings to ensure that adjudicators ''consider the impact and interplay of HIV infection and associated cardiovascular conditions.'' These commenters also suggested that we should cross-reference hepatitis in the HIV listings.

Response: We agree with the comments and have added language to final 14.00J2 and 114.00J2 to note that HIV infection may affect the onset or course of, or treatment for, conditions in other body systems, such as cardiovascular disease and hepatitis. We have also revised 14.11I to provide examples of cardiovascular manifestations of HIV infection.

Comment: One commenter requested that we either eliminate our proposed criteria in 14.11H regarding duration and intervals between hospitalizations or add language that instructs adjudicators to defer to the treating physician with regard to the medical

[10] We evaluate disability claims for children from birth to the attainment of age 18 differently. Steps 4 and 5 of the adult sequential evaluation process do not apply. After we consider whether the child's impairment(s) meets or medically equals a listing, we consider whether the child's impairment(s) functionally equal a listing.

[11] Institute of Medicine. (2010). *HIV and Disability: Updating the Social Security Listings.* Washington, DC: The National Academies Press.

[12] *Id.*

severity of the claimant's condition instead of relying on the hospitalization criteria for the listing. The commenter believes that we are incentivizing claimants to opt for longer hospital stays or abstain from treatment to prove the severity of their conditions and meet the listing criteria.

Response: We did not adopt the comment. In our experience, individuals do not opt for unwarranted hospital stays or forgo treatment in order to possibly qualify for disability benefits. The benefit of having a listing that captures more disabled individuals at step 3 of our sequential evaluation process outweighs the concern that particular claimants may attempt to lengthen hospital stays or abstain from treatment to meet the listing. We believe that a complication(s) of HIV infection that warrants three hospitalizations of 48 hours or longer, 30 days or more apart, within a 12 month period that we are considering in connection with an application or continuing disability review will prevent a person from engaging in any gainful activity and, therefore, represents listing-level severity. Moreover, we are able to evaluate complications of HIV infection resulting in fewer than three hospitalizations in a consecutive 12-month period using medical equivalence, the other listing criteria for adults, the functional equivalence rules for children, or at other steps in our sequential evaluation process. For example, the criteria in listing 14.11I evaluate the functional impact of the person's impairment in the broad areas of activities of daily living, social functioning, and concentration, persistence, or pace, including the functional impact of treatment such as repeated outpatient visits for complications.

Our medical equivalence rules permit us to find that a disorder is medically equivalent to a listing at step 3 if there are other findings related to the disorder that are at least of equal medical significance to the listing criteria (see §§ 404.1526 and 416.926). Although some of our listings include criteria for repeated hospitalizations (14.11H and 114.11G), our medical equivalence policy accommodates recent trends in clinical care that emphasize quality of, rather than quantity of, medical treatment.

The medical equivalence policy also accommodates claimants' varying level of access to medical care, the preference of some medical providers to reduce the use of emergency department and hospital-level medical interventions, and recent trends in clinical care that emphasize quality of, rather than quantity of, medical treatment. This accommodation accounts for differences in medical care people with similar disorders receive depending on the medical resources available to them. The medical equivalence policy provides some flexibility in determining whether a claimant is disabled at step 3 of the sequential evaluation process by allowing us to consider whether the claimant's impairment meets the listed criteria exactly or is at least equal in severity and duration to the criteria of any listed impairment.

If we are not able to find that a person's impairment due to HIV infection is disabling using our listings, we may still find the person disabled at the final steps of the sequential evaluation process.

Finally, the commenter's suggestion that we defer to the treating physician with regard to the medical severity of a person's condition in lieu of hospitalization frequency and duration in this listing means that we would be permitting the physician to determine whether the person is disabled. Under our rules, the finding of disability is an issue reserved to the Commissioner of Social Security.[13]

Comment: One commenter requested that we train adjudicators to evaluate repeated manifestations of HIV infection correctly. The commenter states that, under the current listings, they ''rarely see adjudicators willing to approve claims of individuals with HIV based on repeated manifestations of [HIV infection].''

Response: We did not make any changes in our final listings as a result of this comment. We will provide training on the new listings, as we do for all listing updates. We will also conduct a study on the use of the listings after they have been in use for a year, as we do for all listing updates, and issue further training or policy guidance if needed.

Comment: One commenter recommended that the introductory text be improved by adding a more significant definition of multicentric Castleman disease (MCD), particularly how it is very similar to a lymphoma, although it is not actually a cancer.

Response: We adopted the comment and have provided expanded definitions for MCD in 14.00F3a and 114.00F3a.

Function

Comment: One commenter requested that we provide language to clarify that the examples in the introductory text of complications of HIV infection that may result in hospitalization are ''not an all-inclusive or inflexible list.''

Response: We adopted this comment and have provided text in 14.00F6b and 114.00F5b to indicate that the examples in 14.00F6a and 114.00F5a are not an exhaustive list.

Comment: One commenter agreed with our revisions to section 14.00I5 of the introductory text to clarify our explanation of the term ''marked,'' but suggested that we construct ''this change in a manner that facilitates a better process for determining the 'severity' of the disability.''

Response: We did not adopt this comment. We provide guidance in current sections 14.00I5 through 14.00I8 that explains how we take into consideration a ''marked'' level of limitation in functioning to determine the severity of a person's impairment. This guidance is sufficient to allow adjudicators to evaluate the functional limitations resulting from HIV infection and other immune system disorders.

Comment: Two commenters asked that we ''recognize the validity of an HIV treating physician's objective evaluation of a patient's HIV-related functional limitations.'' They remarked, ''HIV affects individuals differently according to physiological and biological factors unique to the individual,'' and that ''responses to treatment, including side effects, vary greatly according to sex, age and co-occurring conditions.'' These commenters provided specific text that they wanted us to add to proposed listing 14.11I. The proposed text would instruct adjudicators to give special consideration to the opinion(s) of a claimant's primary care provider, in particular, an experienced HIV medical provider.

Response: We did not adopt the comment. When we evaluate medical opinions, such as those described by the commenters, we consider several factors. Those factors include the treating relationship between the opining medical source and the claimant, how much the medical source's treatment records support the medical opinion, and the consistency of the medical opinion with the other evidence throughout the record as a whole, including a claimant's self-reporting.[14] This is true for all impairments across all body systems, not just in cases involving HIV infection.

Additionally, the finding about whether a claimant is or is not disabled is an issue reserved to the Commissioner. We do not give any

[13] See 20 CFR 404.1527(c) and (d) and 416.927(c) and (d).

[14] See 20 CFR 404.1527(c) and 416.927(c).

special significance to the source of a statement on an issue reserved to the Commissioner, even if that source is a medical source who has treated the claimant.[15]

Comment: One commenter suggested that we expand the role of evidence of a claimant's functional limitations, as required under 14.11I, from sources other than those that we consider acceptable medical sources. The commenter urged us to ''immediately adopt the IOM recommendation to expand acceptable medical sources to a wide array of licensed professionals and broaden the acceptable medical sources rule and guidance.''

Response: We did not adopt the comment because it is outside the scope of this rulemaking. However, under our rules, we may use evidence from sources other than acceptable medical sources in order to show the severity of a person's impairment and how that impairment affects the individual's ability to function.[16] For example, we might request evidence from a social worker or another medical or professional source who has been treating a claimant, because this evidence can provide information about the claimant's functional capabilities. Other sources of evidence that we may consider include counselors, family members, caregivers, or neighbors.

Comment: One commenter disagreed with our proposal to remove diarrhea as a standalone listing (current listing 14.08I). The commenter stated that ''diarrhea is a 'manifestation' of HIV infection that does not result in a corresponding 'sign or symptom', and, at [a] certain degree of severity, automatically results in a marked functional limitation.'' The commenter suggested that we retain and revise the current standalone listing for diarrhea, and provided specific language for the revision.

Response: We did not adopt this comment. While we agree that diarrhea is a manifestation of HIV infection that may result in a marked functional limitation, we do not believe it is best evaluated under a standalone listing. We agree with the recommendation of the IOM that diarrhea should be evaluated using functional impairment criteria.[17] We have specifically listed diarrhea as an example of a manifestation of HIV infection that may be evaluated under 14.11I.

Comment: Two commenters requested that we revise proposed listing 14.11I for clarity, to include ''neurocognitive or other mental limitations (including dementia, anxiety, depression, or other mental impairments not meeting the criteria in 12.02, 12.03, 12.04, or 12.06).''

Response: We did not add references to the specific mental disorders listings requested by the commenters, because doing so would appear to restrict the mental disorders we would consider under 14.11I to those specific conditions. Instead, we added language to 14.11I to clarify that we may consider any neurocognitive or other mental limitations not meeting the criteria in 12.00.

Comment: One commenter asked how we would implement the evaluation of a neurocognitive limitation under proposed 14.11I and whether its presence in a claim would necessitate review of the case by a psychological consultant.

Response: We did not make any changes in the final rule based on this comment. The need for a psychological consultant review depends on the facts in the individual case. The neurocognitive limitations provided as an example under listing 14.11I are considered a manifestation of HIV infection. We evaluate medical evidence based on the underlying disorder. If the level of limitation is such that we consider the neurocognitive limitation to be a mental impairment on its own, then a psychological consultant (or a medical consultant who is a psychiatrist) would review the case.

Specific Groups With HIV Infection

Comment: Numerous commenters disagreed with our proposal to remove the text in current section 14.00F4 about manifestations of HIV infection that are specific to women and requested that we restore this language in the final rule. The commenters were concerned that adjudicators who are unfamiliar with HIV infection may not immediately recognize that certain signs and symptoms are related to HIV infection in women. They believed that retaining the current language would help to instruct adjudicators to acknowledge and take these signs and symptoms into account as manifestations of HIV infection in women when making disability determinations.

Response: We adopted these comments and have placed this guidance in section 14.00F7 of the final rule. Additionally, we have added language to 14.11I specifically noting that certain gynecologic conditions may be manifestations of HIV infection.

Comment: One commenter recommended that we consider including the adolescent population more specifically in the listings. The commenter stated that youth ages 13 to 25 years ''constitute the fastest growing and largest group of new HIV infections in the United States.'' The commenter feels the listings ''should take into account adolescents who are transitioning from the Part B listings for children to the Part A listings for adults so that HIV-infected youth are not lost to care.''

Response: We did not adopt this comment. The Part A and Part B listings for adults and children are very similar and closely parallel one another. In addition, under our rules, we may use the criteria in Part A when those criteria give appropriate consideration to the effects of the impairment(s) in children.[18]

Other Body Systems

Comment: One commenter suggested that we remove the information in the proposed revisions to 5.00D4 of the introductory text about how comorbid disorders, such as HIV infection, may affect chronic viral hepatitis infections. The commenter stated that the language ''does not provide meaningful guidance for the listings themselves.''

Response: We did not adopt the comment. We have based our final revisions on recommendations in the IOM report.[19] These revisions also align with the requests of a number of commenters. In the introductory text, we include information that will be useful to our adjudicators when they evaluate impairments in a particular body system. Comorbid disorders, such as HIV infection, do have an impact on chronic viral hepatitis infections, and their presence can affect how we evaluate an impairment under the digestive body system.

General Comments

Comment: Two commenters made suggestions regarding setting diaries for continuing disability review (CDR) under the HIV/AIDS listings. One commenter recommended that ''individuals with HIV/AIDS associated malignancies have markedly improved survival rates,'' and suggested that ''these impairments should be assessed with the same three-year review diary as outlined for primary malignancies in the [cancer (malignant neoplastic)] listings.'' The other commenter suggested that all

[15] See 20 CFR 404.1527(d) and 416.927(d).

[16] See 20 CFR 404.1513(d) and 20.CFR 416.913(d).

[17] Institute of Medicine. (2010). *HIV and Disability: Updating the Social Security Listings.* Washington, DC: The National Academies Press.

[18] See 20 CFR 404.1525(b)(2) and 20 CFR 416.925(b)(2)(i).

[19] Institute of Medicine. (2010). *HIV and Disability: Updating the Social Security Listings.* Washington, DC: The National Academies Press.

HIV/AIDS listings should have a three-year review diary, with the decision to continue or cease benefits defined by the medical improvement review standard (the legal standard for determining whether disability continues in a CDR). The commenter noted ''the specter and presence of an indicator disease no longer portends a poor prognosis,'' and stated that ''improvements in medical care, HAART, and improved survival rates support the need for [a CDR].''

Response: We did not adopt these comments. We do not specify a particular period of disability in the medical listings unless we can uniformly expect medical improvement for an impairment in a specific listing such that a person would no longer be disabled (for example, listing 6.04 for chronic kidney disease with kidney transplant). This is not the case for the impairments in the listings for HIV infection. We will address any new considerations for diary length and CDRs related to HIV infection in our internal policy guidance, as we normally do.

Comment: One commenter expressed concern that we do not provide quantitative data to show the validity of any of our proposed listings. The commenter stated that ''hundreds of thousands of individuals engage in substantial gainful activity while meeting requirements of [other] listings,'' such as hearing loss not treated with cochlear implantation. The commenter requested that we state the information and methods that we used to develop the listing criteria, and questioned whether it is ''possible to evaluate a person's ability to engage in gainful activities using . . . the listings.''

Response: We did not make any changes in the final rule based on this comment. In the NPRM, we provided a list of specific references that we used to inform the changes that we proposed.[20] In this final rule, we are making changes to the proposed rule based on comments that we received in response to the NPRM. The listings in this final rule represent impairments that we consider severe enough to prevent a person from engaging in any gainful activity.

Comment: One commenter noted that medications for HIV infection affect people in different ways and may cause a person's other psychological and physical issues to worsen.

Response: We did not make any changes in the final rule based on this comment. We take the effects of treatment, including medications for HIV infection, into account when evaluating a case. This guidance is provided in section 14.00G of the introductory text, which was not shown in the NPRM because we did not propose to change it. Specifically, in 14.00G5, we explain how we evaluate the effects of treatment of HIV infection, including the effects of antiretroviral drugs, on the ability to function.

Comment: One commenter believed that the language in proposed listing 14.11I is unclear and discussed concerns with how we would apply the rule. The commenter requested that we clarify the listing by adding additional text noting that we consider more than repeated manifestations of HIV (for example, ''significant, documented manifestations, symptoms, or signs'') under 14.11I and asks that we provide training to our adjudicators to properly consider these criteria.

Response: We did not make any changes in the final rule based on this comment. Our proposed language is clear and captures the intent of the listing. The changes that the commenter suggests would alter the meaning of the listing, not clarify it. We will address the concerns with the application of the rule in training for our adjudicators.

Comment: One commenter requested that we provide our disability examiners with more training in evaluating a claim involving HIV infection and applying the HIV infection listings.

Response: We did not make any changes in the final rule based on this comment. As we do with all updates to the listings, we will provide our disability examiners with training on the final rule for evaluating HIV infection.

Other Changes

In the NPRM, we proposed to remove listing 114.08L for evaluating functional limitations resulting from HIV infection in children. We explained that we were not including similar criteria in proposed listing 114.11 for HIV infection in children because of proposed changes in the mental disorders listings and because we may find children disabled under the Supplemental Security Income program based on functional equivalence to the listings.[21] However, we did not propose to revise 114.00I, which notes the childhood listings that we use to evaluate functional limitations under the immune body system, to reflect the removal of 114.08L. After we published the NPRM, we published a final rule for evaluating mental disorders, which removed 114.08L as well as other childhood listing criteria that considered functional limitations under the immune disorders body system. In this final rule, we revised paragraph 114.00I to address how we will consider the impact of immune system disorders, including HIV, on a child's functioning.

In order to provide consistent guidance, we are also making conforming changes to the listings for hematological disorders in 7.00A2 and 107.00A2 to explain that we will evaluate primary central nervous system lymphoma and primary effusion lymphoma associated with HIV infection under 14.11B, 14.11C, 114.11B, and 114.11C, respectively.

When will we begin to use this final rule?

We will begin to use this final rule on its effective date. We will continue to use the current listings until the date this final rule becomes effective. We will apply the final rule to new applications filed on or after the effective date of this final rule and to claims that are pending on or after the effective date.[22]

How long will this final rule be in effect?

This final rule will remain in effect for 3 years after the date it becomes effective, unless we extend the expiration date. We will continue to monitor the rule and may revise it, as needed, before the end of the 3-year period.

What is our authority to make rules and set procedures for determining whether a person is disabled under the statutory definition?

Under the Act, we have full power and authority to make rules and regulations and to establish necessary and appropriate procedures to carry out such provisions. Sections 205(a), 702(a)(5), and 1631(d)(1).

Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the

[20] 79 FR 10730.

[21] See 20 CFR 416.924(d).

[22] This means that we will use this final rule on and after their effective date, in any case in which we make a determination or decision. We expect that Federal courts will review our final decisions using the rules that were in effect at the time we issued the decisions. If a court reverses our final decision and remands a case for further administrative proceedings after the effective date of this final rule, we will apply this final rule to the entire period at issue in the decision we make after the court's remand.

criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB reviewed it.

Regulatory Flexibility Act

We certify that this final rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

These Final Rules do not create any new or affect any existing collections, and therefore, do not require OMB approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income).

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-age, Survivors, and Disability insurance, Reporting and recordkeeping requirements, Social Security.

Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we are amending 20 CFR part 404 subpart P as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart P—Determining Disability and Blindness

■ 1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a)–(b) and (d)–(h), 216(i), 221(a), (i), and (j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)–(b) and (d)–(h), 416(i), 421(a), (i), and (j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Public Law 104–193, 110 Stat. 2105, 2189; sec. 202, Public Law 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Amend appendix 1 to subpart P of part 404 by:

■ a. Revising item 15 of the introductory text before part A;

■ b. Revising the last sentence of paragraph 5.00D4a(i) of part A;

■ c. Revising paragraph 5.00D4b of part A;

■ d. Revising paragraph 7.00A2 of part A;

■ e. Revising the last sentence of paragraph 8.00D3 of part A;

■ f. Revising paragraph 13.00A of part A;

■ g. Revising paragraphs 14.00A4, 14.00F, and 14.00I1 of part A;

■ h. Revising the first two sentences of paragraph 14.00I5 of part A;

■ i. Removing the first three sentences of paragraph 14.00J2 of part A and adding two sentences in their place;

■ j. Removing and reserving listing 14.08 of part A;

■ k. Adding listing 14.11 to part A;

■ l. Revising the last sentence of paragraph 105.00D4a(i) of part B;

■ m. Revising paragraph 105.00D4b of part B;

■ n. Revising paragraph 107.00A2 of part B;

■ o. Revising the last sentence of paragraph 108.00D3 of part B;

■ p. Revising paragraph 113.00A of part B;

■ q. Revising paragraphs 114.00A4, 114.00F, and 114.00I of part B;

■ r. Removing the first two sentences of 114.00J2 of part B and adding three sentences in their place;

■ s. Removing and reserving listing 114.08 of part B; and

■ t. Adding listing 114.11 to part B.

The revisions and additions read as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

* * * * *

15. Immune System Disorders (14.00 and 114.00): January 17, 2020.

* * * * *

Part A

* * * * *

5.00 Digestive System

* * * * *

D. * * *

4. * * *

a. * * *

(i) * * * Comorbid disorders, such as HIV infection, may accelerate the clinical course of viral hepatitis infection(s) or may result in a poorer response to medical treatment.

* * * * *

b. *Chronic hepatitis B virus (HBV) infection.*

(i) *Chronic HBV infection* can be diagnosed by the detection of hepatitis B surface antigen (HBsAg) or hepatitis B virus DNA (HBV DNA) in the blood for at least 6 months. In addition, detection of the hepatitis B e antigen (HBeAg) suggests an increased likelihood of progression to cirrhosis, ESLD, and hepatocellular carcinoma. (HBeAg may also be referred to as ''hepatitis B early antigen'' or ''hepatitis B envelope antigen.'')

(ii) The therapeutic goal of treatment is to suppress HBV replication and thereby prevent progression to cirrhosis, ESLD, and hepatocellular carcinoma. Treatment usually includes interferon injections, oral antiviral agents, or a combination of both. Common adverse effects of treatment are the same as noted in 5.00D4c(ii) for HCV, and generally end within a few days after treatment is discontinued.

* * * * *

7.00 Hematological Disorders

A. * * *

2. We evaluate malignant (cancerous) hematological disorders, such as lymphoma, leukemia, and multiple myeloma, under the appropriate listings in 13.00, except for two lymphomas associated with human immunodeficiency virus (HIV) infection. We evaluate primary central nervous system lymphoma associated with HIV infection under 14.11B, and primary effusion lymphoma associated with HIV infection under 14.11C.

* * * * *

8.00 Skin Disorders

* * * * *

D. * * *

3. * * * We evaluate SLE under 14.02, scleroderma under 14.04, Sjögren's syndrome under 14.10, and HIV infection under 14.11.

* * * * *

13.00 Cancer (Malignant Neoplastic Diseases)

A. *What impairments do these listings cover?* We use these listings to evaluate all cancers (malignant neoplastic diseases) except certain cancers associated with human immunodeficiency virus (HIV) infection. We use the criteria in 14.11B to evaluate primary central nervous system lymphoma, 14.11C to evaluate primary effusion lymphoma, and 14.11E to evaluate pulmonary Kaposi sarcoma if you also have HIV infection. We evaluate all other cancers associated with HIV infection, for example, Hodgkin lymphoma or non-pulmonary Kaposi sarcoma, under this body system or under 14.11F–I in the immune system disorders body system.

* * * * *

14.00 Immune System Disorders

A. * * *

4. *Human immunodeficiency virus (HIV) infection (14.00F).* HIV infection may be characterized by increased susceptibility to common infections as well as opportunistic infections, cancers, or other conditions listed in 14.11.

* * * * *

F. *How do we document and evaluate HIV infection?* Any individual with HIV infection, including one with a diagnosis of acquired immune deficiency syndrome (AIDS), may be found disabled under 14.11 if his or her impairment meets the criteria in that listing or is medically equivalent to the criteria in that listing.

1. *Documentation of HIV infection.*

a. *Definitive documentation of HIV infection.* We may document a diagnosis of HIV infection by positive findings on one or more of the following definitive laboratory tests:

(i) HIV antibody screening test (for example, enzyme immunoassay, or EIA), confirmed by a supplemental HIV antibody test such as the Western blot (immunoblot), an immunofluorescence assay, or an HIV–1/

HIV–2 antibody differentiation immunoassay.

(ii) HIV nucleic acid (DNA or RNA) detection test (for example, polymerase chain reaction, or PCR).

(iii) HIV p24 antigen (p24Ag) test.

(iv) Isolation of HIV in viral culture.

(v) Other tests that are highly specific for detection of HIV and that are consistent with the prevailing state of medical knowledge.

b. We will make every reasonable effort to obtain the results of your laboratory testing. Pursuant to §§ 404.1519f and 416.919f of this chapter, we will purchase examinations or tests necessary to make a determination in your claim if no other acceptable documentation exists.

c. *Other acceptable documentation of HIV infection.* We may also document HIV infection without definitive laboratory evidence.

(i) We will accept a persuasive report from a physician that a positive diagnosis of your HIV infection was confirmed by an appropriate laboratory test(s), such as those described in 14.00F1a. To be persuasive, this report must state that you had the appropriate definitive laboratory test(s) for diagnosing your HIV infection and provide the results. The report must also be consistent with the remaining evidence of record.

(ii) We may also document HIV infection by the medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. For example, we will accept a diagnosis of HIV infection without definitive laboratory evidence of the HIV infection if you have an opportunistic disease that is predictive of a defect in cell-mediated immunity (for example, toxoplasmosis of the brain or *Pneumocystis* pneumonia (PCP)), and there is no other known cause of diminished resistance to that disease (for example, long-term steroid treatment or lymphoma). In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

2. *Documentation of the manifestations of HIV infection.*

a. *Definitive documentation of manifestations of HIV infection.* We may document manifestations of HIV infection by positive findings on definitive laboratory tests, such as culture, microscopic examination of biopsied tissue or other material (for example, bronchial washings), serologic tests, or on other generally acceptable definitive tests consistent with the prevailing state of medical knowledge and clinical practice.

b. We will make every reasonable effort to obtain the results of your laboratory testing. Pursuant to §§ 404.1519f and 416.919f of this chapter, we will purchase examinations or tests necessary to make a determination of your claim if no other acceptable documentation exists.

c. *Other acceptable documentation of manifestations of HIV infection.* We may also document manifestations of HIV infection without definitive laboratory evidence.

(i) We will accept a persuasive report from a physician that a positive diagnosis of your manifestation of HIV infection was confirmed by an appropriate laboratory test(s). To be persuasive, this report must state that you had the appropriate definitive laboratory test(s) for diagnosing your manifestation of HIV infection and provide the results. The report must also be consistent with the remaining evidence of record.

(ii) We may also document manifestations of HIV infection without the definitive laboratory evidence described in 14.00F2a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. For example, many conditions are now commonly diagnosed based on some or all of the following: Medical history, clinical manifestations, laboratory findings (including appropriate medically acceptable imaging), and treatment responses. In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

3. *Disorders associated with HIV infection (14.11A–E).*

a. *Multicentric Castleman disease* (MCD, 14.11A) affects multiple groups of lymph nodes and organs containing lymphoid tissue. This widespread involvement distinguishes MCD from *localized* (or unicentric) Castleman disease, which affects only a single set of lymph nodes. While not a cancer, MCD is known as a lymphoproliferative disorder. Its clinical presentation and progression is similar to that of lymphoma, and its treatment may include radiation or chemotherapy. We require characteristic findings on microscopic examination of the biopsied lymph nodes or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis. Localized (or unicentric) Castleman disease does not meet or medically equal the criterion in 14.11A, but we may evaluate it under the criteria in 14.11H or 14.11I.

b. *Primary central nervous system lymphoma* (PCNSL, 14.11B) originates in the brain, spinal cord, meninges, or eye. Imaging tests (for example, MRI) of the brain, while not diagnostic, may show a single lesion or multiple lesions in the white matter of the brain. We require characteristic findings on microscopic examination of the cerebral spinal fluid or of the biopsied brain tissue, or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

c. *Primary effusion lymphoma* (PEL, 14.11C) is also known as body cavity lymphoma. We require characteristic findings on microscopic examination of the effusion fluid or of the biopsied tissue from the affected internal organ, or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

d. *Progressive multifocal leukoencephalopathy* (PML, 14.11D) is a progressive neurological degenerative syndrome caused by the John Cunningham (JC) virus in immunosuppressed individuals. Clinical findings of PML include clumsiness, progressive weakness, and visual and speech changes. Personality and cognitive changes may also occur. We require appropriate clinical findings, characteristic white matter lesions on MRI, and a positive PCR test for the JC virus in the cerebrospinal fluid to establish the diagnosis. We also accept a positive brain biopsy for JC virus or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

e. *Pulmonary Kaposi sarcoma* (Kaposi sarcoma in the lung, 14.11E) is the most serious form of Kaposi sarcoma (KS). Other internal KS tumors (for example, tumors of the gastrointestinal tract) have a more variable prognosis. We require characteristic findings on microscopic examination of the induced sputum, bronchoalveolar lavage washings, or of the biopsied transbronchial tissue, or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

4. *CD4 measurement (14.11F).* To evaluate your HIV infection under 14.11F, we require one measurement of your absolute CD4 count (also known as CD4 count or CD4+ T-helper lymphocyte count). This measurement must occur within the period we are considering in connection with your application or continuing disability review. If you have more than one measurement of your absolute CD4 count within this period, we will use your lowest absolute CD4 count.

5. *Measurement of CD4 and either body mass index or hemoglobin (14.11G).* To evaluate your HIV infection under 14.11G, we require one measurement of your absolute CD4 count or your CD4 percentage, *and* either a measurement of your body mass index (BMI) or your hemoglobin. These measurements must occur within the period we are considering in connection with your application or continuing disability review. If you have more than one measurement of your CD4 (absolute count or percentage), BMI, or hemoglobin within this period, we will use the lowest of your CD4 (absolute count or percentage), BMI, or hemoglobin. The date of your lowest CD4 (absolute count or percentage) measurement may be different from the date of your lowest BMI or hemoglobin measurement. We calculate your BMI using the formulas in 5.00G2.

6. *Complications of HIV infection requiring hospitalization (14.11H).*

a. Complications of HIV infection may include infections (common or opportunistic), cancers, and other conditions. Examples of complications that may result in hospitalization include: Depression; diarrhea; immune reconstitution inflammatory syndrome; malnutrition; and PCP and other severe infections.

b. Under 14.11H, we require three hospitalizations within a 12-month period that are at least 30 days apart and that result from a complication(s) of HIV infection. The hospitalizations may be for the same complication or different complications of HIV infection and are not limited to the examples of complications that may result in

hospitalization listed in 14.00F6a. All three hospitalizations must occur within the period we are considering in connection with your application or continuing disability review. Each hospitalization must last at least 48 hours, including hours in a hospital emergency department immediately before the hospitalization.

c. We will use the rules on medical equivalence in §§ 404.1526 and 416.926 of this chapter to evaluate your HIV infection if you have fewer, but longer, hospitalizations, or more frequent, but shorter, hospitalizations, or if you receive nursing, rehabilitation, or other care in alternative settings.

7. *HIV infection manifestations specific to women.*

a. *General.* Most women with severe immunosuppression secondary to HIV infection exhibit the typical opportunistic infections and other conditions, such as PCP, *Candida* esophagitis, wasting syndrome, cryptococcosis, and toxoplasmosis. However, HIV infection may have different manifestations in women than in men. Adjudicators must carefully scrutinize the medical evidence and be alert to the variety of medical conditions specific to, or common in, women with HIV infection that may affect their ability to function in the workplace.

b. *Additional considerations for evaluating HIV infection in women.* Many of these manifestations (for example, vulvovaginal candidiasis or pelvic inflammatory disease) occur in women with or without HIV infection, but can be more severe or resistant to treatment, or occur more frequently in a woman whose immune system is suppressed. Therefore, when evaluating the claim of a woman with HIV infection, it is important to consider gynecologic and other problems specific to women, including any associated symptoms (for example, pelvic pain), in assessing the severity of the impairment and resulting functional limitations. We may evaluate manifestations of HIV infection in women under 14.11H–I, or under the criteria for the appropriate body system (for example, cervical cancer under 13.23).

8. *HIV-associated dementia (HAD).* HAD is an advanced neurocognitive disorder, characterized by a significant decline in cognitive functioning. We evaluate HAD under 14.11I. Other names associated with neurocognitive disorders due to HIV infection include: AIDS dementia complex, HIV dementia, HIV encephalopathy, and major neurocognitive disorder due to HIV infection.

* * * * *

I. *How do we use the functional criteria in these listings?*

1. The following listings in this body system include standards for evaluating the functional limitations resulting from immune system disorders: 14.02B, for systemic lupus erythematosus; 14.03B, for systemic vasculitis; 14.04D, for systemic sclerosis (scleroderma); 14.05E, for polymyositis and dermatomyositis; 14.06B, for undifferentiated and mixed connective tissue disease; 14.07C, for immune deficiency disorders, excluding HIV infection; 14.09D, for inflammatory arthritis; 14.10B, for Sjögren's syndrome; and 14.11I, for HIV infection.

* * * * *

5. *Marked* limitation means that the signs and symptoms of your immune system disorder interfere *seriously* with your ability to function. Although we do not require the use of such a scale, ''marked'' would be the fourth point on a five-point scale consisting of no limitation, mild limitation, moderate limitation, marked limitation, and extreme limitation. * * *

* * * * *

J. * * *

2. Individuals with immune system disorders, including HIV infection, may manifest signs or symptoms of a mental impairment or of another physical impairment. For example, HIV infection may accelerate the onset of conditions such as diabetes or affect the course of or treatment options for diseases such as cardiovascular disease or hepatitis. We may evaluate these impairments under the affected body system. * * *

* * * * *

14.08 [Reserved]

* * * * *

14.11 *Human immunodeficiency virus (HIV) infection.* With documentation as described in 14.00F1 and one of the following:

A. Multicentric (not localized or unicentric) Castleman disease affecting multiple groups of lymph nodes or organs containing lymphoid tissue (see 14.00F3a).

OR

B. Primary central nervous system lymphoma (see 14.00F3b).

OR

C. Primary effusion lymphoma (see 14.00F3c).

OR

D. Progressive multifocal leukoencephalopathy (see 14.00F3d).

OR

E. Pulmonary Kaposi sarcoma (see 14.00F3e).

OR

F. Absolute CD4 count of 50 cells/mm^3 or less (see 14.00F4).

OR

G. Absolute CD4 count of less than 200 cells/mm^3 or CD4 percentage of less than 14 percent, *and* one of the following (values do not have to be measured on the same date) (see 14.00F5):

1. BMI measurement of less than 18.5; or

2. Hemoglobin measurement of less than 8.0 grams per deciliter (g/dL).

OR

H. Complication(s) of HIV infection requiring at least three hospitalizations within a 12-month period and at least 30 days apart (see 14.00F6). Each hospitalization must last at least 48 hours, including hours in a hospital emergency department immediately before the hospitalization.

OR

I. Repeated (as defined in 14.00I3) manifestations of HIV infection, including those listed in 14.11A–H, but without the requisite findings for those listings (for example, Kaposi sarcoma not meeting the criteria in 14.11E), or other manifestations (including, but not limited to, cardiovascular disease (including myocarditis, pericardial effusion, pericarditis, endocarditis, or pulmonary arteritis), diarrhea, distal sensory polyneuropathy, glucose intolerance, gynecologic conditions (including cervical cancer or pelvic inflammatory disease, see 14.00F7), hepatitis, HIV-associated dementia, immune reconstitution inflammatory syndrome (IRIS), infections (bacterial, fungal, parasitic, or viral), lipodystrophy (lipoatrophy or lipohypertrophy), malnutrition, muscle weakness, myositis, neurocognitive or other mental limitations not meeting the criteria in 12.00, oral hairy leukoplakia, osteoporosis, pancreatitis, peripheral neuropathy) resulting in significant, documented symptoms or signs (for example, but not limited to, fever, headaches, insomnia, involuntary weight loss, malaise, nausea, night sweats, pain, severe fatigue, or vomiting) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

* * * * *

Part B

* * * * *

105.00 Digestive System

* * * * *

D. * * *

4. * * *

a. * * *

(i) * * * Comorbid disorders, such as HIV infection, may accelerate the clinical course of viral hepatitis infection(s) or may result in a poorer response to medical treatment.

* * * * *

b. *Chronic hepatitis B virus (HBV) infection.*

(i) *Chronic HBV infection* can be diagnosed by the detection of hepatitis B surface antigen (HBsAg) or hepatitis B virus DNA (HBV DNA) in the blood for at least 6 months. In addition, detection of the hepatitis B e antigen (HBeAg) suggests an increased likelihood of progression to cirrhosis, ESLD, and hepatocellular carcinoma. (HBeAg may also be referred to as ''hepatitis B early antigen'' or ''hepatitis B envelope antigen.'')

(ii) The therapeutic goal of treatment is to suppress HBV replication and thereby prevent progression to cirrhosis, ESLD, and hepatocellular carcinoma. Treatment usually includes interferon injections, oral antiviral agents, or a combination of both. Common adverse effects of treatment are the same as noted in 105.00D4c(ii) for HCV, and generally end within a few days after treatment is discontinued.

* * * * *

107.00 Hematological Disorders

A. * * *

2. We evaluate malignant (cancerous) hematological disorders, such as lymphoma,

leukemia, and multiple myeloma, under the appropriate listings in 113.00, except for two lymphomas associated with human immunodeficiency virus (HIV) infection. We evaluate primary central nervous system lymphoma associated with HIV infection under 114.11B, and primary effusion lymphoma associated with HIV infection under 114.11C.

* * * * *

108.00 Skin Disorders

* * * * *

D. * * *

3. * * * We evaluate SLE under 114.02, scleroderma under 114.04, Sjögren's syndrome under 114.10, and HIV infection under 114.11.

* * * * *

113.00 Cancer (Malignant Neoplastic Diseases)

A. *What impairments do these listings cover?* We use these listings to evaluate all cancers (malignant neoplastic diseases) except certain cancers associated with human immunodeficiency virus (HIV) infection. We use the criteria in 114.11B to evaluate primary central nervous system lymphoma, 114.11C to evaluate primary effusion lymphoma, and 114.11E to evaluate pulmonary Kaposi sarcoma if you also have HIV infection. We evaluate all other cancers associated with HIV infection, for example, Hodgkin lymphoma or non-pulmonary Kaposi sarcoma, under this body system or under 114.11F–I in the immune system disorders body system.

* * * * *

114.00 Immune System Disorders

A. * * *

4. *Human immunodeficiency virus (HIV) infection (114.00F).* HIV infection may be characterized by increased susceptibility to common infections as well as opportunistic infections, cancers, or other conditions listed in 114.11.

* * * * *

F. *How do we document and evaluate HIV infection?* Any child with HIV infection, including one with a diagnosis of acquired immune deficiency syndrome (AIDS), may be found disabled under 114.11 if his or her impairment meets the criteria in that listing or is medically equivalent to the criteria in that listing.

1. *Documentation of HIV infection.*

a. *Definitive documentation of HIV infection.* We may document a diagnosis of HIV infection by positive findings on one or more of the following definitive laboratory tests:

(i) HIV antibody screening test (for example, enzyme immunoassay, or EIA), confirmed by a supplemental HIV antibody test such as the Western blot (immunoblot) or immunofluorescence assay, for any child age 18 months or older.

(ii) HIV nucleic acid (DNA or RNA) detection test (for example, polymerase chain reaction, or PCR).

(iii) HIV p24 antigen (p24Ag) test, for any child age 1 month or older.

(iv) Isolation of HIV in viral culture.

(v) Other tests that are highly specific for detection of HIV and that are consistent with the prevailing state of medical knowledge.

b. We will make every reasonable effort to obtain the results of your laboratory testing. Pursuant to § 416.919f of this chapter, we will purchase examinations or tests necessary to make a determination in your claim if no other acceptable documentation exists.

c. *Other acceptable documentation of HIV infection.* We may also document HIV infection without definitive laboratory evidence.

(i) We will accept a persuasive report from a physician that a positive diagnosis of your HIV infection was confirmed by an appropriate laboratory test(s), such as those described in 114.00F1a. To be persuasive, this report must state that you had the appropriate definitive laboratory test(s) for diagnosing your HIV infection and provide the results. The report must also be consistent with the remaining evidence of record.

(ii) We may also document HIV infection by the medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. For example, we will accept a diagnosis of HIV infection without definitive laboratory evidence of the HIV infection if you have an opportunistic disease that is predictive of a defect in cell-mediated immunity (for example, toxoplasmosis of the brain or *Pneumocystis* pneumonia (PCP)), and there is no other known cause of diminished resistance to that disease (for example, long-term steroid treatment or lymphoma). In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

2. *Documentation of the manifestations of HIV infection.*

a. *Definitive documentation of manifestations of HIV infection.* We may document manifestations of HIV infection by positive findings on definitive laboratory tests, such as culture, microscopic examination of biopsied tissue or other material (for example, bronchial washings), serologic tests, or on other generally acceptable definitive tests consistent with the prevailing state of medical knowledge and clinical practice.

b. We will make every reasonable effort to obtain the results of your laboratory testing. Pursuant to § 416.919f of this chapter, we will purchase examinations or tests necessary to make a determination of your claim if no other acceptable documentation exists.

c. *Other acceptable documentation of manifestations of HIV infection.* We may also document manifestations of HIV infection without definitive laboratory evidence.

(i) We will accept a persuasive report from a physician that a positive diagnosis of your manifestation of HIV infection was confirmed by an appropriate laboratory test(s). To be persuasive, this report must state that you had the appropriate definitive laboratory test(s) for diagnosing your manifestation of HIV infection and provide the results. The report must also be consistent with the remaining evidence of record.

(ii) We may also document manifestations of HIV infection without the definitive laboratory evidence described in 114.00F2a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. For example, many conditions are now commonly diagnosed based on some or all of the following: Medical history, clinical manifestations, laboratory findings (including appropriate medically acceptable imaging), and treatment responses. In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

3. *Disorders associated with HIV infection (114.11A–E).*

a. *Multicentric Castleman disease* (MCD, 114.11A) affects multiple groups of lymph nodes and organs containing lymphoid tissue. This widespread involvement distinguishes MCD from *localized* (or unicentric) Castleman disease, which affects only a single set of lymph nodes. While not a cancer, MCD is known as a lymphoproliferative disorder. Its clinical presentation and progression is similar to that of lymphoma, and its treatment may include radiation or chemotherapy. We require characteristic findings on microscopic examination of the biopsied lymph nodes or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis. Localized (or unicentric) Castleman disease does not meet or medically equal the criterion in 114.11A, but we may evaluate it under the criteria in 114.11G or 14.11I in part A.

b. *Primary central nervous system lymphoma* (PCNSL, 114.11B) originates in the brain, spinal cord, meninges, or eye. Imaging tests (for example, MRI) of the brain, while not diagnostic, may show a single lesion or multiple lesions in the white matter of the brain. We require characteristic findings on microscopic examination of the cerebral spinal fluid or of the biopsied brain tissue, or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

c. *Primary effusion lymphoma* (PEL, 114.11C) is also known as body cavity lymphoma. We require characteristic findings on microscopic examination of the effusion fluid or of the biopsied tissue from the affected internal organ, or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

d. *Progressive multifocal leukoencephalopathy* (PML, 114.11D) is a progressive neurological degenerative syndrome caused by the John Cunningham (JC) virus in immunosuppressed children. Clinical findings of PML include clumsiness, progressive weakness, and visual and speech changes. Personality and cognitive changes may also occur. We require appropriate clinical findings, characteristic white matter lesions on MRI, and a positive PCR test for the JC virus in the cerebrospinal fluid to

establish the diagnosis. We also accept a positive brain biopsy for JC virus or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

e. *Pulmonary Kaposi sarcoma* (Kaposi sarcoma in the lung, 114.11E) is the most serious form of Kaposi sarcoma (KS). Other internal KS tumors (for example, tumors of the gastrointestinal tract) have a more variable prognosis. We require characteristic findings on microscopic examination of the induced sputum, bronchoalveolar lavage washings, or of the biopsied transbronchial tissue, or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice to establish the diagnosis.

4. *CD4 measurement (114.11F).* To evaluate your HIV infection under 114.11F, we require one measurement of your absolute CD4 count (also known as CD4 count or CD4+ T-helper lymphocyte count) or CD4 percentage for children from birth to attainment of age 5, or one measurement of your absolute CD4 count for children from age 5 to attainment of age 18. These measurements (absolute CD4 count or CD4 percentage) must occur within the period we are considering in connection with your application or continuing disability review. If you have more than one CD4 measurement within this period, we will use your lowest absolute CD4 count or your lowest CD4 percentage.

5. *Complications of HIV infection requiring hospitalization (114.11G).*

a. Complications of HIV infection may include infections (common or opportunistic), cancers, and other conditions. Examples of complications that may result in hospitalization include: Depression; diarrhea; immune reconstitution inflammatory syndrome; malnutrition; and PCP and other severe infections.

b. Under 114.11G, we require three hospitalizations within a 12-month period that are at least 30 days apart and that result from a complication(s) of HIV infection. The hospitalizations may be for the same complication or different complications of HIV infection and are not limited to the examples of complications that may result in hospitalization listed in 114.00F5a. All three hospitalizations must occur within the period we are considering in connection with your application or continuing disability review. Each hospitalization must last at least 48 hours, including hours in a hospital emergency department immediately before the hospitalization.

c. We will use the rules on medical equivalence in § 416.926 of this chapter to evaluate your HIV infection if you have fewer, but longer, hospitalizations, or more frequent, but shorter, hospitalizations, or if you receive nursing, rehabilitation, or other care in alternative settings.

6. *Neurological manifestations specific to children (114.11H).* The methods of identifying and evaluating neurological manifestations may vary depending on a child's age. For example, in an infant, impaired brain growth can be documented by a decrease in the growth rate of the head. In an older child, impaired brain growth may be documented by brain atrophy on a CT scan or MRI. Neurological manifestations may present in the loss of acquired developmental milestones (developmental regression) in infants and young children or, in the loss of acquired intellectual abilities in school-age children and adolescents. A child may demonstrate loss of intellectual abilities by a decrease in IQ scores, by forgetting information previously learned, by inability to learn new information, or by a sudden onset of a new learning disability. When infants and young children present with serious developmental delays (without regression), we evaluate the child's impairment(s) under 112.00.

7. *Growth failure due to HIV immune suppression (114.11I).*

a. To evaluate growth failure due to HIV immune suppression, we require documentation of the laboratory values described in 114.11I1 and the growth measurements in 114.11I2 or 114.11I3 within the same consecutive 12-month period. The dates of laboratory findings may be different from the dates of growth measurements.

b. Under 114.11I2 and 114.11I3, we use the appropriate table under 105.08B in the digestive system to determine whether a child's growth is less than the third percentile.

(i) For children from birth to attainment of age 2, we use the weight-for-length table corresponding to the child's gender (Table I or Table II).

(ii) For children from age 2 to attainment of age 18, we use the body mass index (BMI)-for-age corresponding to the child's gender (Table III or Table IV).

(iii) BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in 105.00G2c.

* * * * *

I. *How do we consider the impact of your immune system disorder on your functioning?*

1. We will consider all relevant information in your case record to determine the full impact of your immune system disorder, including HIV infection, on your ability to function. Functional limitation may result from the impact of the disease process itself on your mental functioning, physical functioning, or both your mental and physical functioning. This could result from persistent or intermittent symptoms, such as depression, diarrhea, severe fatigue, or pain, resulting in a limitation of your ability to acquire information, to concentrate, to persevere at a task, to interact with others, to move about, or to cope with stress. You may also have limitations because of your treatment and its side effects (see 114.00G).

2. Important factors we will consider when we evaluate your functioning include, but are not limited to: Your symptoms (see 114.00H), the frequency and duration of manifestations of your immune system disorder, periods of exacerbation and remission, and the functional impact of your treatment, including the side effects of your medication (see 114.00G). See §§ 416.924a and 416.926a of this chapter for additional guidance on the factors we consider when we evaluate your functioning.

3. We will use the rules in §§ 416.924a and 416.926a of this chapter to evaluate your functional limitations and determine whether your impairment functionally equals the listings.

J. * * *

2. Children with immune system disorders, including HIV infection, may manifest signs or symptoms of a mental impairment or of another physical impairment. For example, HIV infection may accelerate the onset of conditions such as diabetes or affect the course of or treatment options for diseases such as cardiovascular disease or hepatitis. We may evaluate these impairments under the affected body system. * * *

* * * * *

114.08 [Reserved]

* * * * *

114.11 *Human immunodeficiency virus (HIV) infection.* With documentation as described in 114.00F1 and one of the following:

A. Multicentric (not localized or unicentric) Castleman disease affecting multiple groups of lymph nodes or organs containing lymphoid tissue (see 114.00F3a).

OR

B. Primary central nervous system lymphoma (see 114.00F3b).

OR

C. Primary effusion lymphoma (see 114.00F3c).

OR

D. Progressive multifocal leukoencephalopathy (see 114.00F3d).

OR

E. Pulmonary Kaposi sarcoma (see 114.00F3e).

OR

F. Absolute CD4 count or CD4 percentage (see 114.00F4):

1. For children from birth to attainment of age 1, absolute CD4 count of 500 cells/mm^3 or less, or CD4 percentage of less than 15 percent; or

2. For children from age 1 to attainment of age 5, absolute CD4 count of 200 cells/mm^3 or less, or CD4 percentage of less than 15 percent; or

3. For children from age 5 to attainment of age 18, absolute CD4 count of 50 cells/mm^3 or less.

OR

G. Complication(s) of HIV infection requiring at least three hospitalizations within a 12-month period and at least 30 days apart (see 114.00F5). Each hospitalization must last at least 48 hours, including hours in a hospital emergency department immediately before the hospitalization.

OR

H. A neurological manifestation of HIV infection (for example, HIV encephalopathy or peripheral neuropathy) (see 114.00F6) resulting in one of the following:

1. Loss of previously acquired developmental milestones or intellectual ability (including the sudden onset of a new learning disability), documented on two examinations at least 60 days apart; or

2. Progressive motor dysfunction affecting gait and station or fine and gross motor skills,

documented on two examinations at least 60 days apart; or

3. Microcephaly with head circumference that is less than the third percentile for age, documented on two examinations at least 60 days apart; or

4. Brain atrophy, documented by appropriate medically acceptable imaging.

OR

I. Immune suppression and growth failure (see 114.00F7) documented by 1 and 2, or by 1 and 3:

1. CD4 measurement:

a. For children from birth to attainment of age 5, CD4 percentage of less than 20 percent; or

b. For children from age 5 to attainment of age 18, absolute CD4 count of less than 200 cells/mm^3 or CD4 percentage of less than 14 percent; and

2. For children from birth to attainment of age 2, three weight-for-length measurements that are:

a. Within a consecutive 12-month period; and

b. At least 60 days apart; and

c. Less than the third percentile on the appropriate weight-for-length table under 105.08B1; or

3. For children from age 2 to attainment of age 18, three BMI-for-age measurements that are:

a. Within a consecutive 12-month period; and

b. At least 60 days apart; and

c. Less than the third percentile on the appropriate BMI-for-age table under 105.08B2.

[FR Doc. 2016–28843 Filed 12–1–16; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Docket No. SSA–2007–0101]

RIN 0960–AF69

Revised Medical Criteria for Evaluating Mental Disorders; Correction

AGENCY: Social Security Administration.

ACTION: Final rules; correction.

SUMMARY: We published a document in the **Federal Register** revising our rules on September 26, 2016. That document inadvertently included incorrect amendatory instructions to appendix 1 to subpart P of 20 CFR part 404, removing section 114.00I and redesignating section 114.00J as section 114.00I. This document corrects the final regulation by removing that amendatory instruction.

DATES: These rules are effective January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Cheryl A. Williams, Office of Medical Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–1020. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213, or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: We published a final rule in the **Federal Register** of September 26, 2016 (81 FR 66137) titled, Revised Medical Criteria for Evaluating Mental Disorders. The final rule, among other things, amended 20 CFR part 404. We inadvertently included an amendatory instruction to appendix 1 to subpart P of 20 CFR part 404, removing section 114.00I and redesignating section 114.00J as section 114.00I. This document amends and corrects the final regulation.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income).

In FR Doc. 2016–22908 appearing on page 66138 in the **Federal Register** of Monday, September 26, 2016, the following corrections are made:

Appendix 1 to Subpart P of Part 404 [Corrected]

■ 1. On page 66161, in the first column, in appendix 1 to subpart P of part 404, correct amendatory instruction 3 by removing instruction 3.c.iii, and redesignating instructions 3.c.iv. though 3.c.xvi. as instructions 3.c.iii. through 3.c.xv. respectively.

Carolyn W. Colvin,

Acting Commissioner of Social Security.

[FR Doc. 2016–28845 Filed 12–1–16; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 630 and 635

[FHWA Docket No. FHWA–2015–0009]

RIN 2125–AF61

Construction Manager/General Contractor Contracting

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: Section 1303 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) authorizes the use of the Construction Manager/General Contractor (CM/GC) contracting method. This final rule implements the new provisions in the statute, including requirements for FHWA approvals relating to the CM/GC method of contracting for projects receiving Federal-aid Highway Program funding.

DATES: This final rule is effective January 3, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. Gerald Yakowenko, Contract Administration Team Leader, Office of Program Administration, (202) 366–1562, or Ms. Janet Myers, Office of the Chief Counsel, (202) 366–2019, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), and all comments received may be viewed online through the Federal eRulemaking portal at: *http://www.regulations.gov.* The Web site is available 24 hours each day, 365 days each year. Please follow the instructions. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: *http://www.archives.gov/federal-register/,* or the Government Publishing Office's Web page at: *http://www.gpo.gov/fdsys.*

Executive Summary

This regulatory action fulfills the statutory requirement in section 1303(b) of MAP–21 requiring the Secretary to promulgate a regulation to implement the CM/GC method of contracting. The CM/GC contracting method allows a contracting agency to use a single procurement to secure pre-construction and construction services. In the pre-construction services phase, a contracting agency procures the services of a construction contractor early in the design phase of a project in order to obtain the contractor's input on constructability issues that may be affected by the project design. If the contracting agency and the construction contractor reach agreement on price reasonableness, they enter into a contract for the construction of the project.

The CM/GC method has proven to be an effective method of project delivery through its limited deployment in the FHWA's Special Experimental Project Number 14 (SEP–14) Program. Utilizing the contractor's unique construction expertise in the design phase can recommend for the contracting agency's consideration innovative methods and

industry best practices to accelerate project delivery and offer reduced costs and reduced schedule risks.

Background

Section 1303 of MAP–21 amended 23 U.S.C. 112(b) by adding paragraph (4) to authorize the use of the CM/GC method of contracting. While the term CM/GC is not used in Section 1303 of MAP–21 to describe the contracting method, the statute allows contracting agencies to award a two-phase contract to a ''construction manager or general contractor'' for the provision of construction-related services during both the preconstruction and construction phases of a project. State statutes authorizing this method of contracting use different titles including: CM/GC, Construction Manager at-Risk, and General Contractor/Construction Manager. The FHWA has elected to use the term ''construction manager/general contractor,'' or ''CM/GC,'' in reference to two-phase contracts that provide for constructability input in the preconstruction phase followed by the construction phase of a project.

The CM/GC contracting method allows a contracting agency to receive a contractor's constructability recommendations during the design process. A number of States including Utah, Colorado, and Arizona, have used the CM/GC project delivery method on Federal-aid highway projects under FHWA's SEP–14 program with varying degrees of success. These projects have shown that early contractor involvement through the CM/GC method has the potential to improve the quality, performance, and cost of the project while ensuring that construction issues are addressed and resolved early in the project development process.

The CM/GC contractor's constructability input during the design process is used to supplement, but not replace or duplicate, the engineering or design services provided by the contracting agency or its consultant. A CM/GC contractor does not provide engineering services. More information about the CM/GC project delivery method can be found on the FHWA's Every Day Counts Web page at *http://www.fhwa.dot.gov/everydaycounts/edctwo/2012/cmgc.cfm.*

Notice of Proposed Rulemaking (NPRM)

On June 29, 2015, FHWA published an NPRM in the **Federal Register** at 80 FR 36939 soliciting public comments on its proposal to adopt new regulations. Comments were submitted by nine State Transportation Agencies (STAs),[1] six industry associations, and one private individual.

Analysis of NPRM Comments and FHWA Response

The following summarizes the comments submitted to the docket on the NPRM, notes where and why FHWA has made changes to the final rule, and explains why certain recommendations or suggestions have not been incorporated into the final rule.

Generally speaking, most commenters agreed that the proposed rule implements the statutory requirements. The majority of the comments related to requests for clarification or interpretation of various provisions in the proposed regulatory text. The FHWA has carefully reviewed and analyzed all comments and, where appropriate, made revisions to the rule.

General

The NYSDOT generally supported the proposed regulations and expressed an appreciation for the flexibility allowed by FHWA in various requirements, such as the method of selecting different project delivery methods, developing early work packages, establishing self-perform requirements, and other requirements related to the CM/GC contract method. The FHWA appreciates these comments and finds no substantive response is needed.

The American Association of State Highway and Transportation Officials (AASHTO) indicated the NPRM is consistent with State environmental requirements and protects the integrity of the National Environmental Policy Act (NEPA) decisionmaking process by including specific safeguards to ensure the NEPA decisionmaking process is not biased by the existence of a CM/GC contract and that all reasonable alternatives will be fairly considered when a project involves an Environmental Impact Statement (EIS) or Environmental Assessment (EA). The FHWA appreciates these comments and finds no substantive response is needed.

The Professional Engineers in California Government (PECG) expressed concerns that the CM/GC contracting method will result in non-competitive awards of construction contracts. The group stated the CM/GC contracting method may lead to situations where there is an inherent conflict of interest in having the contractor provide input during the design phase (*e.g.,* a contractor's recommendation to use a specific material because it believes that there is more profitability with that material over another). The PECG believed that CM/GC contracting may result in situations where there is little cost competition because some contracting agencies may be subject to undue pressure to agree to proposed prices to avoid the risk of delaying important highway projects. In response, FHWA has no evidence of situations where a contracting agency was misled by a contractor's recommendation for materials or construction methods. Ultimately, the contracting agency is responsible for the design and material selection issues. Given this responsibility, it is unlikely that there would be an inherent conflict of interest in the design or material selection process. The FHWA acknowledges that some contracting agencies may experience schedule pressures, but all public agencies are responsible for cost, schedule, and quality issues in the development of their projects. The FHWA did not make any revisions to the proposed regulatory text as a result of this comment.

Section-by-Section Analysis

Part 630—Preconstruction Procedures

Section 630.106—Authorization To Proceed

The Minnesota DOT indicated that the proposed provisions in this section would allow certain preconstruction services associated with preliminary design to be authorized but would not provide sufficient flexibility for other limited actions, such as the acquisition of long-lead-time materials, prior to completing NEPA, even at the STA's own risk. The Minnesota DOT stated that materials acquired solely with State funds would not be incorporated into the project until NEPA is complete and would follow FHWA's procurement requirements. The Minnesota DOT recommended that such at-risk work should be eligible for Federal participation once the NEPA evaluation process is completed, and FHWA authorizes construction.

In response, contracting agencies should be aware that 23 U.S.C. 112(b)(4) does not allow construction activities (even at-risk activities) before the conclusion of the NEPA process (and only allows for contracting agency final design activities on an at-risk basis). Title 23 U.S.C. 112(b)(4)(C)(ii) expressly prohibits a contracting agency from awarding the construction services phase of a contract, and from proceeding or permitting any consultant or contractor to proceed with

[1] In this rule FHWA uses the term STA to refer to State Transportation Departments (STD). STA and STD have the same meaning and are used interchangeably in 23 CFR part 635.

construction until completion of the environmental review process. The FHWA considers the acquisition of materials, even on an at-risk basis, to be a ''construction'' activity. Even when performed on an at-risk basis, the early acquisition of materials is an indication that the contracting agency has made a commitment of resources—possibly prejudicing the selection of alternatives before making a final NEPA decision.

The NYSDOT stated that the regulation should provide for an exception to the limitation on final design activities for design elements that are necessary to complete the NEPA process (*e.g.,* to secure environmental approval, an element of the project common to all alternatives may need to be completely designed). The FHWA appreciates this comment but believes that the definition of preliminary design (as contained in 23 CFR 636.103 and referenced in 23 CFR 635.502) is sufficiently broad to include such necessary design work so long as it does not materially affect the objective consideration of alternatives in the NEPA review process. In addition, 23 U.S.C. 139(f)(4)(D) provides authority for a higher level of design for the preferred alternative, subject to conditions in that provision.

In developing the provisions for at-risk activities in the rule, FHWA considered the MAP–21 revisions to 23 U.S.C. 112(b) that added two provisions relating to final design. Section 112(b)(4)(C)(ii) prohibits a contracting agency from proceeding, or permitting any consultant or contractor to proceed, with final design until completion of the NEPA process. Additionally, MAP–21 included language, codified at 23 U.S.C. 112(b)(4)(C)(iv)(I), providing that a contracting agency may proceed at its own expense with design activities at any level of detail for a project before completion of the NEPA process for the project without affecting subsequent approvals required for the project.[2] As noted in the NPRM, FHWA considered these provisions together to determine whether it could give meaning to both. This is consistent with applicable conventions of statutory interpretation. The FHWA determined both provisions could be applied if they are interpreted to prohibit FHWA approval or authorization of financial support for final design work before the conclusion of NEPA, but to allow final design work by a contracting agency solely at its own risk.

Other NEPA requirements and policies, including 40 CFR 1506.1(a)-(b) and FHWA Order 6640.1A—*FHWA Policy on Permissible Project Related Activities During the NEPA Process,* limit agencies from taking actions that might limit the choice of reasonable alternatives in the NEPA review process. The FHWA has a responsibility to ensure compliance with all aspects of the NEPA review process in any federally assisted project, and thus it is important that States not take any actions that might be perceived as limiting the choice of reasonable alternatives—even if those actions are 100 percent State-funded actions taken at the State's financial risk. It is important for FHWA and its partners to be consistent with this issue on both a project-level and national-program basis.

Based on the comments from the Minnesota DOT, NYSDOT, and other commenters, FHWA believes further clarification of allowable at-risk construction activities on CM/GC projects is appropriate. As a result of these comments, we have provided appropriate revisions to the definition of 'early work package' in sections 635.502 and 635.505(b), to clarify what constitutes an early work package and the timing limitations applicable to early work packages. See the discussion in this preamble for each of these sections.

The National Association of Surety Bond Producers (NASBP), the Surety & Fidelity Association of America (SFAA), and the American Subcontractors Association, Inc. (ASA) submitted combined comments. In part, their comments suggested that FHWA revise the appropriate sections of 23 CFR part 630 to clarify the applicability of part 630 to projects that are pursued as public private partnerships (PPP) and receive Federal credit or loan assistance. These associations expressed an interest in ensuring that all Federal assistance is reported for transparency and accountability for long-term PPP agreements. No revisions were made to the proposed regulatory text as these comments are outside of the scope of this rulemaking, and existing USDOT program regulations (49 CFR part 80) and guidance address accountability for Federal credit-based funding in PPP projects.

Part 635—Construction and Maintenance

Subpart A—Contract Procedures

Section 635.110—Licensing and Qualifications of Contractors

The NASBP, SFAA, and ASA recommended that FHWA require contracting agencies to follow the bonding requirements in 49 CFR 18.36—''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments'' (currently 2 CFR 200.325 in 2 CFR part 200—''Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards''). They also suggested that FHWA set appropriate minimum requirements for bonding and other procurement requirements for PPP projects. In response, we note FHWA's contracting regulations do not specify the process or provide requirements for furnishing performance bonds on Federal-aid projects. In general, the contracting agencies may use their own procedures and requirements for bonding, insurance, prequalification, qualification, or licensing of contractors on Federal-aid projects as long as those procedures do not restrict competition (23 CFR 635.110(b)). The revision to this section simply clarifies that this general requirement applies to CM/GC contracting. In general, the provisions of 2 CFR part 200 apply to all Federal assistance programs, except where an authorizing statute provides otherwise. For contracting under the Federal-aid highway program, 23 U.S.C. 112 provides the authority, and the regulations in 23 CFR part 635 implement specific requirements, for construction contracting, including performance bonding requirements. Therefore, the provisions of 23 CFR 635.110 are applicable to all Title 23 funded construction projects, and FHWA did not make any revisions to this section.

The AASHTO provided a recommendation to clarify this section to ensure that both CM/GC and design-build projects are subject to the contracting agency's own bonding, insurance, licensing, qualification, or prequalification procedures. The NPRM proposed to revise the first sentence of subsection (f) to make such clarification. The FHWA reviewed the proposed language and made minor clarifying edits to make it clear the provision applies to both design-build and CM/GC projects. The FHWA concluded the provision is otherwise clear as proposed and therefore made no further revision to the proposed language.

[2] Section 1440 of the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94) (December 4, 2015) allows at-risk preliminary engineering activities under certain conditions. That general provision does not supersede section 112's specific provisions on at-risk final design in connection with CM/GC projects.

Section 635.112—Advertising for Bids and Proposals

The Idaho Transportation Department (ITD) suggested that FHWA's approval of projects included on the Statewide Transportation Improvement Program (STIP) also serve as FHWA's approval of the project for advertising for bids and proposals. The ITD suggested that separate FHWA review and approvals would inevitably delay projects. In response, FHWA notes that the cost information typically available at the time the STIP is developed is preliminary in nature and does not provide sufficient information regarding the project scope and estimated cost for construction authorization purposes. Therefore, FHWA made no revisions to the proposed language.

Section 635.113—Bid Opening and Bid Tabulations

The ITD suggested adding language to the rule that would require the use of low bid procedures if the contracting agency and the CM/GC contractor do not reach an agreed price for construction of the project. In response, FHWA does not want to limit contracting agencies to the use of competitive sealed bidding in circumstances where an agreed price is not reached with the CM/GC contractor. It is possible that another competitive delivery method (such as design-build) could be appropriate for unique projects. Given the need for flexibility in this area, FHWA made no revisions in response to this comment.

Section 635.122—Participation in Progress Payments

The Michigan DOT asked for clarification whether the solicitation document (early in the project development process) needs to specify the method for making construction phase payments. The Michigan DOT recommended that the final rule provide more flexibility to allow contracting agencies to determine the payment method later in the process as long as the method is clearly defined in the construction contract. The Michigan DOT stated that the payment mechanism is one area where risks can be mitigated and transferred effectively. The FHWA agrees with this comment and modified the provision to require the State Transportation Department (STD) to define its procedures for making construction phase progress payments in either the CM/GC solicitation document or the construction services contract documents.

Part 635—Construction and Maintenance

Subpart C—Physical Construction Authorization

Section 635.309—Authorization

The Colorado DOT commented on the preamble discussion for this section and asked if the contracting agency could negotiate the agreed price for construction with the CM/GC contractor before the NEPA review of the project is complete. In response, FHWA notes section 635.505(b) prohibits the contracting agency from awarding the construction services phase of a CM/GC contract before NEPA is complete. The regulation, however, does not prohibit the parties from undertaking the evaluation and negotiation processes that precede such award.

The Maryland State Highway Administration (SHA) asked for clarification whether the term ''Request for Proposals document'' in the proposed language for section 635.309(p)(1)(vi) was in reference to the initial solicitation document or a Request for Proposals for an agreed price for construction services. In response to this comment, FHWA clarifies the provision establishes requirements for design-build Request for Proposals and CM/GC initial solicitation documents. The FHWA edited the references in the provision to better reflect this intended meaning.

Part 635—Construction and Maintenance

Subpart E—Construction Manager/General Contractor (CM/GC) Contracting

Section 635.502—Definitions

Construction Services

The AASHTO expressed a concern that, should the contracting agency desire to include a percent fee when compensating the contractor, it may not be included in the definition and, therefore, not allowed under the rule. The AASHTO suggested adding language to the definition that says the term includes all costs to supervise and administer physical construction work, including fees paid to the CM/GC contractor for project administration. The FHWA acknowledges that, in some instances, payment of a fee to a CM/GC contractor may be an eligible cost. However, after considering the comment, we concluded the eligibility of fees should be addressed on a contract-specific basis. In response to the comment, FHWA added language to the final rule definition that clarifies the term ''construction services'' includes all costs to perform, supervise, and administer physical construction work for the project.

The Connecticut DOT suggested adding the phrase ''[f]or which this portion will be determined by the STA through consideration of the complexity and additional factors associated with each individual project'' after the phrase ''project or portion of the project.'' The FHWA concluded, however, that it was not clear the addition would clarify the definition and therefore did not accept this proposed revision. The Delaware DOT suggested that the definition of ''construction services'' should be modified to account for the possibility that the construction manager does not perform the construction work because an agreed price cannot be negotiated. This possibility is addressed through the provisions in section 635.504(b)(6), and therefore, FHWA did not make this proposed revision to the definition.

Additionally, due to concerns raised by the Minnesota and Connecticut DOTs regarding the statutory requirement for FHWA approval of a price estimate for the entire project before authorizing construction activities (23 U.S.C. 112(b)(4)(C)(iii)(I)), FHWA reviewed the definition of ''construction services'' for clarity. The FHWA determined the last sentence in the proposed definition, concerning procurement and authorization procedures, could cause confusion and could be read as conflicting with requirements in section 635.506(d)(2) of the final rule. For these reasons, FHWA is removing the last sentence in the NPRM definition of ''construction services.''

Early Work Package

The Colorado DOT expressed a concern that the preamble language does not allow contracting agencies to perform long-lead time procurements for materials, equipment, and items at risk. The Minnesota DOT expressed a similar concern and suggested that contracting agencies be allowed to acquire long-lead time materials at their own risk, but not be allowed to install the material prior to the completion of the NEPA process.

For the reasons noted in the discussion for section 630.106, FHWA revised the definition of an early work package to include examples of early construction work, which may not be performed prior to the conclusion of NEPA, even on an at-risk basis (*e.g.,* site preparation, structure demolition, hazardous material abatement/treatment/removal, early material acquisition/fabrication contracts, or any action that may materially affect the objective consideration of alternatives in the NEPA review process). Based on the

concerns expressed by the Minnesota DOT and Colorado DOT, FHWA also added language in the definition of ''preconstruction service'' and in section 635.505(b) to clarify allowable preconstruction activities and emphasize that early construction packages are not allowed until NEPA is complete. In further response to comments questioning the clarity of the definition and the timing of early work package authorizations, FHWA added language to clarify two provisions in the definition that relate to pricing. First, FHWA clarified the type of risks (construction risks) that must be understood before the contracting agency and the CM/GC contractor can agree on a price. The FHWA also inserted into the definition an explicit reference to section 635.506(d)(2), to make it clear that FHWA approval of the price estimate for construction of the entire project must occur before it can authorize any early work package. In addition to the responses above, FHWA believes it is important to emphasize early work packages are for minor elements or stages of project construction that can be accomplished during the period after NEPA is complete and before design of the project is sufficient to permit the parties to reach an agreed price for construction of the project. Early work packages are not to be used to piecemeal construction of the project. Early work packages are intended to support the objective of the CM/GC contracting process, which is to expedite competitive procurement and improve project delivery through use of the two-stage contracting process.

Preconstruction Services

The Michigan DOT requested clarification as to whether the proposed definition of preconstruction services prohibits a design firm from being on the CM/GC contractor's preconstruction team if the design firm is not providing the contracting agency with design/engineering services. In response to this request, the regulation does not prohibit a CM/GC contractor from hiring a design or engineering firm for consultation during preconstruction services. This consulting firm may assist the CM/GC contractor by providing incidental engineering related services typically performed by general construction contractors, such as the preparation of site plans or falsework plans. In order to avoid conflict of interest issues, the design-engineering firm hired by the CM/GC contractor may not be the same as, or affiliated with, the design-engineering firm under contract to the contracting agency for engineering services. The FHWA does not believe it is necessary to revise the regulatory language to address this comment.

The Minnesota DOT expressed concern that the proposed definition for ''preconstruction services'' appeared to disallow site work for testing and other field studies before NEPA completion. The Minnesota DOT suggested that FHWA modify the definition of ''preconstruction services'' to include site work for testing for the contracting agency's design team and other field studies to inform the environmental process. In response, FHWA agrees with this suggestion and revises the final sentence of the definition to expressly include on-site material sampling and data collection to assist the contracting agency's design team in its preliminary design work. The definition still excludes design and engineering-related services as defined in 23 CFR 172.3.

The Minnesota DOT also suggested that FHWA broaden the definition to allow the CM/GC contractor to perform engineering typically performed by the contractor (*e.g.,* falsework plans, shop drawings) during the preconstruction phase of the project. A private individual raised similar concerns, indicating that incidental engineering related services were not within the definition of ''construction'' or the definition of ''engineering'' in 23 CFR 172.3. The private individual requested more specificity on the types of incidental engineering work that could be offered at the preconstruction services (for example, falsework studies, shop plans, formwork studies). The FHWA agrees that it may be appropriate for the CM/GC contractor to develop certain preliminary plans typically prepared by a construction contractor (such as falsework plans) to assist the contracting agency's design team during its preconstruction activities. Shop drawings or fabrication plans, however, are considered to be an element of final design, not preliminary design, and FHWA is precluded from approving or authorizing financial support for final design activities until the NEPA process is complete. In addition, shop drawings are typically developed by a fabricator or material supplier who is under contract with a construction contractor. Even on an at-risk basis, contracting for the acquisition or fabrication of materials is not allowed before the conclusion of the NEPA process. This is necessary to prevent the perception of bias and a commitment of resources to a particular NEPA alternative. The FHWA made modifications to the definition of ''preconstruction services'' to provide clarity on what preconstruction services are eligible and which of these services can or cannot be provided before the completion of the NEPA process.

The Minnesota DOT asked why the proposed rule was silent on the use of subcontractors for preconstruction services. The FHWA does not believe it is necessary to address subcontractors, as the regulation applies directly to Federal-aid recipients (contracting agencies) and indirectly to CM/GC firms. The CM/GC firm may have contractual relationships with subcontractors, lower-tier subcontractors, material suppliers, etc. in accordance with applicable Federal and State requirements. Therefore, no revisions are made to the regulatory language to address this comment.

The NYSDOT asked if guidance should be provided regarding design liability issues identified in *Coghlin Electrical Contractors, Inc.* v. *Gilbane Bldg. Co. et al.,* 472 Mass. 549 (2015). The FHWA believes that providing guidance regarding the applicability of this case, or other liability cases, is beyond the scope of this rule.

The Greater Contractors Association of New York (GCA) supported the distinction in the definition between design services and constructability reviews. The GCA believed that the definition makes it clear that the CM/GC contractor is providing input on constructability, scheduling, risk identification, and cost-related issues only. The FHWA agrees with this comment and does not believe that the regulatory text requires further revisions.

Section 635.504—CM/GC Requirements

Section 635.504(b)(1)

The Maryland SHA expressed concern that the NRPM did not discuss allowable procurement practices (*e.g.,* discussions, procedures for request for proposals, competitive ranges). It requested clarification that State procedures be allowable where FHWA's regulation is silent on an issue. The FHWA agrees with this comment and revises the regulatory text to allow for the use of applicable State or local procedures as long as these procedures do not restrict competition or conflict with Federal law or regulations. In considering this comment, FHWA also recognized the rule should be clearer that the use of State and local procedures is permissive, not mandatory. For this reason, FHWA replaced ''shall'' with ''may'' in the provision.

The ARTBA commented that it was pleased to see numerous references in the NPRM regarding the importance of open competition. At the same time, it

was dismayed by the USDOT's promotion of local labor hiring preference provisions in the Federal-aid highway program and other USDOT assistance programs. It believed that such provisions are in conflict with the principles of open competition. This particular comment is outside of the scope of this rulemaking, and FHWA did not make changes in response to the comment. Local hiring preference is the subject of a separate rulemaking, ''Geographic-Based Hiring Preferences in Administering Federal Awards'' [Docket DOT–OST–2015–0013; RIN 2105–AE38], 80 FR 12092 (Mar. 6, 2016).

Section 635.504(b)(2)

The AGC referenced the procurement requirements in this section of the NPRM and recommended that FHWA include a discussion of what is the expectation in the construction services portion of a contracting agency's solicitation. The AGC suggested that contracting agencies should clarify whether the CM/GC contractor's responsibilities are limited to providing constructability and material reviews, or whether the CM/GC contractor is expected to perform design services. The AGC referenced recent cases that showed a trend of liability and responsibility being assigned to CM/GC contractors related to the preconstruction phase of the contract for what have been considered professional services provided. The FHWA does not believe that the regulatory language requires clarifications. The definition of ''preconstruction services'' in section 635.502 specifically excludes design and engineering-related services as defined in 23 CFR part 172.

Section 635.504(b)(3)

The ARTBA expressed several concerns regarding objectivity and transparency of the selection process for alternative contracting methods. The ARTBA agreed that the NPRM language is consistent with the provision in MAP–21 that gives flexibility to the contracting agency in determining factors for the selection of the CM/GC contractor, but wished to underscore the importance of certain procurement requirements (such as interviews) to ensure integrity and enlist the participation of the industry in CM/GC projects. The ARTBA highlighted the importance of clarity and disclosure in all procurement documents. The FHWA agrees with ARTBA's general comments that clarity and transparency are important in the procurement process. Section 635.504(b)(3)(ii) requires solicitation documents to list the evaluation factors and significant subfactors and their relative importance in evaluating proposals. This provision does not require contracting agencies to use any particular method of identifying relative importance. There are a number of ways to do so, such as by the assignment of specific weights or percentages to the factors, or by listing the evaluation criteria in descending order of importance. This decision about how to do the procurement rests with the contracting agency under 23 U.S.C. 112(b)(4)(B). Under section 635.504(b)(3)(ii), the contracting agency must disclose the evaluation criteria it will use, and the relative importance of the criteria, in the solicitation documents.

In connection with section 635.504(b)(3)(iv), Michigan DOT recommended that FHWA provide some flexibility in allowing the contracting agency to decide whether interviews would be necessary after the receipt of responses to the solicitation but before establishing a final rank. The Michigan DOT indicated that the contracting agency should have the flexibility to determine whether interviews are needed, based upon the strength of written responses to the solicitation document. The Michigan DOT indicated that in some cases, interviews might not be necessary if there were a significant separation between one team and all others. Similarly, the ITD commented that interviews should be conducted at the discretion of the State when the topped ranked firms are close in score, and the evaluation team should determine appropriate additional criteria to be evaluated in the interview. In response, FHWA believes Michigan DOT and ITD have raised valid points for those circumstances where it may not be necessary to interview firms before establishing the final rank. In the final rule, if interviews are used, the contracting agency must offer the opportunity for an interview to all short listed firms (or firms that submitted responsive proposals, if a short list is not used) as required by section 635.504(b)(4). In response to the comments, we have added a parenthetical to section 635.504(b)(3)(iv) so that the provision explicitly recognizes contracting agencies may reserve the right to make a final determination whether interviews are needed based on responses to the solicitation. The FHWA disagrees with ITD, however, about flexibility for the proposal evaluation team to establish additional criteria applicable to the interview process. The FHWA does not believe adding criteria not disclosed in the solicitation documents is conducive to open and transparent competition. For that reason, no change is made to the rule in response to this comment. Under section 635.504(b)(3)(ii), contracting agencies must identify in the solicitation documents their intent to use, or not use, interviews and the relative importance of the interviews as part of the evaluation criteria. The contracting agency must disclose in the solicitation documents any criteria specific to the interview phase, including its relative importance with respect to all evaluation factors.

The AGC suggested that FHWA encourage the use of interviews in the selection process and clarify what value (percent of selection ranking) will be given to the interview. The FHWA agrees that interviews are important element of the selection process, and if used, it is important for proposers to understand the value that contracting agencies will assign to the interview. Section 635.504(b)(3)(ii) requires inclusion in the solicitation documents of the relative importance of evaluation factors, and this requirement would apply to the use of interviews. For this reason, FHWA did not revise the rule in response to this comment.

The AGC also suggested that FHWA add a new section recommending the use of a short list process where only a limited number of firms are selected to proceed through the procurement process and that FHWA require the solicitation to identify the number of firms to be included on the short list. After considering the comment, FHWA concluded the use of shortlisting is a topic that normally would be included in contracting agencies' CM/GC procurement procedures. This procurement process detail is best left to the discretion of the contracting agency, consistent with 23 U.S.C. 112 (b)(4)(B). Those procedures are subject to FHWA approval under section 635.504(c), and will be publicly available. For these reasons, no changes are made to the NPRM language in response to these AGC comments.

The NYSDOT indicated that the NPRM was silent regarding best practices in the administration of CM/GC projects. As an example, it cited the practice of ensuring interaction and coordination between the contracting agency's design or engineering consultant (if out-sourced) and the CM/GC contractor. The NYSDOT suggested that FHWA consider the need for issuing guidance related to other best practices such as risk management plans. The FHWA agrees that coordination and interaction between the contracting agency's designer (if out-

sourced) and the CM/GC contractor is desirable, but this is a matter of administrative practice best addressed by the contracting agency. The issuance of guidance on best practices related to the administration of CM/GC projects is outside of the scope of this rulemaking, and FHWA made no changes to the rule in response to these comments.

Section 635.504(b)(5)

The ITD suggested that approvals by the FHWA Division Administrator be limited to approving changes to the approved State solicitation template documents. The FHWA's role in the CM/GC project approval and authorization process is described in section 635.506, and this comment is addressed in the discussion of that section. Therefore, FHWA did not make changes to this section.

Section 635.504(b)(6)

The Minnesota DOT suggested allowing additional flexibility in situations where the contracting agency and CM/GC contractor are unable to reach agreement on price and schedule for construction services (including early work packages). In particular, the commenter suggested the rule expressly allow flexibility in such cases for the contracting agency to use design-build contracting for the project or individual work packages. The proposed rule suggested that the traditional competitive bidding process be used in these situations. In response, FHWA recognizes that there may be circumstances where it would be appropriate to have the option of using either competitive bidding (23 CFR 635.112) or another approved method, such as design-build contracting under 23 CFR part 636, for both early work packages and the main portion of project construction (*i.e.,* project construction exclusive of any early work packages). The FHWA revised the first sentence of the paragraph by adding ''or another approved method'' at the end of the sentence. The FHWA also deleted the proposed language in the paragraph that would have prohibited the contracting agency, once it advertises for bids or proposals for the project or a portion of the project (early work packages), from using the CM/GC agreed price procedures. Under the final rule, when the contracting agency and the CM/GC contractor fail to agree on a price for an early work package, the contracting agency may perform that work itself under force account provisions, or may undertake a new procurement for that early work package, without affecting its ability to use CM/GC agreed price procedures for other early work packages and for construction services for the main portion of the project.

The AASHTO noted that the proposed provisions of this section (requiring a transition to competitive bidding if the contracting agency and CM/GC contractor are unwilling or unable to enter into a contract for construction services) create a potential conflict with the CM/GC laws of at least one State. Apparently, this unidentified State's statute allows the contracting agency to enter into negotiations with the next highest scored firm(s) until agreement is reached or the process is terminated. The AASHTO provided a recommended revision which would allow such a State to enter into negotiations with the highest ranked firm from the original solicitation for CM/GC services. From FHWA's perspective, the level of design would typically be 60 percent to 90 percent complete when final negotiations for construction services for the main portion of the project take place with the CM/GC contractor. If the contracting agency and the CM/GC contractor are not able to reach agreement regarding schedule and price, then it is in the public interest to transition to a new procurement and solicit competitive bids or proposals from all firms that might be interested in the construction services phase. It is not logical to enter into negotiations for construction services with a firm that was the next highest ranked firm for the preconstruction services because, at this point in the project delivery process, a large portion of the advisory services provided by the CM/GC firm for the preconstruction phase have been completed. In addition, the importance the contracting agency places on various qualifications and contractor experience may be different when it is seeking only construction services, as compared to seeking a combination of preconstruction and construction services. Thus, it does not make sense to enter into negotiations with the second highest scoring CM/GC firm merely for the sake of finalizing input and obtaining construction pricing. Where the contracting agency and CM/GC contractor are unwilling or unable to enter into a contract for construction services, it is appropriate to require either competitive sealed bidding (23 CFR 635.112) or a transition to another approved contracting method, such as design-build contracting under 23 CFR part 636. Therefore, FHWA is not adopting AASHTO's recommendation.

The Connecticut DOT suggested that the requirement in this section for FHWA approval before advertising for construction bids or proposals be removed. The Connecticut DOT believed that an additional round of FHWA approvals would be more cumbersome than beneficial. The FHWA does not agree with this recommendation. In situations where the contracting agency and CM/GC contractor are unwilling or unable to enter into a contract for construction services, it is appropriate that the contracting agency notify the FHWA Division Administrator of this decision and request FHWA's concurrence before advertising for construction bids or proposals in accordance with 23 CFR 635.112 (bid-build) or 23 CFR part 636 (design-build). The reason is that contracting agency is effectively converting from a CM/GC contracting process to a non-CM/GC process subject to separate bidding requirements under title 23 (*e.g.,* bid-build or design-build). In such case, FHWA approval provisions applicable to those procedures will apply. In considering the comments, however, FHWA recognizes there is potential for confusion due to the use of the term ''notification'' in the proposed rule language. In the final rule, FHWA has substituted the term ''concurrence'' for ''notification'' in the first sentence of paragraph (6). This change better reflects FHWA's intent, which is that the contracting agency will follow appropriate procedures for required FHWA approvals prior to issuing new bid/proposal documents. The change makes the rule more consistent with the concurrence concepts used in 23 CFR 635.114(h) and 636.109(c). The concurrence point will help to ensure that FHWA's requirements are being met for before a new solicitation starts.

The ITD suggested using the term ''competitive advantage'' or better defining the term ''conflict of interest.'' The Delaware DOT suggested a clarification of the terms in this section to say that ''. . . the contracting agency may prohibit the CM/GC contractor from submitting competitive bids during the construction phase of the contract if the contracting agency determines that the inclusion of the CM/GC contractor may inhibit fair and open competition among the bidders.'' The FHWA generally agrees with these comments. The final rule permits the contracting agency to exclude the CM/GC contractor from bidding on construction of the project if the contracting agency determines the CM/GC contractor is likely to have a competitive advantage that could adversely affect fair and open competition.

The ARTBA commented that the contracting agency's ability to preclude a CM/GC contractor from bidding on the

construction services contract if the agency and firm have been unable to agree on a price will be a risk allocation factor affecting the price of CM/GC proposals. The commenter stated this type of provision should be clearly delineated in the initial CM/GC procurement documents and elsewhere. The GCA raised similar concerns. It suggested that the contracting agency's original solicitation must outline the process for how the project will be handled if the agency and the CM/GC contractor cannot reach agreement on a final contract. The GCA noted that the NPRM allows the contracting agency the option of allowing or preventing the CM/GC contractor from bidding on the construction in the event a final contract is not negotiated. The GCA believed that this is not acceptable because it exposes the CM/GC contactor to the risk that an agency will simply refuse to negotiate a reasonable price and thereby gain the advantage of the CM/GC's proposal without entering into a contract.

In response, FHWA recognizes that the possibility of contract termination for failure to agree on price for construction creates some risk to the CM/GC contractor when performing preconstruction services. FHWA decided not to revise the rule in response to these comments, however. First, the authority for such termination appears in the rule, which places potential CM/GC contractors on notice of the risk. We also expect contracting agencies to include this termination authority in their CM/GC contract documents. Under section 635.504(b)(3)(v), the solicitation documents must include or reference sample contract forms. Second, a decision to preclude the CM/GC contractor from bidding on construction (including an early work package where the parties failed to reach an agreed price) under a new procurement will be a very fact-specific determination that depends on the circumstances of the particular project. Facts relevant to the decision about a real or apparent competitive advantage often will not be fully available until well after the solicitation process has resulted in the selection of a CM/GC contractor. This would make it difficult for a contracting agency to make that decision at the time the CM/GC solicitation document is developed. The FHWA concluded it is important to provide contracting agencies with flexibility in timing their determination whether the CM/GC contractor has a competitive advantage that could adversely affect fair and open competition for the work in question. That said, we believe contracting agencies need to be consistent with their State policies related to competition (and apparent competitive advantage). The contracting industry appropriately expects fairness and transparency in an owner's procurement process—including any notices to the industry in the solicitation process. Both the owner and the industry rightfully expect good faith negotiations regarding scope, schedule, and price for construction.

Section 635.504(c)

The FHWA received some comments on this section that relate to the relationship between CM/GC provisions and FHWA's Risk-Based Stewardship and Oversight (RSBO) Program. The FHWA's RSBO Program is meant to optimize the successful delivery of programs and projects and ensure compliance with Federal requirements. This risk-based program involves three main avenues: (1) Project approval actions, (2) data-driven compliance assurance, and (3) risk-based stewardship and oversight involvement in Projects of Division Interest (PoDIs) and Projects of Corporate Interest (PoCIs). The FHWA Division Offices are required to execute a Stewardship and Oversight agreement with their respective STA for the oversight of Federal-aid projects, including PoDI and PoCI projects. This agreement establishes the roles and responsibilities for project actions that require FHWA approval.

The Michigan DOT suggested that FHWA's review and approval of a State's procurement document should constitute FHWA's approval to use the CM/GC contracting method for all Federal-aid projects except those where full oversight is needed (*e.g.,* PoDIs or PoCIs). The Michigan DOT indicated that for non-PoDI or non-PoCI projects, FHWA's involvement could be designated in the STA's approved CM/GC procurement procedures, and therefore, the Michigan DOT recommended that FHWA revise numerous sections in part 635 to eliminate the requirement for FHWA approvals for non-PoCI and non-PoDI projects. The FHWA does not agree with this suggestion. Given the differences in FHWA's Stewardship and Oversight Agreements from State-to-State, it is not appropriate to implement a change that would eliminate FHWA Division Office review/approval requirements in our regulations. The FHWA Division Offices have the authority to assess program risks in their States and come to an agreement with their respective States regarding the stewardship of the Federal-aid program. Section 635.506(a) provides a discussion of the flexibilities that are available for States in assuming certain FHWA responsibilities for project approval actions. The Stewardship and Oversight Agreement will formalize these responsibilities in each State. It is expected that the State's assumption of FHWA responsibilities will vary from State-to-State (even on PoDI and PoCI projects), and therefore, no revisions are made in section 635.504(c) related to this recommendation.

Section 635.504(d)

Two commenters on this section, Minnesota DOT and Connecticut DOT, suggested clarification of the terms used and requirements included in this section. The Minnesota DOT indicated that the NPRM appeared to require each construction services contract (*i.e.,* each work package) to include a minimum 30 percent self-performance requirement. The Minnesota DOT said that the application of the self-performance requirement might not be appropriate for particular work packages, such as supplying long lead time materials. The Minnesota DOT suggested that the rule specifically exclude providing materials from the self-performance requirement. They also suggested that the 30 percent self-performance requirement apply to the project overall and not to each individual work package. The Connecticut DOT suggested that the application of the 30 percent self-performance requirement be left to the discretion of the contracting agency, which would allow the use of the Construction Manager-at-Risk concept where the CM/GC contractor serves totally as a construction manager and does not perform any construction during the construction services phase of the project.

The three contracting associations providing comments on this section strongly supported the use of self-performance requirements; however, they differed in their recommended revisions to the NPRM. The AGC supported the use of the traditional 30 percent self-performance minimum requirement and suggested that the rule point out that States are free to use a higher self-performance requirement if they so desire or are mandated under State law. The AGC suggested that the regulation should clarify that there is no upper limit on self-performed work and that the ''total cost of construction services'' should be inclusive of any early work packages and/or task orders. The AGC took exception to the sentence that would allow States to require the CM/GC contractor to competitively let and award subcontracts for construction services to the lowest responsive bidder

if required by State law. The AGC believed that it is imperative that the CM/GC contractor have control over the solicitation, selection, and administration of subcontractors in much the same way as subcontractors are selected through the traditional design-bid-build process.

The GCA had similar concerns. It indicated that it is critical to assure taxpayers that the contractor awarded the contract is the entity responsible for building the project and meeting all obligations. The GCA contended that contracting agencies must ensure that the CM/GC contractor has the same contractual responsibilities as a general contractor during the construction services phase of the project by ensuring that the CM/GC contractor has full control of the subcontractor selection process and is contractually and financially liable for delivering the project on schedule and at a fixed price. The GCA noted that a self-performance requirement of 40–50 percent is common in the industry and recommended that the CM/GC model contain a self-performance requirement higher than the NPRM 30 percent minimum.

The ARTBA also noted the importance of recognizing the difference between CM/GC contracting as currently used by transportation agencies and its use in the ''vertical'' construction industry. The ARTBA noted that by maximizing self-performance, CM/GC contractors can maximize innovation and efficiency, and enhance the value for the project's owner-agency and the taxpayers. This process is in contrast to the customary practices in the vertical building industry, where the ''construction manager'' is often a broker of construction services by other firms.

In response, FHWA is not adopting the Connecticut DOT suggestion that the self-performance requirement be left to the contracting agency's discretion so that the CM/GC contractor can serve in a solely managerial capacity during the construction services phase of the project. The FHWA recognizes such practice occurs in vertical construction, but it is not authorized under 23 U.S.C. 112(b)(4), which requires the CM/GC contractor to be responsible for construction of the project where the parties reach an agreed price for construction services.

After considering the comments, FHWA is revising the rule to clarify that the 30 percent self-performance requirement applies to the total of all construction services performed under the CM/GC contract, not to each individual contract for early work packages and construction services for the main portion of the project. The CM/GC contractor should take steps to ensure its work meets this requirement, which may necessitate adjustments in work performance as the construction work progresses. The exception for specialty work is retained, but FHWA has not expanded the exception to materials. The NPRM language was clear that the 30 percent criteria is a minimum, and contracting agencies have the discretion to set higher threshold if provided for by State or local policy. The final rule retains that language. The FHWA is not revising the sentence that allows contracting agencies to require the CM/GC contractor to competitively let and award subcontracts for construction services to the lowest responsive bidder if required by State law, regulation, or administrative policy. The MAP–21 Section 1303 requirements did not address this issue, and FHWA believes that it is appropriate to allow States to develop their own policies.

Finally, it is important to note in this context that awards of subcontracts must be in accordance with the Disadvantaged Business Enterprise (DBE) regulations in 49 CFR part 26, including the good faith efforts requirements at 49 CFR 26.53 when a DBE contract goal has been set on the contract. Further discussion of FHWA's DBE requirements for CM/GC contracts is provided below in the response to comments on section 635.506(e).

Section 635.504(e)

The Connecticut DOT noted that this section allows for compensation based on actual costs and commented that the accompanying requirement of indirect cost determinations would render this an extremely burdensome option for the CM/GC contractor and contracting agency. The Connecticut DOT recommended that FHWA consider eliminating this option since actual costs are not defined and would probably need to be audited; indirect cost rates would also need to be negotiated, audited, and established. If this method were to remain an option, the Connecticut DOT recommended that the indirect cost be defined as a specific amount, such as 10 percent. The FHWA believes that the use of actual cost rates would be very rare; however, there may be specific circumstances where it might be advantageous for a contracting agency to do so. In these cases, it is important to give the contracting agencies the flexibility to do this. FHWA does not believe that limiting indirect costs to 10 percent of direct costs is appropriate and, therefore, did not adopt any limitations.

When reviewing this comment from Connecticut DOT, FHWA recognized the need for a correction in section 635.504(e). In the NPRM, language relating to indirect cost rates was mistakenly placed in paragraph 635.504(e)(3) rather than in paragraph (e)(2). The FHWA corrected this error in the final rule.

The Connecticut DOT requested that FHWA provide clarification for the basis for prohibiting the use of ''cost plus a percentage of cost and percentage of construction cost methods'' as methods of payment for preconstruction services. In response, FHWA notes that under these payment methods, there is a potential conflict of interest between the contractor's professional responsibility to the contracting agency and the contractor's financial interest in maximizing revenues. This is inherent in cost plus percentage of cost compensation, creating little incentive for the contractor to control its administrative costs or provide recommendations that would result in a more cost effective project. Furthermore, the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting is prohibited in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR 200.323(d)). The FHWA made no revisions to the regulatory text in response to this comment. In reviewing the comment from Connecticut DOT on this topic, however, FHWA determined that including a similar sentence in paragraph (e)(3) (method of payment for construction services) would eliminate any confusion to the applicability of 2 CFR 200.323(d) for construction services payment methods.

Section 635.505—Relationship to the NEPA Process

As is evident from this preamble's discussion of individual sections of the rule, there is some uncertainty among stakeholders about the types of CM/GC contractor activities allowed before the completion of the NEPA review for the project. The FHWA believes it may be useful to summarize how CM/GC contractor services can be used before the conclusion of NEPA under this rule as well as applicable NEPA requirements. This summary consolidates, and expands on, FHWA's responses to specific comments on section 635.505.

- The FHWA may approve and authorize financial support for necessary and reasonable CM/GC contractor costs related to

preconstruction activities including but not limited to: Cost estimating, scheduling; constructability reviews/recommendations; risk analysis; development of implementation plans as required by the contracting agency (safety plans, environmental compliance plans, quality control plans, hazardous material plans, etc.); field studies that assist with preliminary design, including site coring and sampling; site studies; and other activities that do not materially affect the objective consideration of NEPA alternatives;

- The FHWA cannot approve or authorize financial support for final design or construction activities such as: Site preparation, structure demolition, hazardous material removal/treatment/abatement, preparation of shop drawings, early material acquisition contracts (regardless of lead time), or material fabrication contracts (*e.g.,* structural steel, precast concrete members, etc.);
- On an at-risk basis, the contracting agency may perform at-risk final design activities at any level of detail and may contract with the CM/GC firm to perform preconstruction services related to final design if the contracting agency has a procedure for segregating the costs of the CM/GC contractor's at-risk work from the CM/GC contractor's preconstruction services eligible for reimbursement during the NEPA process; and
- Even on an at-risk basis, the contracting agency must not contract for (or direct the CM/GC contractor to perform) construction activities before the completion of NEPA review, including the following activities: Site preparation, demolition, hazardous material treatment/removal, materials acquisition (regardless of lead time), and fabrication of materials or other activities that would adversely affect the objective consideration of NEPA alternatives. Plans or submittals that require an agreement/contract with a supplier or fabricator, such as shop drawings or fabrication plans, are not allowed, even on an at-risk basis prior to the completion of the NEPA review process.

Section 635.505(b)

The Colorado DOT noted that the preamble discussion for this section prohibits contracting agencies from awarding early work packages (such as advanced material acquisition) before the NEPA review process is complete. The Colorado DOT stated that contracting agencies need an exception for long lead time procurements for advanced materials procured at their own risk. The Minnesota DOT stated that the NPRM provides for very limited pre-NEPA activities, and it specifically prohibits advanced material acquisition. The Minnesota DOT recommended that the regulations allow contracting agencies to perform limited construction services, such as procuring materials on an at-risk basis before completing the NEPA review process. The Minnesota DOT suggested that these materials would not be incorporated into the work until NEPA is complete and would follow Federal procurement rules. The Minnesota DOT also suggested that this at-risk work should be eligible for Federal reimbursement once NEPA is completed and the project is authorized.

As noted in the discussion of section 630.106, the advanced acquisition of materials, even on at-risk basis, is an early construction activity which 23 U.S.C. 112(b)(4)(C)(ii) prohibits. That provision provides that contracting agencies may not with the award of the construction services phase before the completion of the NEPA review process. The FHWA acknowledges additional clarification regarding this issue is appropriate, and therefore, we have revised paragraph (b) to prohibit the contracting agency from initiating construction activities or allowing such activities to proceed, even on an at-risk basis, prior to the completion of the NEPA process. The prohibition includes construction work self-performed by the contracting agency and contracts let by the contracting agency for construction services (including construction services under a CM/GC contract such as early work packages for advanced material acquisition or site preparation work).

Section 635.505(e)

The ITD commented that it is not readily apparent why the CM/GC contractor needs to know the NEPA alternatives, as they are only responsible for implementing the preferred alternative identified in the environmental decision. In response, while it is true that the CM/GC contractor will only be responsible for implementing the selected alternative identified in the NEPA process, the CM/GC contractor may provide technical information to the contracting agency during the preconstruction phase for use in the NEPA evaluation for the project. Issues such as constructability and cost often are relevant to the comparison of alternatives. The FHWA and the State are responsible for ensuring a fair and objective comparative evaluation of reasonable alternatives for the project under 40 CFR 1502.14. This includes an analysis of the proposed action and alternatives to it in a substantially similar manner, using consistent criteria for evaluating and screening. *See* Question and Answer 5b, ''*Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*,'' Council on Environmental Quality (46 FR 18026 (March 23, 1981)), as amended (available online at *https://ceq.doe.gov/nepa/regs/40/40P1.HTM*). For these reasons, it is incumbent on the contracting agency to ensure it will have access to comparable data for the evaluation of the reasonable alternatives for the project. To the extent the contracting agency wishes to use data provided by the CM/GC contractor, this means the contracting agency should include provisions in its CM/GC bid and contract documents that permit it to obtain such data from the CM/GC contractor as needed. After considering the comments, FHWA agrees with the commenter that the language proposed in the NPRM did not fully capture the intended meaning. To better capture the scope of the responsibility, this section was revised to place the responsibility on the contracting agency for ensuring its CM/GC contract gives it the ability to obtain, as needed, technical information needed for a fair and objective comparative evaluation of reasonable alternatives for the project.

Section 635.505(f)

The NPRM proposed a requirement that the CM/GC contract include provisions ensuring no commitments are made to any alternative during the NEPA process, and that the comparative merits of all alternatives identified and considered during the NEPA process, including the no-build alternative, will be evaluated and fairly considered. The ITD indicated that the provisions of this section are design functions, not functions of the CM/GC contractor. In response to this comment, FHWA agrees that the NEPA requirements reflected in this section have direct applicability to the contracting agency, but they have implications for the contracting agency's consultants as well. The proposed language, which is similar to language in the design-build regulations (23 CFR 636.109(b)(4)), is intended to ensure NEPA requirements for an independent and non-biased evaluation of project alternatives are satisfied. The provision will help contracting agencies and prospective CM/GC contractors understand the issues related to the NEPA review process, the need for the CM/GC contractor to be unbiased in the advice given to the contracting agency about alternatives, and the contracting agency's role in implementing these requirements during design development. After considering the

comment, FHWA concluded the provision is important to maintain the integrity of the NEPA process, and FHWA is not revising the regulatory text.

Section 635.505(h)

The Minnesota DOT noted a concern with the requirement for each construction services contract to include a provision ensuring that the CM/GC contractor will meet all environmental and mitigation measures committed to in the NEPA document. The Minnesota DOT said that in many situations, the NEPA document has mitigation measures beyond the control of the CM/GC contractor. The Minnesota DOT suggested modifying the clause to require the STA to include ''applicable'' commitments in each contract and deleting the ''and'' in the phrase ''environmental and mitigation'' as unnecessary. The proposed language is consistent with a provision in the design-build regulations at 23 CFR 636.109(b)(5), and FHWA believes that consistency should be maintained in the rule. FHWA agrees the provision would benefit from a clarification to address the concern that the CM/GC contractor ought not to be held responsible for environmental and mitigation work that is not part of the CM/GC contract scope of work. The FHWA revised this section to provide an exception for measures the contracting agency expressly describes in the CM/GC contract as excluded because they are the responsibility of others.

Section 635.506—Project Approvals and Authorizations

The AGC noted that the proposed FHWA review and approval requirements in this section showed a trend away from the past several years during which FHWA has given more flexibility and authority to the States in managing their Federal-aid projects. The ARTBA expressed a similar concern noting that some of the requirements for FHWA review were based on the MAP–21 provisions, while others originated from FHWA's customary stewardship practices. The AGC expressed the concern that such involvement may unnecessarily delay project activities and suggested that, if FHWA believed such reviews were necessary, FHWA should also include timeframes for approval period as to not delay the start of the work. As noted in the discussion of section 635.504(b)(5), the ITD suggested that approvals by the FHWA Division Administrator be limited to only approving changes to the approved State solicitation template documents.

In response to these comments, it should be noted that 23 U.S.C. 112(b)(4)(C)(iii) explicitly requires FHWA's review and approval of the following: (a) The price estimate of the contracting agency for the entire project and (b) any price agreement with the CM/GC contractor for the project or a portion of the project. Other proposed approvals in the NPRM are consistent with oversight provisions found in other title 23 procurement regulations, such as the design-build regulations in 23 CFR part 636. In drafting the proposed rule, FHWA believed it was appropriate to include decision points, designed to ensure the integrity of the Federal-aid Highway Program, but also to make clear which decisions may be assigned by FHWA to the STAs under the authority of 23 U.S.C. 106(c).

Under 23 U.S.C. 106(c), the States may assume certain FHWA responsibilities for project design, plans, specifications, estimates, contract awards, and inspections on the National Highway System (NHS), including projects on the Interstate System, and must assume such responsibilities off the NHS unless the State determines such assumption is inappropriate. After considering the comments, FHWA revised the regulatory text for section 635.506(a) to specify which FHWA review and approval activities in subpart E may, and which may not, be assumed by the STAs. In the final rule, section 635.506(a)(2) provides that STA's may not assume the FHWA review or approval responsibilities for section 635.504(c) and 635.506(c). The approval of procurement procedures required by section 635.504(c) is not a project specific action and cannot be delegated or assigned to the STA. The section 635.506(c) approval of at-risk preconstruction costs for eligibility after the completion of the NEPA process is a Federal-aid eligibility determination and cannot be delegated or assigned to the STA under 23 U.S.C. 106(c). In situations where the State is directly responsible for NEPA compliance (either under an assignment of environmental responsibilities pursuant to 23 U.S.C. 326 or 327, or under a programmatic categorical exclusion agreement as authorized by section 1318(d) of MAP–21), the Division Administrator may rely on a State certification indicating the NEPA-related conditions are satisfied. New section 635.506(a)(3) lists the subpart E project-related FHWA approval responsibilities that are subject to State assumption. In addition to the listed subpart E approvals, the approval of advertising under 23 CFR 635.112(j) is subject to State assumption pursuant to 23 U.S.C. 106(c). None of these approvals involve financial authorization or eligibility determinations, both of which remain solely FHWA functions. When a State first undertakes CM/GC contracting, the FHWA Division should work with the State on implementation of the requirements of this rule so that both parties can develop an understanding of which approvals the State should assume. As contracting agencies become more familiar with CM/GC contracting, it is likely that States will assume FHWA responsibilities for CM/GC project approvals listed in section 636.506(a)(3), and the risk of related delays will be minimal.

Section 635.506(a)(2)

The Connecticut DOT recommended deleting NPRM section 635.506(a)(2), which would require FHWA approval of project-specific solicitation documents. The Connecticut DOT commented that its interpretation of this requirement is that it would require FHWA approval of Requests for Qualifications and Requests for Proposals documents. The Connecticut DOT noted that for larger, more complex, projects these documents can be extremely large and would require longer than ideal review/approval periods, which would introduce additional risk to on-time project delivery. The Connecticut DOT noted that section 635.504(c) requires the submission of CM/GC procurement procedures to FHWA for approval. In response, FHWA agrees with this comment. With other methods of procurement, FHWA has no role in approving the contracting agency's procurement procedures. The requirement for FHWA to review and approve a contracting agency's CM/GC procurement procedures (including changes), combined with FHWA compliance oversight in accordance with FHWA's RSBO Program, should be sufficient to satisfy FHWA's interest. It should not be necessary for FHWA to review and approve individual solicitation documents. Therefore, FHWA removed proposed paragraph 635.506(a)(2) from the final rule. That said, FHWA emphasizes it expects all contracting agencies to follow their approved procurement procedures, and to provide for transparency and fairness in the solicitation process.

Section 635.506(b)(1)

The Michigan DOT requested clarification regarding the language and intent of this provision, which requires a contracting agency to request authorization of preliminary

engineering before incurring such costs. The Michigan DOT asked if the contracting agency needs to have funds obligated before incurring costs. In response, the requirements of this section are consistent with 23 CFR 1.9(a), which requires an FHWA funding authorization through an approved project agreement before costs are incurred. However, after the comment period on the NPRM closed, Congress enacted the FAST Act, which included an uncodified provision in section 1440 relating to reimbursement, under specified conditions, of preliminary engineering costs incurred prior to authorization. The FHWA revised the final rule language to recognize the enactment of section 1440.

Section 635.506(b)(2)

The Minnesota DOT asked for clarification regarding the requirement for FHWA's Division Administrator review and approval of a cost or price analysis for every procurement before authorizing pre-construction services. The Minnesota DOT asked if the phrase ''every procurement'' pertains to just the pre-construction services or also construction services contracts. The Minnesota DOT also said that it was not clear if the requirement applies only when the contracting agency is requesting Federal-aid funding in preconstruction service contracts or in all situations. The FHWA agrees with the need for clarification. It is anticipated that there will be a single procurement for CM/GC preconstruction services. The requirement for a cost or price analysis would apply to that agreement and to any modifications of that agreement, when the contracting agency is requesting (or, under FAST Act section 1440, may request in the future) Federal-aid funding for the cost of preconstruction services. The FHWA revised the language of the rule to explicitly state the requirement applies to preconstruction services procurements when Federal-aid funding is involved in the preconstruction services contract. The NPRM language is further clarified by replacing the phrase ''currently $150,000'' with a reference to the simplified acquisition threshold in 2 CFR 200.88. This change avoids the need for amending the regulation in the event the simplified acquisition threshold changes in the future.

Section 635.506(d)(1)

The Michigan DOT asked if the language of this section requires the contracting agency to have funds obligated before incurring costs. In response to this inquiry, consistent with 23 CFR 1.9(a) and as discussed in FHWA's response to a similar comment on section 635.506(b)(1), the contracting agency must request FHWA's construction authorization through an approved project agreement before incurring any costs if Federal assistance is being requested. The FHWA made no revisions to the regulatory text.

Section 635.506(d)(2)

The Minnesota DOT and the Connecticut DOT noted that the requirement for FHWA approval of a price estimate for the entire project prior to authorizing construction activities may be problematic when early work packages are involved. The Minnesota DOT said that in these cases, it may not be possible to provide a very accurate estimate, depending on how far the design has progressed. The FHWA recognizes the Minnesota DOT's concern; however, the requirement for FHWA to approve a price estimate for the entire project is a statutory requirement (23 U.S.C. 112(b)(4)(C)(iii)). In addition, the authorization of CM/GC construction services occurs only after completion of the NEPA review, which typically includes preliminary design work that reaches (and sometimes exceeds) 80 percent. After considering the comments, FHWA concluded the contracting agency should have sufficient data available at the time of a request for construction services authorization to provide a good faith estimate of the price for the entire project. The FHWA understands that when a contracting agency is using early work packages, the level of final design for the entire project (*i.e.,* final construction plans and detailed specifications) may not be at an advanced stage, and thus, the price estimate for the entire project at this point in the design process may not be as accurate as a detailed engineer's estimate later in the design phase. The FHWA believes, however, the contracting agencies can provide a sound enough price estimate to meet the statutory requirement. This requirement applies to the first request for an authorization for activities meeting the definition of ''construction services.'' Where a contracting agency requests construction authorization for only a portion of the project (*e.g.,* early work packages), the contracting agency may submit a revised price estimate once final design is complete if such revision is needed to support subsequent authorization requests. The FHWA made no revisions in response to these comments.

The GCA noted the need for openness and transparency in the CM/GC procurement process and the need for FHWA to conduct its review and approval in a timely and reasonable manner. In response, we agree with openness and transparency are important in these procurements, but have concluded no revision is needed. We believe this rule and other applicable Federal laws (including regulations) already foster open and transparent procurement practices. In addition, States must act in accordance with State procurement integrity and other requirements. The FHWA fully appreciates the need for time and reasonable decisions on price estimates, but does not believe there is a need to establish standards in the regulation.

Section 635.506(d)(3)

As noted in the above in the discussion for section 635.506(b)(2), the use of the phrase ''currently $150,000'' in this section is replaced with a reference to the simplified acquisition threshold in 2 CFR 200.88. This change will avoid the need to amend this rule each time the simplified acquisition threshold is adjusted.

Section 635.506(e)

The GCA believed that the CM/GC rule should clarify that CM/GC is similar to design-build with respect to the use of DBE program requirements. The GCA believed that design-build and CM/GC are similar in that it is difficult to identify specific DBE commitments up front as part of the bid documents. The GCA stated that the CM/GC contractor should only be required to put forth the list of the DBEs to be used for work in the first year of the project, or for early work items, and, for work that will be performed in later years, to list the categories of work that will be available for DBE participation. The ARTBA noted that the DBE program requirements are still geared toward the traditional design-bid-build delivery process and that the increased use of alternative contracting techniques has precipitated apparent compliance gaps in the DBE program. The ARTBA stated that it is critical that FHWA provide clarity in exactly how DBE program compliance is to be harmonized with the CM/GC process as the latter evolves in use. The ARTBA indicated that uncertainty in this regard merely invites various agencies, or individual officials, to inject their own, unrelated policy priorities into the procurement process. As it relates to DBE compliance, the GCA and ARTBA believed that CM/GC projects should be treated like design-build projects where the contractor has some flexibility in identifying DBE commitments when submitting its technical and price proposals.

In response, FHWA agrees that CM/GC contracting presents a variation from the DBE selection process used in traditional design-bid-build projects. The FHWA recognizes ARTBA's concerns regarding potential DBE implementation issues on alternative contracting projects, but DBE policy revisions are best made through the rulemaking process for the DBE program. The FHWA believes that it is possible for the CM/GC contractor to provide the DBE documentation required by 49 CFR 26.53(b)(2) when the CM/GC contractor is providing its initial proposal for the construction services. There may be situations, however, where at this stage there is not sufficient detail (such as price, scope, and schedule) to provide the required DBE information. The FHWA has added language to the rule that will allow the CM/GC contractor to provide a contractually binding commitment at the time of initial proposal that will commit the contractor to meet the DBE contract goal if the contractor is awarded the construction services contract. This would give the CM/GC contractor time to provide the information required by 49 CFR 26.53(b)(2) before the contracting agency awards the contract. For example, CM/GC contractors may be able to gather and provide the required DBE documentation when the contracting agency and the CM/GC contractor enter into final price discussions because the level of design would be relatively high, and the scope and schedule would be defined so that risk and price can be assigned. This allowance is consistent with 49 CFR 26.53.(b)(3)(ii) for negotiated procurement situations.

The ITD stated that it is critical to use the term ''agreement'' when discussing preconstruction services and the term ''contract'' for the construction services. The FHWA appreciates this comment regarding Idaho's policy; however, we believe that the terms ''agreement'' and ''contract'' are used interchangeably for professional services. In addition, FHWA's regulations on ''Procurement, Management, and Administration of Engineering and Design Related Services'' (23 CFR 172) define a contract as a written procurement contract or agreement. For clarity, the terms ''preconstruction services contract'' and ''construction services contact'' will be used throughout this subpart. The term ''agreement'' will be reserved for agreements between FHWA and the STA.

The Connecticut DOT requested clarification of the requirement for FHWA approval of price estimates and project schedules for the entire project before authorization of construction services. The commenter expressed specific concern about situations which need to begin early work activities, such as building of temporary facilities and utility relocations, while the project's cost and/or schedule are still being refined. The commenter noted that, if the final rule retained the requirement as proposed, FHWA should appreciate that project costs and/or schedules may evolve and warrant subsequent review(s)/approval(s). In response, to the extent this comment relates to approval of a price estimate for the entire project before beginning construction services, FHWA addressed this issue in the discussion for section 635.506(d)(2). The requirement for FHWA to approve a price estimate for the entire project is a statutory requirement (23 U.S.C. 112 (b)(4)(C)(iii)). The references to agreed price, scope, and schedule in section 635.506(e) relate to the approval of those elements for each individual contract awarded as part of the overall CM/CG contract. Award approval reflects an underlying determination that procurement requirements, such price reasonableness, are satisfied and it is reasonable to award of the contract.

Section 635.507—Cost Eligibility

The Colorado DOT asked if the indirect cost rate provisions of section 635.507(b) applied to both preconstruction and construction contracts, and if the requirement applies to any other contracts besides cost-reimbursement contracts (*e.g.,* lump sum, unit price, etc.).

In response, the requirement to use an approved indirect cost rate applies where payments for preconstruction services are based on actual costs (cost reimbursement contracts). Indirect cost rates do not apply in the construction services context, where actual cost work required due to unforeseen conditions is subject to applicable force account provisions.

The Michigan DOT noted that most construction contractors do not have an approved indirect cost rate. The Michigan DOT recommended, in the absence of an official indirect cost rate, a documented industry standard be used (*e.g.,* a rate in the STA's Standard Specifications). The FHWA appreciates and understands the Michigan DOT comment, and the extent of the issue within the highway contracting community; however, if a contracting agency elects to use a payment method based on actual costs for preconstruction services, then it is necessary to ensure that the indirect cost rates comply with the Federal cost principles in 2 CFR 200 Subpart E.

The Connecticut DOT questioned the applicability of 2 CFR 200, Subpart E to CM/GC projects. The Connecticut DOT questioned the meaning and intent of the term ''individual elements of costs'' and asked for clarification if extra work is negotiated and an agreed upon price or cost plus is determined, could this extra work be seen as ''negotiated based on individual elements of costs'' and therefore also require indirect cost rates be established as part of its negotiations.

In response, the provisions of 2 CFR 200 apply to all Federal assistance programs such as the Federal-aid Highway Program. Unless there is a specific statutory exception, the requirements of 2 CFR 200 apply, including the ''Cost Allowability'' provisions of Subpart E. Regarding the use of the term ''individual elements of costs,'' the FHWA agrees that this term is not clear. The requirement for the use of indirect cost rates applies in cost-reimbursement type contracts. We agree that the NPRM language would benefit from a revision. We have changed the first sentence of section 635.507(b) to require the CM/GC contractor to provide an indirect cost rate established in accordance with the Federal cost principles when preconstruction service payments are based on actual costs. The FHWA notes that requirement is not applicable to competitive sealed bidding contracts that are typically bid on a lump sum or unit price basis. For competitive sealed bid contracts, the determination of price reasonableness is based on a price analysis (a comparison with the engineer's estimate or an independent cost estimate). For construction change order situations, where as a last resort, it is necessary to perform the construction work on an actual cost basis, the contracting agency may use its force account specifications as the basis for payment (23 CFR 635.120(d)).

Finally, as it relates to cost eligibility, the NYSDOT referenced two recent National Cooperative Highway Research Program studies that cited the use of an independent third party to prepare cost estimates for the purpose of evaluating the acceptability of the engineer estimate and CM/GC price proposals.[3] The NYSDOT suggested that costs

[3] National Cooperative Highway Research Program, Synthesis 402, ''Construction Manager-at-Risk Project Delivery for Highway Programs, *http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_syn_402.pdf;* National Cooperative Highway Research Program Report 787, ''Guide for Design Management on Design-Build and Construction Manager/General Contractor Projects'', *http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_787.pdf.*

associated with the use of an independent estimator should be eligible for participation. The FHWA agrees. The use of an independent cost estimate is mentioned in section 635.506(d)(3) as an allowable activity. Experience to date has shown the independent cost estimate has been helpful in verifying price reasonableness. The preparation of an independent cost estimate falls within the statutory definition of ''construction'' in 23 U.S.C. 101(a)(4) as a preliminary engineering activity. The FHWA Division Office has the authority to make all decisions regarding cost eligibility based on whether a cost is necessary, reasonable, and allocable to a Federal-aid project consistent with the Cost Principals in 2 CFR part 200, subpart E. Given the contracting agency's objectives of verifying price reasonableness in the price analysis required by section 635.506(d)(3), the costs associated with the independent cost estimate are eligible for participation.

Rulemaking Analyses and Notices

The FHWA considered all comments received before the close of business on the comment closing date indicated above, and the comments are available for examination in the docket (FHWA–2015–0009) at *Regulations.gov*. The FHWA also considered comments received after the comment closing date and filed in the docket prior to this final rule.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA determined that this rule does not constitute a significant regulatory action within the meaning of Executive Order 12866 or within the meaning of DOT regulatory policies and procedures. The amendments clarify and revise requirements for the procurement, management, and administration of engineering and design related services using Federal-Aid Highway Program (FAHP) funding and directly related to a construction project. Additionally, this action complies with the principles of Executive Order 13563. The changes to parts 630 and 635 provide additional clarification, guidance, and flexibility to stakeholders implementing these regulations. This rule is not anticipated to adversely affect, in any material way, any sector of the economy. In addition, these changes will not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. After evaluating the costs and benefits of these amendments, FHWA anticipates that the economic impact of this rule will be minimal; therefore, a full regulatory evaluation is not necessary.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Public Law 96–354, 5 U.S.C. 601–612), FHWA evaluated the effects of this rule on small entities, such as local governments and businesses. The FHWA determined that this action would not have a significant economic impact on a substantial number of small entities. The amendments clarify and revise requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project. After evaluating the cost of these proposed amendments, as required by changes in authorizing legislation, other applicable regulations, and industry practices, FHWA has determined the projected impact upon small entities which utilize FAHP funding for consultant engineering and design related services would be negligible. Therefore, FHWA certifies that the rule would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, March 22, 1995, 109 Stat. 48). Furthermore, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA evaluated this rule to assess the effects on State, local, and tribal governments and the private sector. This rule does not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $156 million or more in any one year (2 U.S.C. 1532). Additionally, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The FAHP permits this type of flexibility.

Executive Order 13132 (Federalism Assessment)

This rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it was determined that this rule does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this rule directly preempts any State law or regulation or affects the States' ability to discharge traditional State governmental functions.

Paperwork Reduction Act

Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. This rule does not contain a collection of information requirement for the purpose of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

National Environmental Policy Act

Agencies must adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This action qualifies for an FHWA categorical exclusion under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives). The FHWA has evaluated whether the action would involve unusual circumstances or extraordinary circumstances and has determined that this action would not involve such circumstances. As a result, FHWA finds that this rule would not result in significant impacts on the human environment.

Executive Order 12898 (Environmental Justice)

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* and DOT Order 5610.2(a) (the DOT Order), 91 FR 27534, May 10, 2012 (available at *www.fhwa.dot.gov/enviornment/environmental_justice/ej_at_dot/order_56102a/index.cfm*), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with Executive Order 12898 and the DOT

Order in all rulemaking activities. In addition, FHWA has issued additional documents relating to administration of Executive Order 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (the FHWA Order) (available at *www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm*).

The FHWA has evaluated this rule under the Executive Order, the DOT Order, and the FHWA Order and has determined that this rule would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations.

Executive Order 13175 (Tribal Consultation)

The FHWA analyzed this rule under Executive Order 13175, dated November 6, 2000, and believes that this rule would not have substantial direct effects on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal law. This rule establishes the requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project. As such, this rule would not impose any direct compliance requirements on Indian tribal governments nor would it have any economic or other impacts on the viability of Indian tribes. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We determined that this rule would not be a significant energy action under that order because any action contemplated would not be likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, FHWA certifies that a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12630 (Taking of Private Property)

The FHWA analyzed this rule and determined that this rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, and certifies that this action would not cause an environmental risk to health or safety that may disproportionately affect children.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 630

Government contracts, Grant programs—transportation, Highway safety, Highways and roads, Reporting and recordkeeping requirements, Traffic regulations.

23 CFR Part 635

Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements.

Issued on: November 23, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA amends title 23, Code of Federal Regulations, parts 630 and 635 as follows:

PART 630—PRECONSTRUCTION PROCEDURES

■ 1. Revise the authority citation for part 630 to read as follows:

Authority: 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1501 and 1503 of Pub. L. 109–59, 119 Stat. 1144; Pub. L. 105–178, 112 Stat. 193; Pub. L. 104–59, 109 Stat. 582; Pub. L. 97–424, 96 Stat. 2106; Pub. L. 90–495, 82 Stat. 828; Pub. L. 85–767, 72 Stat. 896; Pub. L. 84–627, 70 Stat. 380; 23 CFR 1.32 and 49 CFR 1.48(b), and Pub. L. 112–141, 126 Stat. 405, section 1303.

■ 2. Amend § 630.106 by adding paragraph (a)(8) to read as follows:

§ 630.106 Authorization to proceed.

(a) * * *

(8) For Construction Manager/General Contractor projects, the execution or modification of the project agreement for preconstruction services associated with final design and for construction services, and authorization to proceed with such services, shall not occur until after the completion of the NEPA process. However, preconstruction services associated with preliminary design may be authorized in accordance with this section.

* * * * *

PART 635—CONSTRUCTION AND MAINTENANCE

■ 3. Revise the authority citation for Part 635 to read as follows:

Authority: Sections 1525 and 1303 of Pub. L. 112–141, Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.;* Sec. 1041(a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

■ 4. Amend § 635.102 by adding, in alphabetical order, the definition of ''Construction Manager/General Contractor (CM/GC) project'' to read as follows:

§ 635.102 Definitions.

* * * * *

Construction Manager/General Contractor (CM/GC) project means a project to be delivered using a two-phase contract with a construction manager or general contractor for services during both the preconstruction and construction phases of a project.

* * * * *

■ 5. Amend § 635.104 by adding paragraph (d) to read as follows:

§ 635.104 Method of construction.

* * * * *

(d) In the case of a CM/GC project, the requirements of subpart E and the appropriate provisions pertaining to the CM/GC method of contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the CM/GC delivery method.

■ 6. Amend § 635.107 by revising paragraph (b) to read as follows:

§ 635.107 Participation by disadvantaged business enterprises.

* * * * *

(b) In the case of a design-build or CM/GC project funded with title 23 funds, the requirements of 49 CFR part 26 and the State's approved DBE plan apply.

■ 7. Amend § 635.109 by revising paragraph (a) introductory text to read as follows:

§ 635.109 Standardized changed conditions clauses.

(a) Except as provided in paragraph (b) of this section, the following changed conditions contract clauses shall be made part of, and incorporated in, each highway construction project, including construction services contracts of CM/GC projects, approved under 23 U.S.C. 106:

* * * * *

■ 8. Amend § 635.110 by revising paragraph (f) introductory text to read as follows:

§ 635.110 Licensing and qualifications of contractors.

* * * * *

(f) In the case of design-build and CM/GC projects, the STDs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of procurement.

* * * * *

■ 9. Amend § 635.112 by adding paragraph (j) to read as follows:

§ 635.112 Advertising for bids and proposals.

* * * * *

(j) In the case of a CM/GC project, the FHWA Division Administrator's approval of the solicitation document will constitute the FHWA's approval to use the CM/GC contracting method and approval to release the solicitation document. The STD must obtain the approval of the FHWA Division Administrator before issuing addenda which result in major changes to the solicitation document.

■ 10. Amend § 635.113 by adding paragraph (d) to read as follows:

§ 635.113 Bid opening and bid tabulations.

* * * * *

(d) In the case of a CM/GC project, the requirements of this section do not apply. See subpart E of this part for approval procedures.

■ 11. Amend § 635.114 by adding paragraph (l) to read as follows:

§ 635.114 Award of contract and concurrence in award.

* * * * *

(l) In the case of a CM/GC project, the CM/GC contract shall be awarded in accordance with the solicitation document. See subpart E for CM/GC project approval procedures.

■ 12. Amend § 635.122 by adding paragraph (d) to read as follows:

§ 635.122 Participation in progress payments.

* * * * *

(d) In the case of a CM/GC project, the STD must define its procedures for making construction phase progress payments in either the solicitation or the construction services contract documents.

■ 13. Amend § 635.309 by revising paragraphs (p) introductory text, (p)(1)(vi) and (p)(3) to read as follows:

§ 635.309 Authorization.

* * * * *

(p) In the case of a design-build or CM/GC project, the following certification requirements apply

(1) * * *

(vi) If the STD elects to include right-of-way, utility, and/or railroad services as part of the design-builder's or CM/GC contractor's scope of work, then the applicable design-build Request for Proposals document, or the CM/GC solicitation document must include:

* * * * *

(3) Changes to the design-build or CM/GC project concept and scope may require a modification of the transportation plan and transportation improvement program. The project sponsor must comply with the metropolitan and statewide transportation planning requirements in 23 CFR part 450 and the transportation conformity requirements (40 CFR parts 51 and 93) in air quality nonattainment and maintenance areas, and provide appropriate approval notification to the design builder or the CM/GC contractor for such changes.

■ 14. Add subpart E to read as follows:

Subpart E—Construction Manager/General Contractor (CM/GC) Contracting

Sec.
635.501 Purpose.
635.502 Definitions.
635.503 Applicability.
635.504 CM/GC requirements.
635.505 Relationship to the NEPA process.
635.506 Project approvals and authorizations.
635.507 Cost eligibility.

Subpart E—Construction Manager/General Contractor (CM/GC) Contracting

§ 635.501 Purpose.

The regulations in this subpart prescribe policies, requirements, and procedures relating to the use of the CM/GC method of contracting on Federal-aid projects.

§ 635.502 Definitions.

As used in this subpart:

Agreed price means the price agreed to by the Construction Manager/General Contractor (CM/GC) contractor and the contracting agency to provide construction services for a specific scope and schedule.

CM/GC contractor means the entity that has been awarded a two-phase contract for a CM/GC project and is responsible for providing preconstruction services under the first phase and, if a price agreement is reached, construction services under the second phase of such contract.

CM/GC project means a project to be delivered using a two-phase contract with a CM/GC contractor for services during the preconstruction and, if there is an agreed price, construction phases of a project.

Construction services means the physical construction work undertaken by a CM/GC contractor to construct a project or a portion of the project (including early work packages). Construction services include all costs to perform, supervise, and administer physical construction work. Construction services may be authorized as a single contract for the project, or through a combination of contracts covering portions of the CM/GC project.

Contracting agency means the State Transportation Agency (STA), and any State or local government agency, public-private partnership, or Indian tribe (as defined in 2 CFR 200.54) that is the acting under the supervision of the STA and is awarding and administering a CM/GC contract.

Division Administrator means the chief FHWA official assigned to conduct business in a particular State.

Early work package means a portion or phase of physical construction work (including but not limited to site preparation, structure demolition, hazardous material abatement/treatment/removal, early material acquisition/fabrication contracts, or any action that materially affects the objective consideration of alternatives in the NEPA review process) that is procured after NEPA is complete but before all design work for the project is complete. Contracting agencies may procure an early work package when construction risks have been addressed (both agency and CM/GC contractor risks) and the scope of work is defined sufficiently for the contracting agency and the CM/GC contractor to reasonably determine price. The requirements in § 635.506 (including § 635.506(d)(2)) and § 635.507 apply to procuring an early work package and FHWA authorization for an early work package.

Final design has the same meaning as defined in § 636.103 of this chapter.

NEPA process means the environmental review required under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), applicable portions of the NEPA implementing regulations at 40 CFR parts 1500–1508, and part 771 of this chapter.

Preconstruction services means consulting to provide a contracting agency and its designer with information regarding the impacts of design on the physical construction of the project, including but not limited to: Scheduling, work sequencing, cost engineering, constructability, cost estimating, and risk identification. Under a preconstruction services contract, the CM/GC contractor may provide consulting services during both preliminary and, subject to provisions in this subpart, final design. Such services may include on-site material sampling and data collection to assist the contacting agency's design team in its preliminary design work, but do not include design and engineering-related services as defined in § 172.3 of this chapter. The services may include the preparation of plans typically developed by a construction contractor during the construction phase (such as preliminary staging or preliminary falsework plans) when needed for the NEPA process. However, services involving plans or submittals that are considered elements of final design and not needed for the NEPA process (such as shop drawings or fabrication plans) is not allowed, even on an at-risk basis, prior to the completion of the NEPA review process.

Preliminary design has the same meaning as defined in section 636.103 of this title.

Solicitation document means the document used by the contracting agency to advertise the CM/GC project and request expressions of interest, statements of qualifications, proposals, or offers.

State transportation agency (STA) has the same meaning as the term State transportation department (STD) under § 635.102 of this chapter.

§ 635.503 Applicability.

The provisions of this subpart apply to all Federal-aid projects within the right-of-way of a public highway, those projects required by law to be treated as if located on a Federal-aid highway, and other projects which are linked to such projects (*i.e.,* the project would not exist without another Federal-aid highway project) that are to be delivered using the CM/GC contractor method.

§ 635.504 CM/GC Requirements.

(a) *In general.* A contracting agency may award a two-phase contract to a CM/GC contractor for preconstruction and construction services. The first phase of this contract is the preconstruction services phase. The second phase is the construction services phase. The construction services phase may occur under one contract or under multiple contracts covering portions of the project, including early work packages.

(b) *Procurement requirements.* (1) The contracting agency may procure the CM/GC contract using applicable State or local competitive selection procurement procedures as long as those procedures do not serve as a barrier to free and open competition or conflict with applicable Federal laws and regulations.

(2) Contracting agency procedures may use any of the following solicitation options in procuring a CM/GC contract: Letters of interest, requests for qualifications, interviews, request for proposals or other solicitation procedures provided by applicable State law, regulation or policy. Single-phase or multiple-phase selection procedures may also be used.

(3) Contracting agency procedures shall require, at a minimum, that a CM/GC contract be advertised through solicitation documents that:

(i) Clearly define the scope of services being requested;

(ii) List evaluation factors and significant subfactors and their relative importance in evaluating proposals;

(iii) List all required deliverables;

(iv) Identify whether interviews will be conducted before establishing the final rank (however, the contracting agency may reserve the right to make a final determination whether interviews are needed based on responses to the solicitation); and

(v) Include or reference sample contract form(s).

(4) If interviews are used in the selection process, the contracting agency must offer the opportunity for an interview to all short listed firms (or firms that submitted responsive proposals, if a short list is not used). Also, if interviews are used, then the contracting agency must not engage in conduct that favors one firm over another and must not disclose a firm's offer to another firm.

(5) A contracting agency may award a CM/GC contract based on qualifications, experience, best value, or any other combination of factors considered appropriate by the contracting agency and the Division Administrator and which are clearly specified in the solicitation documents.

(6) In the event that the contracting agency is unwilling or unable to enter into a contract with the CM/GC contractor for the construction services phase of the project (including any early work package), after the concurrence of the Division Administrator, the contracting agency may initiate a new procurement process meeting the requirements of subpart A of this part, or of another approved method for the affected portion of the construction work. If Federal-aid participation is being requested in the cost of construction, the contracting agency must request FHWA's approval before advertising for bids or proposals in accordance with § 635.112 and part 636 of this chapter. When the contracting agency makes a decision to initiate a new procurement, the contracting agency may determine that the CM/GC contractor is likely to have a competitive advantage that could adversely affect fair and open competition and not allow the CM/GC contractor to submit competitive bids.

(c) *FHWA approval of CM/GC procedures.* (1) The STA must submit its proposed CM/GC procurement procedures to the FHWA Division Administrator for review and approval. Any changes in approved procedures and requirements shall also be subject to approval by the Division Administrator. Other contracting agencies may follow STA approved procedures, or their own procedures if approved by both the STA and FHWA.

(2) The Division Administrator may approve procedures that conform to the requirements of this subpart and which do not, in the opinion of the Division Administrator, operate to restrict competition. The Division Administrator's approval of CM/GC procurement procedures may not be delegated or assigned to the STA.

(d) *Subcontracting.* Consistent with § 635.116(a), contracts for construction services must specify a minimum percentage of work (no less than 30 percent of the total cost of all construction services performed under the CM/GC contract, excluding specialty work) that a contractor must perform with its own forces. If required by State law, regulation, or administrative policy, the contracting agency may require the CM/GC contractor to competitively let and award subcontracts for construction services to the lowest responsive bidder.

(e) *Payment methods.* (1) The method of payment to the CM/GC contractor shall be set forth in the original solicitation documents, contract, and any contract modification or change order thereto. A single contract may

contain different payment methods as appropriate for compensation of different elements of work.

(2) The methods of payment for preconstruction services shall be: Lump sum, cost plus fixed fee, cost per unit of work, specific rates of compensation, or other comparable payment method permitted in State law and regulation. When compensation is based on actual costs, an approved indirect cost rate must be used. The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

(3) The method of payment for construction services may include any method of payment authorized by State law (including, but not limited to, lump sum, unit price, and target price). The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

§ 635.505 Relationship to the NEPA process.

(a) In procuring a CM/GC contract before the completion of the NEPA process, the contracting agency may:

(1) Issue solicitation documents;

(2) Proceed with the award of a CM/GC contract providing for preconstruction services and an option to enter into a future contract for construction services once the NEPA review process is complete;

(3) Issue notices to proceed to the CM/GC contractor for preconstruction services, excluding final design-related activities; and

(4) Issue a notice-to-proceed to a consultant design firm for the preliminary design and any work related to preliminary design of the project to the extent that those actions do not limit any reasonable range of alternatives.

(b) The contracting agency shall not initiate construction activities (even on an at-risk basis) or allow such activities to proceed prior to the completion of the NEPA process. The contracting agency shall not perform or contract for construction services (including early work packages of any kind) prior to the completion of the NEPA process.

(c) A contracting agency may proceed, solely at the risk and expense of the contracting agency, with design activities at any level of detail, including final design and preconstruction services associated with final design, for a CM/GC project before completion of the NEPA process without affecting subsequent approvals required for the project. However, FHWA shall not authorize final design activities and preconstruction services associated with final design, and such activities shall not be eligible for Federal funding as provided in § 635.506(c), until after the completion the NEPA process. A contracting agency may use a CM/GC contractor for preconstruction services associated with at-risk final design only if the contracting agency has a procedure for segregating the costs of the CM/GC contractor's at-risk work from preconstruction services eligible for reimbursement during the NEPA process. If a contracting agency decides to perform at-risk final design, it must notify FHWA of its decision to do so before undertaking such activities.

(d) The CM/GC contract must include termination provisions in the event the environmental review process does not result in the selection of a build alternative. This termination provision is in addition to the termination for cause or convenience clause required by Appendix II to 2 CFR part 200.

(e) If the contracting agency expects to use information from the CM/GC contractor in the NEPA review for the project, then the contracting agency is responsible for ensuring its CM/GC contract gives the contracting agency the right to obtain, as needed, technical information on all alternatives analyzed in the NEPA review.

(f) The CM/GC contract must include appropriate provisions ensuring no commitments are made to any alternative during the NEPA process, and that the comparative merits of all alternatives identified and considered during the NEPA process, including the no-build alternative, will be evaluated and fairly considered.

(g) The CM/GC contractor must not prepare NEPA documentation or have any decisionmaking responsibility with respect to the NEPA process. However, the CM/GC contractor may be requested to provide information about the project and possible mitigation actions, including constructability information, and its work product may be considered in the NEPA analysis and included in the record.

(h) Any contract for construction services under a CM/GC contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA documentation and committed to in the NEPA determination for the selected alternative will be implemented, excepting only measures the contracting agency expressly describes in the CM/GC contract as excluded because they are the responsibility of others.

§ 635.506 Project approvals and authorizations.

(a) *In general.* (1) Under 23 U.S.C. 106(c), the States may assume certain FHWA responsibilities for project design, plans, specifications, estimates, contract awards, and inspections. Any individual State's assumption of FHWA responsibilities for approvals and determinations for CM/GC projects, as described in this subpart, will be addressed in the State's FHWA/STA Stewardship and Oversight Agreement. The State may not further delegate or assign those responsibilities. If an STA assumes responsibility for an FHWA approval or determination contained in this subpart, the STA will include documentation in the project file sufficient to substantiate its actions and to support any request for authorization of funds. The STA will provide FHWA with the documentation upon request.

(2) States cannot assume FHWA review or approval responsibilities for §§ 635.504(c) (review and approval of CM/GC procurement procedures) or 635.506(c) (FHWA post-NEPA review of at-risk final design costs for eligibility).

(3) In accordance with 23 U.S.C. 106(c), States may assume FHWA review or approval responsibilities for §§ 635.504(b)(6) (approval of bidding), 635.504(e)(3) (approval of indirect cost rate), 635.506(b) (approval of preconstruction price and cost/price analysis), 635.506(d)(2) (approval of price estimate for entire project), 635.506(d)(4) (approval of construction price analysis for each construction services contract), and 635.506(e) (approval of preconstruction services and construction services contract awards) for CM/GC projects on the National Highway System, including projects on the Interstate System, and must assume such responsibilities for projects off the National Highway System unless the State determines such assumption is not appropriate.

(b) *Preconstruction services approvals and authorization.* (1) If the contracting agency wishes Federal participation in the cost of the CM/GC contractor's preconstruction services, it must request FHWA's authorization of preliminary engineering before incurring such costs, except as provided by section 1440 of the Fixing America's Surface Transportation Act, Pub. L. 114–357 (December 1, 2015).

(2) Before authorizing pre-construction services by the CM/GC contractor, the Division Administrator must review and approve the contracting agency's cost or price analysis for the preconstruction services procurement (including contract modifications). A cost or price analysis

is encouraged but not required for procurements less than the simplified acquisition threshold in 2 CFR 200.88. The requirements of this paragraph apply when the contracting agency is requesting Federal assistance in the cost of preconstruction services.

(c) *Final design during NEPA process.* (1) If the contracting agency proceeds with final design activities, including CM/GC preconstruction services associated with final design activities, at its own expense before the completion of the NEPA process, then those activities for the selected alternative may be eligible for Federal reimbursement after the completion of the NEPA process so long as the Division Administrator finds that the contracting agency's final design-related activities:

(i) Did not limit the identification and fair evaluation of a reasonable range of alternatives for the proposed project;

(ii) Did not result in an irrevocable commitment by the contracting agency to the selection of a particular alternative;

(iii) Did not have an adverse environmental impact; and

(iv) Are necessary and reasonable and adequately documented.

(2) If, during the NEPA process, the Division Administrator finds the final design work limits the fair evaluation of alternatives, irrevocably commits the contracting agency to the selection of any alternative, or causes an adverse environmental impact, then the Division Administrator shall require the contracting agency to take any necessary action to ensure the integrity of the NEPA process regardless of whether or not the contracting agency wishes to receive Federal reimbursement for such activities.

(d) *Construction services approvals and authorizations.* (1) Subject to the requirements in § 635.505, the contracting agency may request Federal participation in the construction services costs associated with a CM/GC construction project, or portion of a project (including an early work package). In such cases, FHWA's construction contracting requirements will apply to all of the CM/GC project's construction contracts if any portion (including an early work package) of the CM/GC project construction is funded with title 23 funds. Any expenses incurred for construction services before FHWA authorization shall not be eligible for reimbursement except as may be determined in accordance with § 1.9 of this chapter.

(2) The Division Administrator must approve the price estimate for construction costs for the entire project before authorization of construction services (including authorization of an early work package).

(3) The contracting agency must perform a price analysis for any contract (or contract modification) that establishes or revises the scope, schedule or price for the construction of the CM/GC project or a portion of the project (including an early work package). The price analysis must compare the agreed price with the contracting agency's engineer's estimate or an independent cost estimate (if required by the contracting agency). A price analysis is encouraged but not required for procurements less than the simplified acquisition threshold in 2 CFR 200.88.

(4) The Division Administrator must review and approve the contracting agency's price analysis and agreed price for the construction services of a CM/GC project or a portion of the project (including an early work package) before authorization of construction services.

(5) Where the contracting agency and the CM/GC contractor agree on a price for construction services that is approved under paragraph (d)(4) of this section, FHWA's authorization of construction services will be based on the approved agreed price for the project or portion of the project. The authorization may include authorization of an early work package, including the advanced acquisition of materials consistent with § 635.122 and this subpart. In the event that construction materials are acquired for a CM/GC project but not installed in the CM/GC project, the cost of such material will not be eligible for Federal-aid participation. In accordance with § 635.507 and 2 CFR part 200, FHWA may deny eligibility for part or all of an early work package if such work is not needed for, or used for, the project.

(e) *Contract award.* The award of a Federal-aid CM/GC contract for preconstruction services and the award of contract(s) for construction services require prior concurrence from the Division Administrator. The concurrence is a prerequisite to authorization of preconstruction and construction services (including authorization for an early work package). Concurrence in the CM/GC contract award for construction services constitutes approval of the agreed price, scope, and schedule for the work under that contract. Where the contracting agency has established a Disadvantaged Business Enterprise (DBE) contract goal for the CM/GC construction services contract, the initial proposal for CM/GC construction services must include the DBE documentation required by 49 CFR 26.53(b)(2), or it must include a contractually binding commitment to meet the DBE contract goal, with the information required by 49 CFR 26.53(b)(2) provided before the contracting agency awards the contract for construction services. A copy of the executed contract between the contracting agency and the CM/GC contractor, including any contract for construction services, shall be furnished to the Division Administrator as soon as practical after execution. If the contracting agency decides not to proceed with the award of a CM/GC construction services contract, then it must notify the FHWA Division Administrator as provided in § 635.504(b)(6).

§ 635.507 Cost eligibility.

(a) Costs, or prices based on estimated costs, under a CM/GC contract shall be eligible for Federal-aid reimbursement only to the extent that costs incurred, or cost estimates included in negotiated prices, are allowable in accordance with the Federal cost principles (as specified in 2 CFR part 200, subpart E). Contracting agencies must perform a cost or price analysis in connection with procurement actions, including contract modifications, in accordance with 2 CFR 200.323(a) and this subpart.

(1) For preconstruction services, to the extent that actual costs or cost estimates are included in negotiated prices that will be used for cost reimbursement, the costs must comply with the Federal cost principles to be eligible for participation.

(2) For construction services, the price analysis must confirm the agreed price is reasonable in order to satisfy cost eligibility requirements (see § 635.506(d)(3)). The FHWA will rely on an approved price analysis when authorizing funds for construction.

(b) *Indirect cost rates.* Where preconstruction service payments are based on actual costs the CM/GC contractor must provide an indirect cost rate established in accordance with the Federal cost principles (as specified in 2 CFR part 200 subpart E).

(c) *Cost certification.* (1) If the CM/GC contractor presents an indirect cost rate established in accordance with the Federal cost principles (as specified in 2 CFR part 200 subpart E), it shall include a certification by an official of the CM/GC contractor that all costs are allowable in accordance with the Federal cost principles.

(2) An official of the CM/GC contractor shall be an individual executive or financial officer of the CM/GC contractor's organization, at a level

no lower than a Vice President or Chief Financial Officer, or equivalent, who has the authority to make representations about the financial information utilized to establish the indirect cost rate proposal submitted.

(3) The certification of final indirect costs shall read as follows:

Certificate of Final Indirect Costs

This is to certify that I have reviewed this proposal to establish final indirect cost rates and to the best of my knowledge and belief:

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles in 2 CFR part 200 subpart E; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of 2 CFR part 200 subpart E.

[FR Doc. 2016–28977 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91 and 92

[Docket No. FR 5792–I–01]

RIN 2501–AD69

Changes to HOME Investment Partnerships (HOME) Program Commitment Requirement

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Interim final rule.

SUMMARY: This rule changes the method by which HUD will determine participating jurisdictions' compliance with the statutory 24-month commitment requirement. Beginning with Fiscal Year (FY) 2015 grants, HUD will implement a grant-specific method for determining compliance with these requirements. This rule also establishes a method of administering program income that will prevent participating jurisdictions from losing appropriated funds when they expend program income.

DATES: *Effective Date:* January 31, 2017.

Comment Due Date: January 3, 2017.

ADDRESSES: Interested persons are invited to submit comments regarding this interim final rule. All communications must refer to the above docket number and title. To receive consideration as public comments, comments must be submitted through one of the two methods specified below:

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

No Facsimiled Comments. Facsimiled (faxed) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Virginia Sardone, Director, Office of Affordable Housing Programs, Department of Housing and Urban Development, Office of Community Planning and Development, 451 7th Street SW., Suite 7286, Washington, DC 20410; or at 202–708–2684 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Section 218(g) of the National Affordable Housing Act of 1990 (NAHA), as amended, requires that participating jurisdictions place Home Investment Partnerships Program (HOME) funds under binding commitment within 24 months after the last day of the month in which HUD made the funds available (*i.e.,* obligated the grant by executing the HOME grant agreement). This section of NAHA further states that a participating jurisdiction loses the right to draw any funds that are not placed under binding commitment by that date and that HUD shall reduce the participating jurisdiction's line of credit by the expiring amount.

To date, HUD has measured compliance with the HOME program 24-month requirement for committing funds using a cumulative methodology. Because HUD's Integrated Disbursement and Information System (IDIS) committed and disbursed funds on a first-in, first-out basis through participating jurisdictions' FY 2014 HOME grants, participating jurisdictions did not have the ability to designate funds from a specific allocation when committing HOME funds to a project. Consequently, HUD implemented the commitment requirement through a cumulative methodology under which HUD determined a participating jurisdiction's compliance with the 24-month deadline by determining whether the total amount committed by the participating jurisdiction from all HOME grants it had received was equal to or greater than the participating jurisdiction's cumulative commitment requirement for all grants that had been obligated for 24 months or longer. This methodology has been described in the HOME program regulations since 1997.

HUD will begin using a grant-specific method of determining compliance with the 24-month commitment deadline, beginning with FY 2015 HOME grants. HUD has made changes to IDIS so that, beginning with FY 2015 grants, the participating jurisdiction will select the grant year's funds that will be committed to a specific project or activity. When the participating jurisdiction requests a draw of grant funds for that project or activity, HUD, through IDIS, will disburse the funds committed to that project or activity, rather than the oldest funds available.

As mentioned above, prior to this change, IDIS did not permit participating jurisdictions to specify which grant years' funds they were committing to a specific project. This system change makes it possible for participating jurisdictions to commit funds and for HUD to assess commitment deadline compliance on a grant-specific basis, beginning with FY 2015 HOME grants.

HOME program regulatory changes are also needed to address the timely commitment and expenditure of program income, repaid funds, recaptured funds, and funds committed for programs to be administered by State recipients and subrecipients. Conforming changes to the consolidated plan regulations with respect to program income, repaid funds, and recaptured funds are also made.

The following section of this preamble provides a section-by-section overview of the interim regulatory changes.

II. This Interim Rule—Section-by-Section

Consolidated Planning (§§ 91.220 and 91.320)

HUD has revised the regulations governing the HOME program components of the action plans for local governments (§ 91.220) and States (§ 91.320). Specifically, this rule revises sections § 91.220(l)(2)(i) and § 91.320(k)(2)(i) to require the participating jurisdiction to include uncommitted program income, repayments, and recaptured funds that it has received during the previous year in the resources it describes in its annual action plan. The rule gives participating jurisdictions the option to include program income, repayments, or recaptures expected to be received during the program year in the summary of anticipated Federal resources described in their annual action plan. Participating jurisdictions are not required to include these anticipated funds in their action plan, because doing so would result in them having a period of less than 24 months to commit these funds. However, if a participating jurisdiction did not include anticipated program income, repayments, or recaptured funds in the annual action plan and later wished to commit such funds to a HOME project or activity, it would be required to amend its annual action plan, in accordance with the provisions of § 91.505.

Definitions (§ 92.2)

This rule eliminates reference to an agreement with a contractor from the definition of ''commitment'' in § 92.2. Unlike State recipients and subrecipients, which design programs and develop policies and procedures to administer those programs, contractors that administer HOME-funded programs carry out the participating jurisdiction's policies and procedures. When a participating jurisdiction carries out HOME activities using its own employees, HOME funds are committed when the participating jurisdiction executes an agreement with a project owner to assist a specific project. When a participating jurisdiction uses contractors in place of its own employees to carry out activities, the agreement with those contractors should not constitute a commitment.

HUD has added language to the definition clarifying that community housing development organization (CHDO) operating expense funds, CHDO capacity building funds, and CHDO project-specific technical assistance and site control loans are considered committed when the participating jurisdiction executes a legally binding agreement for the use of the funds. Similarly, the rule includes language clarifying that administrative and planning cost funds are considered committed based on the amount set aside for such purposes in IDIS. These revisions reflect HUD's longstanding practice of considering these three types of CHDO funds, each of which is designated as a unique fund type in IDIS, as committed based upon legally binding written agreements for the activities and make the regulatory definition of ''commitment'' comprehensive.

HOME Investment Trust Fund (§ 92.500)

Commitment Deadline

This rule revises § 92.500(d). Currently, 24 CFR 92.500(d)(1) describes the requirements for reducing a participating jurisdiction's grant for failure to meet the 24-month commitment deadline, the 24-month deadline for committing 15 percent of a HOME allocation for CHDO set-aside projects, and the 5-year deadline for expending HOME funds. Section 92.500(d)(2) then describes the cumulative method for determining compliance with the deadlines outlined in paragraph (d)(1) of § 92.500. This rule reorganizes these paragraphs so that § 92.500(d)(1) addresses commitment, CHDO set-aside commitment, and expenditure requirements for FY 2015 and subsequent-year HOME allocations and § 92.500(d)(2) addresses these requirements for FY 2014 and prior-year HOME allocations.

At § 92.500(d)(1)(i), this rule requires that HUD recapture any funds (including funds for CHDOs under § 92.300) from a specific grant allocation that are in the participating jurisdiction's United States Treasury Account and are not committed within 24 months of the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement for the specific fiscal year allocation. Participating jurisdictions will no longer have flexibility to meet the requirement that 15 percent of its HOME allocation be used for housing owned, developed, or sponsored by CHDOs on a cumulative basis (*e.g.,* committing less than 15 percent to CHDOs in some years and more than 15 percent to CHDOs in others, but maintaining compliance by ensuring that 15 percent of cumulative HOME allocations are used for CHDO projects). Each participating jurisdiction is now required to commit a minimum of 15 percent of each year's allocation or HUD will recapture the funds.

The rule at § 92.500(d)(1)(ii) establishes a new deadline to ensure that funds that have been committed to State recipients or subrecipients are subsequently committed timely to a specific local project. HOME funds that a participating jurisdiction committed to a State recipient or subrecipient must be committed to a specific local project within 36 months after the last day of the month in which HUD notified the participating jurisdiction of HUD's execution of its HOME Investment Partnership Agreement for the specific fiscal year allocation. HUD has established this deadline because, with the elimination of the 5-year expenditure deadline described below, HOME funds committed to a State recipient or subrecipient could remain uncommitted to a project until the expiration of the funds at the end of 9 years, at which point they would be recaptured. The additional deadline is necessary to ensure that HOME funds that have been committed to State recipients or subrecipients are committed to projects within a reasonable period of time.

For FY 2014 and previous grants, HUD will continue using the cumulative method for determining compliance with the commitment deadline. Participating jurisdictions have relied on the existing HOME regulations at § 92.500(d)(2) and the HOME Deadline Compliance reports that HUD has posted monthly on its HOME program Web site [1] since 2005, which describe and implement the cumulative method of determining compliance with the HOME commitment, CHDO commitment, and expenditure deadlines. However, HUD has eliminated the existing § 92.500(d)(2) and added new text to fully explain the cumulative methodology that will

[1] HUD's HOME program Web site is located at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/programs/home.*

continue to apply to FY 2014 and previous grants. A new paragraph (d)(2)(i)(A) in § 92.500 establishes the 24-month commitment requirement for FY 2014 and previous HOME allocations, including the 15 percent CHDO reservation requirement. New paragraph (d)(2)(i)(B) describes the cumulative method that HUD will continue to use to measure compliance with the 24-month commitment deadlines for these grants. New paragraph (d)(2)(i)(C) retains existing regulatory language stating that HUD may recapture HOME funds for any penalties assessed by HUD under § 92.552 (Sanctions).

New paragraph § 92.500(d)(2)(iii) requires FY 2014 and previous allocations to be committed by the participating jurisdiction's deadline for FY 2015 allocations. For deadlines occurring in 2016 for FY 2014 HOME allocations, HUD is following the existing regulation and using the cumulative method for determining compliance with the 24-month commitment requirement. As a result, it was necessary to include commitments from FY 2015 allocations in the cumulative calculation of commitments, creating a situation in which FY 2014 and earlier funds would not be separately subject to any commitment requirement.

Expenditure Deadline

In this rule, HUD has eliminated the 5-year deadline for expenditure of HOME funds appropriated for FY 2015 and subsequent years. This regulatory deadline was established in the December 16, 1991, interim rule (56 FR 65313) issued to implement the HOME statute. At that time, funds appropriated for the HOME program were available until expended and HUD determined that it was necessary to establish a deadline to ensure that HOME funds were expended expeditiously to develop affordable housing. Beginning with the FY 2002 HOME appropriation, and for all subsequent appropriations, funds appropriated for the HOME program are available for obligation to participating jurisdictions for 3 years after the first day of the fiscal year for which they were appropriated and expire 5 years after the period of obligation (*i.e.,* at the end of the eighth year). Expired funds are recaptured by the United States Treasury. HUD's FY 2015 and FY 2016 appropriations laws have extended the period of obligation of HOME funds to 4 years; the funds expire 5 years after the period of obligation (*i.e.,* at the end of the ninth year). In addition, in 2013, HUD established a 4-year deadline for completing projects assisted with HOME funds in § 92.205(e)(2). Because of these new deadlines for expiration of appropriated funds and completion of projects, HUD believes that the 5-year expenditure deadline is duplicative and creates an unnecessary burden on participating jurisdictions. Thus, the deadline is eliminated.

This rule also eliminates the separate 5-year deadline for expenditure of CHDO set-aside funds appropriated for FY 2015 and subsequent years. In its 2013 HOME rulemaking, HUD determined that a separate examination of CHDO expenditures was necessary because, under the cumulative method of determining compliance with the 5-year expenditure requirement, rapid expenditure of other HOME funds frequently shielded older, unexpended CHDO funds from deobligation. This separate deadline is no longer necessary and this rule eliminates both the overall and the CHDO-specific 5-year deadlines for expending HOME funds.

Expiration of Funds

For clarity, HUD has included the 9-year deadline for the expiration of HOME funds in § 92.500(d)(2)(iii)(C). The new provision states that HUD will recapture funds from a specific fiscal year allocation that are in the United States Treasury account and are not expended by the end of the fifth year after the period of availability for obligation by HUD. These funds will be deobligated from the participating jurisdiction and returned to the United States Treasury.

Program Disbursement and Information System (§ 92.502)

This rule eliminates § 92.502(b)(2), which contained two provisions related to HUD cancellation of projects. The first provision stated that HUD's information system could cancel a project for which project set-up information was not completed within 20 days. This provision is not necessary, because IDIS does not permit project set up to occur until all required information has been entered. The second provision permitted HUD to automatically cancel projects that had been committed in IDIS for 12 months without an initial disbursement of funds. HUD will continue to monitor projects for timely initial disbursement of funds. However, the automatic cancellation of projects by IDIS is no longer appropriate because it may result in the loss of funds that become uncommitted after the 24-month commitment deadline irrespective of the nature and extent of any project delay.

The rule revises § 92.502(c)(3) to add language stating that, beginning with FY 2015 allocations, the specific funds that are committed to a project will be disbursed for that project. This provision is necessary because, beginning with FY 2015 HOME grants, IDIS no longer disburses funds on a first-in, first-out basis. HUD also adds language to this paragraph stating that if funds in both the HOME local account and in the United States Treasury account are committed to a HOME project, the funds in the local account must be disbursed before the participating jurisdiction requests that HOME funds be disbursed from the United States Treasury account. This provision ensures that program income and other HOME funds in the local account are disbursed before HOME funds are drawn from the Treasury.

Program Income, Repayments, and Recaptured Funds (§ 92.503)

HUD has revised paragraphs § 92.503(b)(2) and (3) so that participating jurisdictions that must repay HOME funds for any reason must seek HUD's instructions with respect to the account to which the HOME funds must be repaid. By providing specific instructions on a case-by-case basis, HUD can avoid situations in which a participating jurisdiction repays funds to a Federal HOME account after the 24-month deadline and loses access to the funds as a result.

Under the first-in, first-out method of disbursing funds, it was generally not necessary for participating jurisdictions to commit program income and other funds in the local HOME account through IDIS prior to expending the funds. When a participating jurisdiction had program income on hand, it, generally, disbursed program income for the next HOME cost. Since 2007, HUD has excluded expended HOME program income from the calculation of total commitments or expenditures for determining compliance with the 24-month commitment and the 5-year expenditure deadlines.

This rule changes the manner in which program income and other funds in the local HOME account are treated. Otherwise, a participating jurisdiction would be required to uncommit appropriated HOME funds from a specific project each time it disbursed program income for that project. This would then subject the newly uncommitted HOME funds to recapture by HUD if the 24-month commitment deadline for those funds had passed. To avoid unnecessary loss of funds, HUD has determined that participating jurisdictions should be permitted to accumulate program income, repayments, and recaptured funds

during a program year and that a deadline for committing HOME funds should be applied to those funds in the local account. Although participating jurisdictions are required to include program income expected to be received in their consolidated plan or annual action plans, HUD recognizes that participating jurisdictions cannot always accurately estimate the amount and timing of program income, recaptures, or repaid funds that they may receive. Consequently, to accommodate the unpredictability associated with the receipt of program income, HUD has established special provisions with respect to program income.

The rule adds a new § 92.503(d) to establish a deadline for committing funds deposited in a participating jurisdiction's local HOME account. These funds include program income as defined at § 92.2, repayments of HOME funds pursuant to § 92.503(b), and recaptured funds as described in § 92.503(c). HUD has determined it is necessary to establish this deadline because, under the new requirements for committing funds from specific allocations, funds in the local account will have to be committed to specific projects before they can be expended. The deadline for committing program income, repayments, and recaptured funds received during a program year is the same as the commitment deadline for the HOME grant allocation for the subsequent program year. HUD has determined that this approach is appropriate because: (1) The deadline for committing program income should not be shorter than for appropriated funds, and, unlike appropriated funds, program income, repayments, and recaptured funds are received sporadically throughout the year; and (2) it would be administratively burdensome for participating jurisdictions to track and comply with two separate deadlines each year for committing their HOME allocation and funds in their local account. Further, while the amount and approximate date of receipt for program income can often be estimated by a participating jurisdiction, repaid funds and recaptured funds generally cannot be anticipated in advance.

Participating Jurisdiction Responsibilities; Written Agreements; On-Site Inspections (§ 92.504)

This rule adds new paragraphs at § 92.504(c)(7) and (8) to establish the requirements for written agreements for CHDO project-specific technical assistance, site control loans, project-specific seed money loans, and community development capacity building activities. These provisions are added to correspond to the addition of these agreements to the definition of ''commitment'' at § 92.2.

III. Justification for Interim Rule

HUD generally publishes rules for advance public comment in accordance with its rule on rulemaking at 24 CFR part 10. However, under 24 CFR 10.1, HUD may omit prior public notice and comment if it is ''impracticable, unnecessary, or contrary to the public interest.'' In this instance, HUD has determined that it is unnecessary to delay the effectiveness of this rule for advance public comment.

The HOME statute requires that HOME funds be placed under legally binding agreement within 24 months of HUD's obligation of the HOME grant to the participating jurisdiction. As described in the HOME regulations at 24 CFR 92.500(d)(2), since 1997 HUD has determined compliance with the commitment requirement by comparing cumulative commitments through the deadline date to the cumulative amount of HOME funds required to have been committed as of that date.

Beginning in 2013, HUD has frequently discussed with HOME participating jurisdictions the planned change from the cumulative method of measuring commitment compliance to a grant-specific method as part of HUD's transition to grant-based accounting for its formula grant programs. HUD notified all HOME participating jurisdictions of the planned IDIS programming changes to implement grant-specific commitment deadline compliance for FY 2015 HOME grants.[2]

HUD has also conducted webinars to explain the pending changes in the method for determining compliance with the commitment deadline beginning with FY 2015 HOME grants.[3] During 2015 and 2016, HUD provided HOME grant-based accounting training at numerous HOME conferences sponsored by membership associations for HOME participating jurisdictions and at meetings hosted by HUD field offices across the country.

The scope of the rule amendments is limited to this change and to other changes that: (1) Conform the regulations to the new method or make minor corrections and clarifications of provisions relating to commitments and the written agreements through which HOME funds are committed; (2) eliminate the expenditure deadline and automatic project cancellation provisions that are no longer required under the grant-specific method of committing and expending funds, or which may otherwise help to minimize undue risk of HOME funding deobligations; and (3) establish a project commitment deadline for funds provided to State recipients and subrecipients to ensure timely deployment of funds for affordable housing projects.

With the exception of the new requirements related to program income, this rule does not establish new and unfamiliar requirements for HOME participating jurisdictions. Moreover, if HUD were to issue this rule without adjusting the program income requirements, HOME participating jurisdictions could potentially lose millions of dollars of appropriated HOME funds each time they expended program income while HUD conducted proposed and final rulemaking processes. Consequently, the program income changes are included in the rule because they help to avert the loss of large amounts of HOME funds by the communities and beneficiaries for which they were appropriated.

Although HUD has determined that good cause exists to publish this rule for effect without prior solicitation of public comment, HUD recognizes the value and importance of public input in the rulemaking process. Accordingly, HUD is issuing these regulatory amendments on an interim basis and providing a 60-day public comment period. HUD is specifically soliciting comment on the best way to treat program income to avoid loss of appropriated HOME funds. All comments will be considered in the development of the final rule.

IV. Findings and Certifications

Information Collection Requirements

In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid Office of

[2] HUD memorandum, ''System and Regulatory Changes to Eliminate First-In-First-Out Accounting in the Integrated Disbursement and Information System,'' May 9, 2014, *https://www.hudexchange.info/resources/documents/CPD-Memo-System-and-Regulatory-Changes-to-Eliminate-First-In-First-Out-Accounting-in-IDIS.pdf;* HUD fact sheet, ''Transition to Grant Based Accounting,'' June 2015, *https://www.hudexchange.info/resources/documents/Transition-to-Grant-Based-Accounting.pdf;* and HOME FACTS—Vol. 6 No. 2, June 2015, *https://www.hudexchange.info/resources/documents/HOME-FACTS-Vo6-No2-HOME-IDIS-Grant-Based-Accounting.pdf.*

[3] ''HOME IDIS Webinar: Grant Based Accounting Changes for FY 2015 and Onward,'' August 12, 2015, *https://www.hudexchange.info/training-events/courses/home-idis-grant-based-accounting-changes-for-fy-2015-and-onward-webinar/.*

Management and Budget (OMB) control number. The information collection requirements contained in this rule have been submitted to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2506–0171.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule will not impose any Federal mandates on any State, local, or tribal governments or the private sector within the meaning of UMRA.

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500, and is also available to view on *www.regulations.gov.* Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339 (this is a toll-free number).

Impact on Small Entities

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As discussed, this regulation changes the manner in which HUD measures compliance with the statutory 24-month commitment deadline in the HOME program and does not alter the manner in which participating jurisdictions administer their HOME programs. Given this fact, HUD anticipates the regulatory changes will have minimal, or no, economic impacts.

Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's belief that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt State law within the meaning of the Executive order.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number applicable to the program that would be affected by this rule is 14.239.

List of Subjects

24 CFR Part 91

Aged, Grant programs-housing and community development, Homeless, Individuals with disabilities, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure, Grant programs-housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR parts 91 and 92 as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

■ 2. In § 91.220, redesignate paragraphs (l)(2)(i) through (vii) as (l)(2)(ii) through (viii), and add new paragraph (l)(2)(i) to read as follows:

§ 91.220 Action plan.

* * * * *

(l) * * *

(2) * * *

(i) The HOME program resources that the participating jurisdiction must describe in the action plan are the fiscal year HOME allocation plus the amount of program income, repayments, and recaptured funds in the participating jurisdiction's HOME Investment Trust Fund local account (see 24 CFR 92.500(c)(1)) at the beginning of the participating jurisdiction's program year. The jurisdiction may choose to include program income, repayments, and recaptured funds that are expected to be received during the program year if the jurisdiction plans to commit these funds during the program year.

* * * * *

■ 3. In § 91.320, redesignate paragraphs (k)(2)(i) through (vii) as paragraphs (k)(2)(ii) through (viii), and add new paragraph (k)(2)(i) to read as follows.

§ 91.320 Action plan.

* * * * *

(k) * * *

(2) * * *

(i) The HOME program resources that the State must describe in the action plan are the fiscal year HOME allocation plus the amount of program income, repayments, and recaptured funds in the State's HOME Investment Trust Fund local account (see 24 CFR 92.500(c)(1)) at the beginning of the State's program year. The State may choose to include program income, repayments, and recaptured funds that are expected to be received during the program year if the State plans to commit these funds during the program year.

* * * * *

■ 4. Revise § 91.505(a)(2) to read as follows:

§ 91.505 Amendments to the consolidated plan.

(a) * * *

(2) To carry out an activity, using funds from any program covered by the consolidated plan (including program income, reimbursements, repayment, recaptures, or reallocations from HUD), not previously described in the action plan; or

* * * * *

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 5. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

■ 6. In § 92.2, revise paragraph (1) of the definition of ''Commitment'' to read as follows:

§ 92.2 Definitions.

* * * * *

Commitment means:

(1) The participating jurisdiction has executed a legally binding written agreement (that includes the date of the signature of each person signing the agreement) that meets the minimum requirements for a written agreement in § 92.504(c). An agreement between the participating jurisdiction and a subrecipient that is controlled by the participating jurisdiction (*e.g.,* an agency whose officials or employees are official or employees of the participating jurisdiction) does not constitute a commitment. An agreement between the representative unit and a member unit of general local government of a consortium does not constitute a commitment. Funds for administrative and planning costs of the HOME program are committed based on the amount in the program disbursement and information system for administration and planning. The written agreement must be:

(i) With a State recipient or a subrecipient to use a specific amount of HOME funds to produce affordable housing, provide downpayment assistance, or provide tenant-based rental assistance;

(ii) With a community housing development organization to provide operating expenses;

(iii) With a community housing development organization to provide project-specific technical assistance and site control loans or project-specific seed money loans, in accordance with § 92.301;

(iv) To develop the capacity of community housing development organizations in the jurisdiction, in accordance with § 92.300(b); or

(v) To commit to a specific local project, as defined in paragraph (2) of this definition.

* * * * *

■ 7. Revise § 92.500(d) to read as follows:

§ 92.500 The HOME Investment Trust Fund.

* * * * *

(d)(1) *Reductions of Fiscal Year 2015 and subsequent fiscal year allocations.* HUD will reduce or recapture HOME funds in the HOME Investment Trust Fund, as follows:

(i) Any funds from a specific fiscal year allocation that are in the United States Treasury account that are not committed (including funds for community housing development organizations under § 92.300) within 24 months after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement for the specific fiscal year allocation;

(ii) Any funds from a specific fiscal year allocation that were committed to a State recipient or subrecipient that are not committed to a specific local project within 36 months after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement for the specific fiscal year allocation;

(iii) Any funds from a specific fiscal year allocation that are in the United States Treasury account that are not expended (drawn down) by September 30 of the fifth year after the end of the period of availability of the fiscal year allocation for obligation by HUD. Due to end-of-year financial system closeouts that begin before this date and prevent electronic access to the payment system, requests to draw down the funds must be made at least 7 full business days before this date to ensure that the funds still can be drawn from the United States Treasury account through the computerized disbursement and information system; and

(iv) Any penalties assessed by HUD under § 92.552.

(2)(i) *Reductions of Fiscal Year 2014 and prior fiscal year allocations.* HUD will reduce or recapture HOME funds in the HOME Investment Trust Fund by the amount of:

(A) Any funds from Fiscal Year 2014 and prior fiscal year allocations in the United States Treasury account that are required to be reserved (*i.e.,* 15 percent of the funds) by a participating jurisdiction, under § 92.300, and which are not committed to a community housing development organization project within 24 months after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement;

(B) Any funds from Fiscal Year 2014 and prior fiscal year allocations in the United States Treasury account that are not committed within 24 months after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement;

(C) Any funds from Fiscal Year 2014 and prior fiscal year allocations in the United States Treasury account that are not expended within 5 years after the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of the HOME Investment Partnership Agreement; and

(D) Any penalties assessed by HUD under § 92.552.

(ii) For purposes of determining the amount by which the HOME Investment Trust Fund will be reduced or recaptured under paragraphs (d)(2)(i)(A), (B), and (C) of this section, HUD will consider the sum of commitments to CHDOs, commitments, or expenditures, as applicable, from all fiscal year allocations through the Fiscal Year 2014 allocation. This sum must be equal to or greater than the sum of all fiscal year allocations through the fiscal year allocation being examined (minus previous reductions to the HOME Investment Trust Fund), or in the case of commitments to CHDOs, 15 percent of those fiscal year allocations.

(iii) HUD will reduce or recapture HOME funds in the HOME Investment Trust Fund by the amount of all fiscal year allocations through the Fiscal Year 2014 allocation that are uncommitted by the commitment deadline for the Fiscal Year 2015 allocation.

■ 8. In § 92.502, remove paragraph (b)(2), redesignate paragraph (b)(1) as (b), and revise paragraph (c)(3) to read as follows:

§ 92.502 Program disbursement and information system.

* * * * *

(c) * * *

(3) HOME funds in the local account of the HOME Investment Trust Fund must be disbursed before requests are made for HOME funds in the United States Treasury account. Beginning with the Fiscal Year 2015 allocation, the specific funds that are committed to a project will be disbursed for that project. If both funds in the local account and funds in the United States Treasury account are committed to a project, the funds in the local account must be disbursed before requests are made for HOME funds in the United States Treasury account for the project.

* * * * *

■ 9. In § 92.503, revise paragraphs (b)(2) and (3) and add paragraph (d) to read as follows:

§ 92.503 Program income, repayments, and recaptured funds.

* * * * *

(b) * * *

(2) Any HOME funds invested in a project that is terminated before completion, either voluntarily or otherwise, must be repaid by the participating jurisdiction, in accordance with paragraph (b)(3) of this section,

except for repayments of project-specific community housing development organization loans that are waived, in accordance with §§ 92.301(a)(3) and (b)(3). In addition, any HOME funds used for costs that are not eligible under this part must be repaid by the participating jurisdiction, in accordance with paragraph (b)(3) of this section.

(3) HUD will instruct the participating jurisdiction to either repay the funds to the HOME Investment Trust Fund Treasury account or the local account. If the jurisdiction is not a participating jurisdiction at the time the repayment is made, the funds must be remitted to HUD and reallocated, in accordance with § 92.454.

* * * * *

(d) *Commitment of funds in the local account.* Beginning with the Fiscal Year 2017 action plan, as provided in 24 CFR 91.220(l)(2) and 91.320(k)(2), program income, repayments, and recaptured funds in the participating jurisdiction's HOME Investment Trust Fund local account must be used in accordance with the requirements of this part, and the amount of program income, repayments, and recaptured funds in the participating jurisdiction's HOME Investment Trust Fund local account at the beginning of the program year must be committed before HOME funds in the HOME Investment Trust Fund United States Treasury account, except for the HOME funds in the United States Treasury account that are required to be reserved (*i.e.,* 15 percent of the funds), under § 92.300(a), for investment only in housing to be owned, developed, or sponsored by community housing development organizations. The deadline for committing program income, repayments, and recaptured funds received during a program year is the date of the participating jurisdiction's commitment deadline for the subsequent year's grant allocation.

■ 10. Add § 92.504(c)(7) and (8) to read as follows:

§ 92.504 Participating jurisdiction responsibilities; written agreements; on-site inspection.

* * * * *

(c) * * *

(7) *Community housing development organization receiving assistance for project-specific technical assistance and site control loans or project-specific seed money loans.* The agreement must identify the specific site or sites and describe the amount and use of the HOME funds (in accordance with § 92.301), including a budget for work, a period of performance, and a schedule for completion. The agreement must also set forth the basis upon which the participating jurisdiction may waive repayment of the loans, consistent with § 92.301, if applicable.

(8) *Technical assistance provider to develop the capacity of community housing development organizations in the jurisdiction.* The agreement must identify the specific nonprofit organization(s) to receive capacity building assistance. The agreement must describe the amount and use (scope of work) of the HOME funds, including a budget, a period of performance, and a schedule for completion.

* * * * *

Dated: November 22, 2016.

Harriet Tregoning,

Principal Deputy Assistant, Secretary for Community Planning and Development.

Approved on November 2, 2016.

Nani A. Coloretti,

Deputy Secretary.

[FR Doc. 2016–28591 Filed 12–1–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Parts 140, 141, 211, 213, 225, 226, 227, 243, and 249

[178A2100DD/AAKC001030/A0A501010.999900 253G]

RIN 1076–AF32

Civil Penalties Inflation Adjustments

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is adopting as final the interim final rule published on June 30, 2016, adjusting the level of civil monetary penalties contained in Indian Affairs regulations with an initial ''catch-up'' adjustment under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and Office of Management and Budget (OMB) guidance. The Department of the Interior (Department) did not receive any significant adverse comments during the public comment period on the interim final rule, and therefore adopts the rule as final without change.

DATES: *Effective date:* December 2, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Director, Office of Regulatory Affairs and Collaborative Action, Office of the Assistant Secretary—Indian Affairs; telephone (202) 273–4680, *elizabeth.appel@bia.gov.*

SUPPLEMENTARY INFORMATION: On June 30, 2016, the Department published an interim final rule (81 FR 42478) to adjust the level of civil monetary penalties contained in Indian Affairs regulations with an initial ''catch-up'' adjustment under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and OMB guidance.

The Department received no comments on the rule. Consequently, the Department did not make any change to the interim final rule. For these reasons, the Department adopts the interim rule published June 30, 2016 (81 FR 42478), as final without change.

Dated: November 18, 2016.

Lawrence S. Roberts,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2016–28750 Filed 12–1–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9797]

RIN 1545–BM98

Consistent Basis Reporting Between Estate and Person Acquiring Property From Decedent

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide transition rules providing that executors and other persons required to file or furnish a statement under section 6035(a)(1) or (2) regarding the value of property included in a decedent's gross estate for federal estate tax purposes before June 30, 2016, need not have done so until June 30, 2016. These final regulations are applicable to executors and other persons who file federal estate tax returns required by section 6018(a) or (b) after July 31, 2015.

DATES: *Effective Date.* These regulations are effective on December 2, 2016.

Applicability Dates: For date of applicability, see § 1.6035–2(b).

FOR FURTHER INFORMATION CONTACT: Theresa Melchiorre (202) 317–6859 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 6018(a) requires executors to file federal estate tax returns with

respect to (1) certain estates of citizens or residents of the United States and (2) certain estates of nonresidents that are not citizens of the United States. If an executor is unable to make a complete federal estate tax return as to any property that is a part of a decedent's gross estate, section 6018(b) requires every person or beneficiary holding such property, upon notice from the Secretary, to make a federal estate tax return as to such part of the gross estate.

On July 31, 2015, the President of the United States signed into law H.R. 3236, *The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015,* Public Law 114–41, 129 Stat. 443 (Act). Section 2004 of the Act added new section 6035.

Section 6035 imposes reporting requirements with regard to the value of property included in a decedent's gross estate for federal estate tax purposes. Section 6035(a)(1) provides that the executor of any estate required to file a return under section 6018(a) must file with the Secretary and furnish to the person acquiring any interest in property included in the decedent's gross estate, a statement identifying the value of each interest in such property as reported on such return and such other information with respect to such interest as the Secretary may prescribe.

Section 6035(a)(2) provides that each other person required to file a return under section 6018(b) must file with the Secretary and furnish to each person who holds a legal or beneficial interest in the property to which such return relates, a statement identifying the same information described in section 6035(a)(1).

Section 6035(a)(3)(A) provides that each statement required to be filed or furnished under section 6035(a)(1) or (2) is to be filed or furnished at such time as the Secretary may prescribe, but in no case at a time later than the earlier of (i) the date that is 30 days after the date on which the return under section 6018 was required to be filed (including extensions actually granted, if any) or (ii) the date which is 30 days after the date such return is filed.

On August 21, 2015, the Treasury Department and the IRS issued Notice 2015–57, 2015–36 IRB 294. That notice delayed until February 29, 2016, the due date for any statements required by section 6035.

On February 11, 2016, the Treasury Department and the IRS issued Notice 2016–19, 2016–09 IRB 362. That notice provided that executors or other persons required to file or furnish a statement under section 6035(a)(1) or (2) before March 31, 2016, need not have done so until March 31, 2016.

On March 4, 2016, the Treasury Department and the IRS published temporary regulations (TD 9757) in the **Federal Register** (81 FR 11431–01) providing transition relief under § 1.6035–2T. The temporary regulations extended the due date for statements required by section 6035 to March 31, 2016, as provided in Notice 2016–19.

Also on March 4, 2016, the Treasury Department and the IRS published in the **Federal Register** (81 FR 11486–01) proposed regulations (REG–127923–15). The text of TD 9757 served as the text of the proposed regulations regarding the transition relief provided under § 1.6035–2T.

On March 23, 2016, the Treasury Department and the IRS issued Notice 2016–27, 2016–15 IRB 576. That notice provided that executors or other persons required to file or furnish a statement under section 6035(a)(1) or (2) before June 30, 2016, need not have done so until June 30, 2016.

On June 27, 2016, the Treasury Department and the IRS held a public hearing on the proposed regulations. In addition to the comments received at the hearing, the Treasury Department and the IRS received numerous written comments. Both at the hearing and in written comments, commenters commented favorably on the transition relief providing extensions of time to file and furnish the statements required by section 6035(a)(1) or (2) that the Treasury Department and the IRS had granted in TD 9757 and the notices (including Notice 2016–27 issued after TD 9757 was published in the **Federal Register**).

Explanation of Provisions

These final regulations reiterate the statement in Notice 2016–27 and provide that executors or other persons required to file or furnish a statement under section 6035(a)(1) or (2) before June 30, 2016, need not have done so until June 30, 2016. These final regulations are issued within 18 months of the date of the enactment of the statutory provisions to which the final regulations relate and, as authorized by section 7805(b)(2), are applicable to executors and other persons who file a return required by section 6018(a) or (b) after July 31, 2015.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, 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 Printing Office, Washington, DC 20402, or by visiting the IRS Web site at *http://www.irs.gov.*

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required.

In addition, section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) did not apply to TD 9757 because TD 9757 was excepted from the notice and comment requirements of section 553(b) and (c) of the Administrative Procedure Act under the interpretative rule and good cause exceptions provided by section 553(b)(3)(A) and (B). The Act included an immediate effective date, thus making the first required statements due 30 days after enactment. It was necessary to provide more time to provide the statements required by section 6035(a), to allow the Treasury Department and the IRS sufficient time to issue both substantive and procedural guidance on how to comply with the section 6035(a) requirement, and to provide executors and other affected persons the opportunity to review this guidance before preparing the required statements. TD 9757 reiterated the relief in Notice 2016–19 and, because of the immediate need to provide relief, notice and public comment pursuant to 5 U.S.C. 553(b) and (c) was impracticable, unnecessary, and contrary to the public interest. Public comment, however, was received on TD 9757 and all the notices, including Notice 2016–27, at the public hearing held on June 27, 2016, and in written comments submitted on the proposed regulations that cross-referenced and included the text of TD 9757.

It has been certified that the collection of information in these final regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that this rule primarily affects individuals (or their estates) and trusts, which are not small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601). Although it is anticipated that there may be an incremental economic impact on executors that are small entities, including entities that provide tax and legal services that assist individuals in preparing tax returns, any impact would not be significant and would not affect a substantial number of small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Code, TD 9757 and notice of the proposed rulemaking that cross-referenced and included the text of TD 9757 was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

Drafting Information

The principal author of these final regulations is Theresa Melchiorre, Office of the Associate Chief Counsel (Passthroughs and Special Industries). 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, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

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

* * * * *

Section 1.6035–2 also issued under 26 U.S.C. 6035(b).

* * * * *

§ 1.6035–2T [Removed]

■ **Par. 2.** Section 1.6035–2T is removed.

■ **Par. 3.** Section 1.6035–2 is revised to read as follows:

§ 1.6035–2 Transitional relief.

(a) *Statements due before June 30, 2016.* Executors and other persons required to file or furnish a statement under section 6035(a)(1) or (2) after July 31, 2015 and before June 30, 2016, need not have done so until June 30, 2016.

(b) *Applicability Date.* This section is applicable to executors and other persons who file a return required by section 6018(a) or (b) after July 31, 2015.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: November 16, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–28906 Filed 12–1–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9798]

RIN 1545–BN37

User Fees for Installment Agreements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide user fees for installment agreements. The final regulations affect taxpayers who wish to pay their liabilities through installment agreements.

DATES: *Effective date:* These regulations are effective on December 2, 2016.

Applicability date: These regulations apply to installment agreements entered into, restructured, or reinstated on or after January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Maria Del Pilar Austin at (202) 317–5437; concerning cost methodology, Eva Williams, at (202) 803–9728 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains amendments to the User Fee Regulations under 26 CFR part 300. On August 22, 2016, the Treasury Department and the IRS published in the **Federal Register** (81 FR 56550) a notice of proposed rulemaking (REG–108792–16) relating to the user fees charged for entering into and reinstating and restructuring installment agreements. The Independent Offices Appropriations Act of 1952 (IOAA), which is codified at 31 U.S.C. 9701, authorizes agencies to prescribe regulations establishing user fees for services provided by the agency. Regulations prescribing user fees are subject to the policies of the President, which are currently set forth in the Office of Management and Budget Circular A–25 (the OMB Circular), 58 FR 38142 (July 15, 1993). The OMB Circular allows agencies to impose user fees for services that confer a special benefit to identifiable recipients beyond those accruing to the general public. The agency must calculate the full cost of providing those benefits, and, in general, the amount of a user fee should recover the full cost of providing the service, unless the Office of Management and Budget (OMB) grants an exception under the OMB Circular.

The notice of proposed rulemaking proposed to increase the user fees under § 300.1 for entering into an installment agreement from $120 to $225 and for entering into a direct debit installment agreement from $52 to $107. The notice of proposed rulemaking proposed to increase the user fee under § 300.2 for restructuring or reinstating an installment agreement from $50 to $89. The notice of proposed rulemaking proposed the introduction of two new types of online installment agreements under § 300.1, each subject to a separate user fee: (1) An online payment agreement with a fee of $149 and (2) a direct debit online payment agreement with a fee of $31. Under the notice of proposed rulemaking, the user fee for low-income taxpayers, as defined in § 300.1(b)(3), would continue to be $43 for entering into a new installment agreement, except that the lower fee of $31 for a direct debit online payment agreement would apply to all taxpayers. Under § 300.2(b), the fee for low-income taxpayers restructuring or reinstating an installment agreement would be reduced to $43 from $50. The new user fee rates were proposed to be effective beginning on January 1, 2017. As explained in the notice of proposed rulemaking, the proposed fees bring user fee rates for installment agreements in line with the full cost to the IRS of providing these taxpayer-specific services. In particular, the new user fee structure offers taxpayers more tailored installment agreement options, including a $31 user fee for direct debit online payment agreements, which ensures that taxpayers are not charged more for their chosen installment agreement option than the actual cost incurred by the IRS in providing the type of installment agreement selected by taxpayers. Because OMB has granted an exception to the full cost requirement for low-income taxpayers, low-income taxpayers would continue to pay the reduced fee of $43 for any new installment agreement, except where they request a $31 direct debit online payment agreement, and would pay the reduced $43 fee for restructuring or reinstating an installment agreement.

No public hearing on the notice of proposed rulemaking was held because one was not requested. Five comments were received. After careful consideration of the comments, this Treasury Decision adopts the proposed regulations without change.

Summary of Comments

The first comment suggested that filing a tax return and requesting an installment agreement should not be a two-step process and that taxpayers

requesting an installment agreement with the filing of their returns should not be subject to a higher user fee. The comment expressed concern with tying eligibility for the $31 user fee to submitting a request for a direct debit online payment agreement. The comment also noted the length of time it takes the IRS to initiate direct debit installment agreement payments. The comment asserted that taxpayers requesting installment agreements with the filing of their tax returns and paying via direct debit should be entitled to the $31 user fee.

These regulations deal with only the user fees for installment agreements and not the administration of the installment agreement program generally, and so this comment is addressed only to the extent it relates to user fees for installment agreements. As explained in the notice of proposed rulemaking, agencies are required to set user fees at an amount that recovers the full cost of providing the service unless an agency requests, and the OMB grants, an exception to the full cost requirement. The proposed installment agreement fees are structured to reflect the full cost to the IRS to establish and monitor the different types of installment agreements associated with each user fee. The costs to the IRS for installment agreements are the same to the IRS whether the taxpayer requests an installment agreement at the same or a different time from filing its tax return. The regulations now offer taxpayers additional types of installment agreements to choose from, including a low-cost user fee of $31 for a direct debit online payment agreement. A taxpayer may file a return and then request a direct debit online payment agreement and would be charged a fee of only $31. As discussed in the notice of proposed rulemaking, the IRS incurs higher costs in establishing and monitoring all other forms of installment agreements. If a taxpayer chooses to request an installment agreement other than a direct debit online payment agreement, that taxpayer must pay the full cost of that user fee unless the taxpayer qualifies as a low-income taxpayer. The length of time required to establish direct debit installment agreements that the comment described is due to IRS budget cuts in recent years that have resulted in lower staffing levels combined with increased workloads. During peak times of the year, the IRS has more installment agreements to process than available staff to process them and backlogs occur. In addition, there are Federal e-pay requirements that also add time in processing installment agreements paid by direct debit. However, taxpayers using the online payment agreement service receive immediate confirmation of direct debit online payment agreements. Taxpayers requesting installment agreements via a Form 9465 when e-filing are not entitled to the lower $31 user fee under the proposed regulations because the costs associated with processing the Form 9465 are greater than those incurred for taxpayers using the online payment agreement service. At the time taxpayers submit Form 9465 with their e-filed returns, the IRS has no way of determining whether the taxpayers qualify for an installment agreement or whether the payment proposal meets streamlined processing criteria. While the IRS continues to explore ways to make this process completely automated, at this time the process to review a regular installment agreement request requires IRS staff involvement that direct debit online payment agreements do not.

The second comment expressed concern that the proposed increase in user fees was too high and asked whether ''any consideration [has] been given to increasing the time frame for an exten[s]ion [from] 120[]days to 180[]days.'' It appears that the latter part of this comment is referring to the full pay agreement that has no user fee but requires the taxpayer to full pay within 120 days. The extension of the time period for full pay agreements is unrelated to the proposed increase in the user fees for installment agreements. With regard to the increase in fee, the fee increase is consistent with the requirement under the OMB Circular that agencies that confer special benefits on identifiable recipients beyond those accruing to the general public are to establish user fees that recover the full cost of providing those services. In the notice of proposed rulemaking, the IRS provided a detailed analysis of how it calculated the full cost of this service and the fee is consistent with the full cost of the particular service.

The third comment provided examples of taxpayers with varying circumstances and opined that increasing the user fee for installment agreements would be unfair to taxpayers who are so situated. For taxpayers whose income falls at or below 250 percent of the poverty level as established by the U.S. Department of Health and Human Services and updated annually, the proposed regulations continue to offer a reduced fee for low-income taxpayers of $43, and extend the $43 fee to low-income taxpayers restructuring or reinstating installment agreements. In addition, the proposed regulations establish a lower fee of $31 for online direct debit installment agreements that is available to all taxpayers. Thus, even if taxpayers do not qualify for the reduced low-income taxpayer fee, the proposed regulations permit all taxpayers the option to pay the lower $31 fee by establishing direct debit online payment agreements.

The fourth comment had four main concerns and additional concerns with respect to each of these main concerns.

The fourth comment's first main concern challenged the IRS's application of the OMB Circular. The comment opined that an installment agreement is not a special benefit as provided under the OMB Circular for several reasons. Specifically, the comment noted that if a taxpayer does not have assets to levy, then relief of levy is not a benefit to that taxpayer. The comment suggested that the IRS receives a benefit when a taxpayer enters into an installment agreement and as a result, the installment agreement does not provide a special benefit for purposes of the OMB Circular. The comment questioned how many installment agreements resulted in payments that the IRS would not have otherwise received. The comment also questioned whether installment agreement income is a benefit to the fisc or whether the IRS could use levies to secure the same amount of payment. The comment stated that the IRS is required to enter into certain installment agreements pursuant to section 6159(c) and questioned how a statutory requirement could be considered a special benefit. The comment quoted Section 6(1)(4) of the OMB Circular, which provides that ''[n]o charge should be made for a service when the identification of the specific beneficiary is obscure, and the service can be considered primarily as benefiting broadly the general public.'' The comment opined that because the IRS may receive some benefit, the specific beneficiary of an installment agreement is incompletely identified. Finally, the comment noted that the OMB Circular allows for exceptions to charging full cost and questioned whether it is good public policy to increase the user fee considering that some installment agreements are statutorily required and help bring noncompliant taxpayers into compliance.

As described in the preamble to the proposed regulations, each taxpayer entering into an installment agreement receives the special benefit of paying an outstanding tax obligation over time rather than immediately. This special

benefit does not accrue to the general public because taxpayers are otherwise obligated to pay any outstanding taxes immediately when due. The taxpayer receives this special benefit regardless of whether the taxpayer has any assets on which the IRS could levy. In addition to paying an outstanding tax obligation over time rather than immediately, there are also the special benefits of avoiding enforcement action generally and, for timely filed returns, a reduction of the section 6651 failure to pay penalty to 0.25 percent during any month during which an installment agreement is in effect. The enforcement actions that are put on hold during the pendency of an installment agreement include wage garnishments, the filing of notices of federal tax liens, and the making of levies. Even if it is argued that the government derives some general benefit from collecting outstanding tax liabilities to which it is inarguably entitled, it is still appropriate under the OMB Circular to charge a user fee for entering into, reinstating, or restructuring an installment agreement because installment agreements provide ''specific services to specific individuals.'' *Seafarers Int'l Union of N. Am.* v. *U.S. Coast Guard,* 81 F.3d 179, 183 (D.C. Cir. 1996). The benefit to the government generally of collecting on outstanding tax liabilities is a benefit that accrues to the public generally and does not diminish the special benefit provided to an identifiable taxpayer who requests an installment agreement. As noted in the notice of proposed rulemaking, the IOAA permits the IRS to charge a user fee for providing a ''service or thing of value.'' 31 U.S.C. 9701(b). A government activity constitutes a ''service or thing of value'' when it provides ''special benefits to an identifiable recipient beyond those that accrue to the general public.'' See the OMB Circular Section 6(a)(1). Among other things, a ''special benefit'' exists when a government service is performed at the request of a taxpayer and is beyond the services regularly received by other members of the same group or the general public. See OMB Circular Section 6(a)(1)(c). Under the IOAA, agencies may impose ''specific charges for specific services to specific individuals or companies.'' See *Fed. Power Comm'n* v. *New England Power Co.,* 415 U.S. 345, 349 (1974); see also *Seafarers,* 81 F.3d at 182–83 (D.C. Cir. 1996) (''[A] user fee will be justified under the IOAA if there is a sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed.'').

Section 6(a)(3) of the OMB Circular explains that ''when the public obtains benefits as a necessary consequence of an agency's provision of special benefits to an identifiable recipient (*i.e.,* the public benefits are not independent of, but merely incidental to, the special benefits), an agency need not allocate any costs to the public and should seek to recover from the identifiable recipient either the full cost to the Federal Government of providing the special benefit or the market price, whichever applies.'' While it is true that installment agreements benefit tax administration and collection, and by extension the public fisc, the benefit is incidental to the special benefits of allowing taxpayers to satisfy their Federal tax liabilities over time rather than when due as required by the Code and avoiding enforcement actions.

By the very nature of government action, the general public will almost always experience some benefit from an activity that is subject to a user fee. See, *e.g., Seafarers,* 81 F.3d at 184–85 (D.C. Cir. 1996). However, as long as the activity confers a specific benefit upon an identifiable beneficiary, it is permissible for the agency to charge the beneficiary a fee even though the public will also experience an incidental benefit. See *Engine Mfrs. Ass'n* v. *E.P.A.,* 20 F.3d 1177, 1180 (D.C. Cir. 1994) (''If the agency does confer a specific benefit upon an identifiable beneficiary . . . then it is of no moment that the service may incidentally confer a benefit upon the general public as well.'') citing *Nat'l Cable Television Ass'n* v. *FCC,* 554 F.2d 1094, at 1103 (D.C. Cir. 1976). It is permissible for a service for which a user fee is charged to generate an ''incidental public benefit,'' and there is no requirement that the agency weigh this public benefit against the specific benefit to the identifiable recipient. *Seafarers,* 81 F.3d at 183–84 (D.C. Cir. 1996). Furthermore, the benefit to the fisc of collecting outstanding taxes is not an additional benefit to the government because the IRS would collect those amounts through other means absent the installment agreement. Even so, an agency is still entitled to charge for services that assist a person in complying with her statutory duties. See *In Elec. Indus Ass'n* v. *FCC,* 554 F.2d 1109, 1115 (D.C. Cir. 1976).

While the IRS is required to enter into certain installment agreements pursuant to section 6159(c), the IRS may still charge a fee for providing that service. In fact, under the OMB Circular, there are several examples of special benefits (*e.g.,* passport, visa, patent) for which the issuing agency may charge a fee even though the agency is required to issue such benefit if the individual meets certain statutory or regulatory requirements. In addition, a taxpayer meeting the criteria in section 6159(c) must still submit a request for an installment agreement before one is established. Section 6159(c) requires that the IRS enter into the installment agreement provided that the taxpayer establishes its eligibility for such an agreement. In that situation, the IRS incurs the costs of establishing and monitoring these installment agreements as with any other installment agreement. Therefore, it is proper under the OMB Circular to charge a user fee for providing this service.

The IRS has taken public policy into consideration and is providing multiple user fee options to tailor the user fees to the specific IRS costs in establishing and monitoring the installment agreements. As a result, the IRS has introduced a reduced fee of $31 for direct debit online payment agreements. This $31 reduced fee is available to all taxpayers choosing to obtain the special benefits of installment agreements by using this service. The $31 reduced fee reflects the substantially lower costs the IRS incurs for establishing and monitoring direct debit online payment agreements. Thus, the installment agreement user fee structure now more closely reflects the full cost of processing each specific type of installment agreement.

The fourth comment's second main concern was that the IRS charges user fees inconsistently because, for example, the IRS does not charge user fees for toll-free telephone service, estimated income tax payments, walk-in service, notice letters, annual filing season program record of completion, and administrative appeals within the IRS.

The IRS's user fee policies are consistent with the OMB Circular. The IOAA authorizes agencies to prescribe regulations that establish charges for services provided by the agency, that is, user fees that ''are subject to policies prescribed by the President. . . .'' One of the OMB Circular's stated objectives is to ''ensure that each service . . . provided by an agency to specific recipients be self-sustaining.'' OMB Circular Section 5(a). The General Policy of the OMB Circular states that ''a user charge . . . will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.'' OMB Circular Section 6. The presumption under the OMB Circular is that agencies are encouraged, but not mandated, to charge user fees where

special benefits are provided to identifiable individuals. Installment agreements are such special benefits. For purposes of these regulations, the IRS need only take into consideration comments relating to the installment agreement user fees and need not address comments relating to other services for which no fee is charged. With respect to installment agreement user fees, the IRS has charged fees since 1995 in accordance with the OMB Circular that requires full cost unless an exception is granted. The OMB Circular requires the IRS to review the user fees it charges for special services biennially to ensure that the fees are adjusted for cost. See OMB Circular Section 8(e). The new installment agreement user fee structure is consistent with that requirement.

The fourth comment's third main concern questioned the ''optics'' of increasing installment agreement user fees because of IRS budget constraints. As discussed in this Summary of Comments, the IRS has determined that the proposed installment agreement user fees are appropriate and consistent with the OMB Circular, and the question of ''optics'' raised in this comment is not relevant in this analysis. Section 6(a)(2)(a) of the OMB Circular provides that user fees will be sufficient to recover the full cost to the Government of providing the service except as provided in Section 6(c) of the OMB Circular. The exceptions in Section 6(c)(2) of the OMB Circular provide that agency heads may recommend to the OMB that exceptions to the full cost requirement be made when either (1) the cost of collecting the user fee would represent an unduly large part of the fee or (2) any other condition exists that, in the opinion of the agency head, justifies an exception. The cost of collecting the proposed user fees for the various types of installment agreements will not represent an unduly large part of the fee for the activity because it occurs automatically with the first installment payment. As noted above, Section 6(a)(2)(a) of the OMB Circular requires that user fees recover the full cost to the government of providing the service and nothing in the OMB Circular mandates agency heads to seek an exception to the full cost requirement. Nonetheless, the Commissioner of Internal Revenue has determined that there is a compelling tax administration reason for seeking an exception to the full cost requirement for low-income taxpayers.

The fourth comment's fourth main concern focused on the overall amount of the proposed user fees and included a number of related comments on the size of the fees, the agency's methodology in calculating the fees, and the efforts the IRS has taken to minimize the costs of providing these services. The comment questioned why the IRS decided not to change the $43 user fee for low-income taxpayers. The comment asked why the increase in costs of these services exceeded the rate of inflation during the past two years. The comment also questioned the IRS's efficiency in providing this special benefit and the IRS's concern in ensuring that its costs are driven down when providing this service. The comment expressed concern that if installment agreement volumes remained the same, the agency would increase its user fee receipts by tens of millions of dollars. Finally, the comment noted that the user fees do not depend on the balance due under an installment agreement and questioned why the user fee is taken from the first payments due under the installment agreement.

Contrary to what the comment asserted, the per-unit cost of the installment agreement program has not generally increased, rather it has generally decreased. In the 2013 biennial review, the IRS determined that the full cost of an installment agreement was $282, the full cost of an installment agreement paid by way of direct debit was $122, and the full cost of restructuring and reinstating an installment agreement was $85. See 78 FR 53702 (2013 Regulations). In connection with the 2013 biennial review and the 2013 Regulations, the IRS had requested and received an exception to the full cost requirement under the OMB Circular for the installment agreement user fees. As a result, the 2013 Regulations did not charge full cost for any of the installment agreement options. Requesting an exception to the full cost requirement of the OMB Circular is within the discretion of the agency head and must be approved by the Office of Management and Budget. In the 2015 biennial review, the IRS determined that the full cost of an installment agreement is $225, the full cost of an installment agreement paid by way of direct debit is $107, and the full cost of restructuring and reinstating an installment agreement is $89. Thus, contrary to the comment's assertion, the cost of the installment agreement program has generally decreased rather than generally increased during the span of two years. Furthermore, the IRS always strives to make its services cost-effective. The decrease in the installment agreement costs since 2013 demonstrates one of the ways the IRS seeks to make its services most cost effective for the public. The IRS also seeks new ways to makes its services more accessible to taxpayers. The IRS has worked to improve the usability of the online payment agreement application that provides for significantly lower costs. The user fee for the online payment agreement is $149, and if the installment agreement is paid by way of direct debit, is only $31. Practitioners can submit an online payment agreement application on behalf of their clients to secure lower fees. For smaller tax liabilities, the IRS has established procedures for setting up installment agreements utilizing guaranteed, streamlined, or in-business express criteria that are quicker to process and do not require securing a collection of information statement. See I.R.M. 5.14.5. The IRS has never based its user fee on the amount of liability due under the agreement, which would be inconsistent with the full cost requirement under the OMB Circular. The IRS, however, has provided taxpayers the option to pay their liability in full over 120 days without being charged any user fee. Furthermore, under the new fee structure, taxpayers choose a specific installment agreement service and pay the cost of the service. For example, a taxpayer may choose a direct debit online payment agreement and pay only $31 or a taxpayer may choose a regular installment agreement and pay $225. With regard to the user fee being taken from the first payments due under the installment agreement, this is not relevant for purposes of the regulations as this is not addressed in the regulations. Regardless, the OMB Circular requires user fees to be ''collected in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services.'' Section 6(a)(2)(C) of the OMB Circular. Instead of requiring the taxpayer to pay the entire fee in advance of the IRS entering into the installment agreement, the IRS allows the taxpayer to pay the fee with the first installment agreement payments, thereby lessening the burden on the taxpayer and making installment agreements more accessible to taxpayers.

The fifth comment had three suggestions: (1) Eliminate installment agreement user fees for low-income taxpayers, (2) revise internal guidelines to place less emphasis on speedy collection practices and more emphasis on viable collection practices, and (3) increase the transparency of the

installment agreement user fees in publications.

The fifth comment's first suggestion was that the IRS should waive the entire user fee for low-income taxpayers and thereby incentivize them to enter into installment agreements instead of being placed in currently not collectible status or entering into an offer in compromise. According to the comment, this would increase the amount of revenue that the IRS collects and encourage taxpayers to enter into compliance. The comment pointed out that there is no user fee for a low-income taxpayer entering an offer in compromise. The IRS's response to a similar comment made to the installment agreement fee increase proposed in the 2013 notice of proposed rulemaking pointed out that the offer in compromise fee is charged for mere consideration of the offer and is not refunded if it is not accepted. The comment claimed that the IRS contradicted itself by further responding that the purpose of a user fee is to recover the cost to the government for a particular service to the recipient.

The comment opined that by waiving the low-income taxpayer user fee entirely, the number of low-income taxpayers making payments on their tax liabilities could increase. By way of example, the comment posited the possibility of a low-income taxpayer submitting an offer in compromise, paying no fee, and the IRS ultimately collecting less than it would have if it had allowed the low-income taxpayer to enter into an installment agreement with a complete fee waiver. According to the comment, if a low-income taxpayer enters into currently not collectible status and makes voluntary payments, those payments will be sporadic and less than would be collected from an installment agreement since the taxpayer would not receive monthly reminders. The comment referenced the IRS's response to a similar comment made to the installment agreement fee increase proposed in the 2013 notice of proposed rulemaking, to which the IRS responded that generally taxpayers who have the ability to pay their tax liability over time (and thus are eligible for installment agreements) will not qualify for currently not collectible status. In response, the comment suggested that many taxpayers that qualify for currently not collectible status may be mistakenly placed into installment agreements because the taxpayers may feel pressured to make payments, the taxpayers misstate their expenses and income, or the taxpayers are willing to cut back on their monthly living expenses. The comment provided examples to show how the $43 fee created disincentives for low-income taxpayers to enter into installment agreements in cases where the liability was relatively small. The comment requested that the IRS clarify that the user fee does not have to be paid up front but may be paid in installments if the taxpayer's monthly installment payment is less than the user fee.

The IRS considered the effect of the user fee on low-income taxpayers in 2006 and 2013 when the installment agreement user fees were updated. Both times, the IRS determined that the user fee should remain $43 for low-income taxpayers. The IRS again has determined that the user fee for installment agreements (other than for a direct debit online payment agreement) should remain at $43 for low-income taxpayers, both because requiring the full rate would be financially burdensome to low-income taxpayers and because waiving the fee entirely is not fiscally sustainable for the IRS given the constraints on its resources for tax administration. Typically, a taxpayer that is able to pay in full the liability under an installment agreement is not eligible to enter into an offer in compromise. As discussed in the preamble to T.D. 9647, 78 FR 72016–01, a taxpayer that is in currently not collectible status is typically not eligible to enter into an installment agreement. The low-income taxpayers that enter into installment agreements described in the examples the comment presented do so as a result of the taxpayers' choices or erroneous submissions of information to the IRS. Thus, the comment's hypothetical low-income taxpayer is the exception not the general rule. To ensure that low-income taxpayers are more aware of the fee options for the various types of installment agreements, the IRS will be revising its publications to make them consistent with the final regulations.

The fifth comment's second main concern was that low-income taxpayers are not always aware of the availability of the reduced fee and as a consequence some low-income taxpayers pay the regular fee. The comment suggested that IRS employees could do more to make low-income taxpayers aware of their options. The comment also asserted that installment agreements are set up not to allow low-income taxpayers to modify payments based on unforeseen changes in economic circumstances. The comment stated this can result in low-income taxpayers defaulting and either become subject to collection action or subject to the installment agreement reinstatement fee of $89 under the proposed regulations.

The comment requested that the IRS revise its procedures in the Internal Revenue Manual to place less emphasis on timely collection practices and more emphasis on viable collection practices.

The fifth comment's concerns about tax administration are generally beyond the scope of these regulations. However, for purposes of clarification, under the proposed regulations the user fee for reinstating an installment agreement for a low-income taxpayer would be $43, not $89. Furthermore, while these concerns do not affect the content of these final regulations, the IRS will consider these comments when updating the procedures in the Internal Revenue Manual for entering into installment agreements.

The fifth comment's third suggestion was for the IRS to clearly communicate to the public both through the internet and in hard copy publications the revised fee schedule so that taxpayers may make informed decisions when deciding the manner of setting up an installment agreement. The comment suggested that taxpayers who lack access to the internet, lack computer efficiency, lack a bank account, or have other disabilities or barriers should not be subjected to the higher user fees.

The IRS will be updating its electronic and hard copy publications to reflect the user fees in the final regulations. As explained in the proposed notice of rulemaking and in this Summary of Comments, the purpose of the user fees for installment agreements is to recover the full cost to the IRS of providing this special benefit to specific beneficiaries and the user fees in these final regulations are in accordance with the OMB Circular.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the information that follows. The economic impact of these regulations on any small entity would result from the entity being required to pay a fee prescribed by these regulations in order to obtain a particular service. The dollar amount of the fee is not, however, substantial enough to have a significant economic impact on any entity subject to the fee. Low-income taxpayers and taxpayers entering into direct debit online payment agreements will be charged a

lower fee, which lessens the economic impact of these regulations. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business and no comments were received.

Drafting Information

The principal author of these regulations is Maria Del Pilar Austin of the Office of the Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 300 is amended as follows:

PART 300—USER FEES

■ **Paragraph 1.** The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

■ **Par. 2.** In § 300.1, paragraphs (b) and (d) are revised to read as follows:

§ 300.1 Installment agreement fee.

* * * * *

(b) *Fee.* The fee for entering into an installment agreement before January 1, 2017, is $120. The fee for entering into an installment agreement on or after January 1, 2017, is $225. A reduced fee applies in the following situations:

(1) For installment agreements entered into before January 1, 2017, the fee is $52 when the taxpayer pays by way of a direct debit from the taxpayer's bank account. The fee is $107 when the taxpayer pays by way of a direct debit from the taxpayer's bank account for installment agreements entered into on or after January 1, 2017;

(2) For online payment agreements entered into before January 1, 2017, the fee is $120, except that the fee is $52 when the taxpayer pays by way of a direct debit from the taxpayer's bank account. The fee is $149 for entering into online payment agreements on or after January 1, 2017, except that the fee is $31 when the taxpayer pays by way of a direct debit from the taxpayer's bank account; and

(3) Notwithstanding the type of installment agreement and method of payment, the fee is $43 if the taxpayer is a low-income taxpayer, that is, an individual who falls at or below 250 percent of the dollar criteria established by the poverty guidelines updated annually in the **Federal Register** by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 357, 511), or such other measure that is adopted by the Secretary, except that the fee is $31 when the taxpayer pays by way of a direct debit from the taxpayer's bank account with respect to online payment agreements entered into on or after January 1, 2017;

* * * * *

(d) *Applicability date.* This section is applicable beginning January 1, 2017.

■ **Par. 3.** In § 300.2, paragraphs (b) and (d) are revised to read as follows:

§ 300.2 Restructuring or reinstatement of installment agreement fee.

* * * * *

(b) *Fee.* The fee for restructuring or reinstating an installment agreement before January 1, 2017, is $50. The fee for restructuring or reinstating an installment agreement on or after January 1, 2017, is $89. If the taxpayer is a low-income taxpayer, that is, an individual who falls at or below 250 percent of the dollar criteria established by the poverty guidelines updated annually in the **Federal Register** by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 357, 511), or such other measure that is adopted by the Secretary, then the fee for restructuring or reinstating an installment agreement on or after January 1, 2017 is $43.

* * * * *

(d) *Applicability date.* This section is applicable beginning January 1, 2017.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: November 16, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–28936 Filed 11–29–16; 11:15 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0560; FRL–9954–63]

Bicyclopyrone; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of bicyclopyrone in or on wheat and barley. Syngenta Crop Protection, LLC. requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 2, 2016. Objections and requests for hearings must be received on or before January 31, 2017, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2015–0560, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

applies to them. Potentially affected entities may include:

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2015–0560 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 31, 2017. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2015–0560, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of October 21, 2015 (80 FR 63731) (FRL–9935–29), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 5F8374) by Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419. The petition requested that 40 CFR part 180.682 be amended by establishing tolerances for residues of the herbicide, bicyclopyrone: 4-hydroxy-3-{2-[(2-methoxyethoxy) methyl}-6-(trifluoromethyl)-3-pyridylcarbonyl} bicyclo oct-3-en-2-one, in or on the raw agricultural commodities: Barley, bran at 0.15 parts per million (ppm); barley, germ at 0.10 ppm; barley, grain, at 0.07 ppm; barley, hay at 0.3 ppm; barley, straw at 0.50 ppm; wheat, aspirated grain fractions at 0.50 ppm; wheat, bran at 0.15 ppm; wheat, forage at 0.50 ppm; wheat, germ at 0.10 ppm; wheat, grain, at 0.04 ppm; wheat, hay at 0.9 ppm; and wheat, straw at 0.50 ppm. That document referenced a summary of the petition prepared by Syngenta Crop Protection, LLC., the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerances to wheat, forage at 0.40 ppm; wheat, hay at 0.80 ppm; wheat, bran at 0.07 ppm; grain, aspirated fractions at 0.30 ppm; and barley, straw at 0.40 ppm. EPA has increased the existing tolerances to cattle, meat byproducts at 2.0 ppm; goat, meat byproducts at 2.0 ppm; sheep, meat byproducts at 2.0 ppm; horse, meat byproducts; at 2.0 ppm; and hog, meat byproducts at 0.40 ppm. EPA has determined that tolerances are not needed to be established for barley, germ and wheat, germ. The reason for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for bicyclopyrone including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with bicyclopyrone follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The effects of bicyclopyrone are indicative of inhibition of 4-hydroxyphenylpyruvate dioxygenase (HPPD). Plasma tyrosine levels were consistently elevated in rats, rabbits, and dogs (levels in mice were not tested). Consistent with these elevated tyrosine levels, ocular effects (corneal opacity, keratitis) were observed for subchronic and chronic durations through the oral and dermal routes in rats, which was the most sensitive species tested (minor instances in dogs). There were also increased incidences of thyroid follicular hyperplasia and a chronic progressive nephropathy.

While minor instances of ocular effects were observed in dogs, different toxicological effects were generally observed. For subchronic oral exposure, clinical signs (moderate hypoactivity, slightly unsteady gait, increased heart rate, regurgitation, and vomiting) were observed, and clinical pathological indicators of toxicity occurred in the eye

and the thymus. Following chronic exposure, there was a dose-dependent increase in chromatolysis and swelling of selected neurons in the dorsal root ganglia, and degeneration of nerve fibers in the spinal nerve roots in both sexes. In one female dog at the high dose, corneal opacity and light sensitivity were observed.

Across the database, there were decreased absolute body weights (the only finding in mice for any duration) and food consumption. There were no signs of immunotoxicity or neurotoxicity in rodents.

Bicyclopyrone treatment resulted in developmental toxicity in both rats and rabbits, and there was an increased quantitative fetal susceptibility in both species tested. In rats, maternal toxicity was not observed up to 1,000 milligram/kilogram/day (mg/kg/day). Fetal effects occurred at all doses (≥100 mg/kg/day), and manifested as skeletal variations (increased incidences of full or rudimentary supernumerary ribs, pelvic girdle malpositioned caudal, costal cartilage 11 long). In New Zealand White rabbits, maternal effects consisted of mortality/moribundity in conjunction with minimal food consumption at 200 mg/kg/day. Fetal effects once again occurred at all doses tested (≥10 mg/kg/day). The sole fetal effect at the lowest dose tested was the appearance of the 27th presacral vertebrae. There were two studies in Himalayan rabbits. In both studies, maternal effects consisted of macroscopic findings in the stomach wall and an increased incidence of post-implantation loss at the 250 mg/kg/day dose level. In the first study, fetal effects occurred starting at 50 mg/kg/day and consisted of skeletal variations (increased incidence of the 27th prepelvic vertebra and malpositioned pelvic girdle). In the second study, the increased quantitative fetal susceptibility was not observed due to a change in the dose selection. Fetal effects occurred at 250 mg/kg/day and consisted of external, visceral, and skeletal abnormalities, and visceral variations, skeletal, bone and cartilage variations. In total, the effects in these studies are consistent with effects of other chemicals in this class.

In the two-generation reproductive study in rats, ocular toxicity occurred in parents and offspring and there was no increased offspring susceptibility of any kind. Reproductive effects included changes in sperm parameters, and a decrease of precoital interval.

To determine the mechanism for the thyroid hyperplasia observed in the chronic/carcinogenicity study in rats, two mode-of-action studies were performed. In the *in vitro* study, bicyclopyrone was negative for thyroid peroxidase inhibition. The results from the *in vivo* study suggested that the observed thyroid hyperplasia was the result of increased metabolism of thyroid hormones indicated by: (1) Decreased plasma T3 and T4 levels, (2) increased thyroid follicular cell hypertrophy, (3) increased liver weights associated, and (4) increased hepatocellular centrilobular hypertrophy and increased hepatic uridine diphosphate glucuronyl transferase (UDPGT) activities. Bicyclopyrone is categorized as having low acute lethality via all routes of administration. Bicyclopyrone produces minimal eye irritation and mild acute inhalation toxicity.

Two adequate carcinogenicity studies were submitted. One study conducted on rats showed the presence of rare ocular tumors in male rats only. The corneal tumors observed in male rats are (1) treatment related, (2) found at doses that were considered to be adequate and not excessive for assessing carcinogenicity, (3) there are no concerns for mutagenicity or genotoxicity, and (4) are supported by structure-activity relationship (SAR) data for another HPPD inhibitor, tembotrione. Another study conducted on mice showed lung tumors, which are not considered treatment related. Because the tumors are found only in one species and only in males, consistent with the Agency guidelines for carcinogen risk assessment, the Agency has classified bicyclopyrone as ''suggestive evidence of cancer'' and has determined that quantification of bicyclopyrone's carcinogenic potential is not required. A non-linear approach (*i.e.,* reference dose (RfD)) will adequately protect for all chronic toxicity, including carcinogenicity that could result from exposure to bicyclopyrone. Using EPA's non-linear approach, the 1000X combined uncertainty factor used to calculate the chronic RfD/chronic population-adjusted dose for the chronic dietary assessment, generates a dose which is 10,000-fold lower than the dose at which the ocular tumors were not observed and is thus protective of their potential formation.

Specific information on the studies received and the nature of the adverse effects caused by bicyclopyrone as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document titled ''Bicyclopyrone: Human Health Risk Assessment for the Section 3 Registration Action on Cereals (Wheat and Barley)'' at pp. 29–34 in docket ID number EPA–HQ–OPP–2015–0560.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and the LOAEL are identified. Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a RfD—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.* A summary of the toxicological endpoints for bicyclopyrone used for human risk assessment is discussed in Unit III. B of the final rule published in the **Federal Register** of April 23, 2015 (80 FR 22648) (FRL–9926–66).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to bicyclopyrone, EPA considered exposure under the petitioned-for tolerances as well as all existing bicyclopyrone tolerances in 40 CFR 180.682. EPA assessed dietary exposures from bicyclopyrone in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for bicyclopyrone. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 2003–2008 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). The acute dietary analysis was conducted for

bicyclopyrone assuming tolerance level residues, default processing factors, and 100% crop treatment (PCT) information.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 2003–2008 CSFII. The chronic dietary exposure assessment was conducted for bicyclopyrone assuming average field trial residues for crops, average empirical processing factors, anticipated residues for livestock commodities, and PCT estimates for some commodities.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has determined that a separate cancer exposure assessment does not need to be conducted.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition A:* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition B:* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition C:* Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses as follows: The chronic analysis incorporated the following PCT estimates: Field corn, 40% and sweet/popcorn, 35%. The PCT for livestock commodities is based on the PCT estimate value for the livestock feed item used in the dietary burden with the highest PCT (field corn, 40%).

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency estimated the PCT for new uses as follows: The chronic analysis incorporated the following PCT estimates: Barley, 5% and wheat, 1%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition A, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions B and C, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which bicyclopyrone may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for bicyclopyrone in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of bicyclopyrone. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

The Surface Water Concentration Calculator (SWCC) computer model was used to generate surface water Estimated Drinking Water Concentrations (EDWCs), while the Pesticide Root Zone Model for Groundwater (PRZM–GW) and the Screening Concentration in Ground Water (SCI–GROW) models were used to generate groundwater EDWCs. The maximum acute, chronic, and cancer surface water EDWCs associated with bicyclopyrone use on wheat and barley were 3.43, 1.02, and 0.46 parts per billion (ppb), respectively. For groundwater sources of drinking water, the maximum acute, chronic and cancer EDWCs of bicyclopyrone in shallow groundwater from PRZM–GW were 4.82, 4.2, and 2.1 ppb, respectively. EDWCs of 4.82 ppb and 4.2 ppb were used in the acute and chronic analyses, respectively.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Bicyclopyrone is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

There are marked differences among species in the ocular toxicity associated with bicyclopyrone's mechanism of toxicity, the inhibition of HPPD. Ocular effects following treatment with HPPD inhibitor herbicides are seen in the rat but not in the mouse. Monkeys also seem to be recalcitrant to the ocular toxicity induced by HPPD inhibition. One explanation for this species-specific response in ocular opacity may be related to species differences in the clearance of tyrosine. A metabolic pathway exists to remove tyrosine from the blood that involves the liver enzyme tyrosine aminotransferase (TAT). In

contrast to rats where ocular toxicity is observed following exposure to HPPD-inhibiting herbicides, mice and humans are unlikely to achieve the levels of plasma tyrosine necessary to produce ocular opacities because the activity of TAT in these species is much greater compared to rats.

HPPD inhibitors (*e.g.,* nitisinone) are used as an effective therapeutic agent to treat patients suffering from rare genetic diseases of tyrosine catabolism. Treatment starts in childhood but is often sustained throughout patient's lifetime. The human experience indicates that a therapeutic dose (1 mg/kg/day dose) of nitisinone has an excellent safety record in infants, children, and adults and that serious adverse health outcomes have not been observed in a population followed for approximately a decade. Rarely, ocular effects are seen in patients with high plasma tyrosine levels; however, these effects are transient and can be readily reversed upon adherence to a restricted protein diet. This observation indicates that an HPPD inhibitor in and of itself cannot easily overwhelm the tyrosine-clearance mechanism in humans.

Therefore, exposures to environmental residues of HPPD-inhibiting herbicides are unlikely to result in the high blood levels of tyrosine and ocular toxicity in humans due to an efficient metabolic process to handle excess tyrosine. The EPA continues to study the complex relationships between elevated tyrosine levels and biological effects in various species. In the future, assessments of HPPD-inhibiting herbicides may consider more appropriate models and cross species extrapolation methods. Therefore, EPA has not conducted cumulative risk assessment with other HPPD inhibitors.

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor (FQPA SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. The FQPA SF is retained at 10X for all exposure scenarios based on use of a LOAEL for the points of departure. The toxicology database for bicyclopyrone is adequate for characterizing toxicity and quantification of risk for food and non-food uses; however, a LOAEL from the New Zealand white rabbit developmental and chronic/carcinogenicity rat toxicity studies has been used as the POD for several scenarios.

There is no evidence of neurotoxicity in either of the neurotoxicity screening batteries, but there are effects in the chronic dog study. The level of concern is low, however, since the study and POD chosen for the chronic dietary exposure scenario is protective of these effects. There is evidence of increased quantitative fetal susceptibility following *in utero* exposure in both rats and rabbits; however, these effects are well characterized and the selected endpoints are protective of the observed fetal effects. Lastly, there are no residual uncertainties in the exposure database.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to bicyclopyrone will occupy 4.6% of the aPAD for females 13–49 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to bicyclopyrone from food and water will utilize 90% of the cPAD for children <1 years old the population group receiving the greatest exposure. There are no residential uses for bicyclopyrone.

3. *Short-term risk.* A short-term adverse effect was identified; however, bicyclopyrone is not registered for any use patterns that would result in short-term residential exposure. Short-term risk is assessed based on short-term residential exposure plus chronic dietary exposure. Because there is no short-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short-term risk for bicyclopyrone.

4. *Intermediate-term risk.* An intermediate-term adverse effect was identified; however, bicyclopyrone is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for bicyclopyrone.

5. *Aggregate cancer risk for U.S. population.* Because the Agency has determined that the chronic RfD will be protective of any potential cancer risk and there is not a chronic risks do not exceed the Agency's level of concern, EPA concludes that there is not a concern for cancer risk from exposure to bicyclopyrone.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to bicyclopyrone residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology liquid chromatography-mass spectroscopy/mass spectroscopy (LC-MS/MS) methods for tolerance enforcement have been developed and independently validated. For all matrices and analytes, the level of quantification (LOQ), defined as the lowest spiking level where acceptable precision and accuracy data were obtained, was determined to be 0.01 ppm for each of the common moieties, SYN503780 and CSCD686480, for a combined LOQ of 0.02 ppm is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701

Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. The Codex has not established a MRL for bicyclopyrone.

C. Revisions to Petitioned-For Tolerances

The requested tolerance levels for some wheat and barley raw agricultural commodities (RAC) differ slightly from those being set by the EPA. Although both the petitioner and EPA have used the Organization for Economic Cooperation and Development (OECD) calculation procedures to determine tolerance levels, EPA determined that some of the field residue trials were not independent, thus resulting in different inputs. Using the highest average RAC residues and average processing factors, EPA calculated tolerance levels for processed commodities that were generally lower than those requested and determined that the requested tolerances for residues in/on wheat and barley germ are not necessary as the expected residue levels are covered by the RAC tolerance levels.

Consistent with 40 CFR 180.6, EPA is amending existing livestock commodity tolerances as necessary. As a result of increased dietary burdens resulting from the use on wheat and barley commodities, the existing tolerances of 1.5 ppm for residues in/on the meat byproducts of cattle, goats, horses, and sheep are increased to 2.0 ppm; and the existing tolerance of 0.15 ppm for residues in/on for hog meat byproducts is increased to 0.40 ppm.

In addition, EPA changed the commodity terminology for aspirated grain fractions to grain, aspirated fractions in order to conform to terms used in the Agency's Food and Feed Commodity Vocabulary and amended the tolerance value for barley, hay from 0.3 ppm to 0.30 ppm to conform with the Agency policy to carry tolerance levels out two significant figures.

V. Conclusion

Therefore, tolerances are established for residues of the herbicide bicyclopyrone in or on barley, bran at 0.15 ppm; barley, grain, at 0.07 ppm; barley, hay at 0.30 ppm; barley, straw at 0.40 ppm; cattle, meat byproducts at 2.0 ppm; goat, meat byproducts at 2.0 ppm; grain, aspirated fractions at 0.30 ppm; hog, meat byproducts at 0.40 ppm; horse, meat byproducts at 2.0 ppm; sheep, meat byproducts at 2.0 ppm; wheat, bran at 0.07 ppm; wheat, forage at 0.40 ppm; wheat, grain, at 0.04 ppm; wheat, hay at 0.80 ppm; and wheat, straw at 0.50 ppm.

VI. Statutory and Executive Order Reviews

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

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

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 3, 2016.

Michael Goodis,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.682, revise the table in paragraph (a)(1) to read as follows:

§ 180.682 Bicyclopyrone; tolerances for residues.

(a) * * *

(1) * * *

Commodity	Parts per million
Barley, bran	0.15
Barley, grain	0.07
Barley, hay	0.30
Barley, straw	0.40
Cattle, meat byproducts	2.0
Corn, field, forage	0.30
Corn, field, grain	0.02
Corn, field, stover	0.40
Corn, pop, grain	0.02
Corn, pop, stover	0.40
Corn, sweet, forage	0.40
Corn, sweet, kernel plus cob with husks removed	0.03
Corn, sweet, stover	0.70
Goat, meat byproducts	2.0
Grain, aspirated fractions	0.30
Hog, meat byproducts	0.40
Horse, meat byproducts	2.0
Sheep, meat byproducts	2.0
Sugarcane, cane [1]	0.02
Wheat, bran	0.07
Wheat, forage	0.40
Wheat, grain	0.04
Wheat, hay	0.80
Wheat, straw	0.50

[1] There are no U.S. Registration on Sugarcane as of March 13, 2015.

* * * * *

[FR Doc. 2016–29005 Filed 12–1–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 160801681–6999–02]

RIN 0648–BG22

International Fisheries; Tuna and Tuna-Like Species in the Eastern Pacific Ocean; Silky Shark Fishing Restrictions and Fish Aggregating Device Data Collection and Identification

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS is issuing regulations under the Tuna Conventions Act to implement certain provisions of two Resolutions adopted by the Inter-American Tropical Tuna Commission (IATTC) in 2016: Resolution C–16–01 (*Collection and Analyses of Data On Fish-Aggregating Devices*) and Resolution C–16–06 (*Conservation Measures for Shark Species, with Special Emphasis on the Silky Shark (Carcharhinus Falciformis) for the Years 2017, 2018, and 2019*). Per Resolution C–16–01, these regulations require the owner or operator of a U.S. purse seine vessel to ensure characters of a unique code be marked indelibly on each fish aggregating device (FAD) deployed or modified on or after January 1, 2017, in the IATTC Convention Area. The vessel owner or operator must record and submit information about the FAD, as described in Annex I of Resolution C–16–01. Per Resolution C–16–06, these regulations prohibit the owner or operator of a U.S. purse seine vessel from retaining on board, transshipping, landing, or storing, in part or whole, carcasses of silky sharks caught by purse-seine vessels in the IATTC Convention Area. These regulations also provide limits on the retained catch of silky sharks caught in the IATTC Convention Area. This rule is necessary for the United States to satisfy its obligations as a member of the IATTC.

DATES: This rule is effective January 1, 2017.

ADDRESSES: Copies of the Regulatory Impact Review and other supporting documents are available via the Federal eRulemaking Portal: *http://www.regulations.gov,* docket NOAA–NMFS–2016–0106 or by contacting the Regional Administrator, Barry A. Thom, NMFS West Coast Region, 1201 NE. Lloyd Boulevard, Suite 1100, Portland Oregon, 97232–1274, or *RegionalAdministrator.WCRHMS@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Rachael Wadsworth, NMFS, West Coast Region, 562–980–4036.

SUPPLEMENTARY INFORMATION: On October 11, 2016, NMFS published a proposed rule in the **Federal Register** (81 FR 70080) to implement certain provisions of Resolutions C–16–01 and C–16–06 adopted by the IATTC in 2016. The proposed rule contained additional background information, including information on the IATTC, the international obligations of the United States as an IATTC member, and the need for regulations. The 30-day public comment period for the proposed rule closed on November 10, 2016.

The final rule is implemented under the Tuna Conventions Act (16 U.S.C. 951 *et seq.*), as amended on November 5, 2015, by title II of Public Law 114–81. The recent amendments direct the Secretary of Commerce, in consultation with the Secretary of State, and, with respect to enforcement measures, the U.S. Coast Guard, to promulgate such regulations as may be necessary to carry out the United States' obligations under the Antigua Convention, including recommendations and decisions adopted by the IATTC. The authority of the Secretary of Commerce to promulgate such regulations has been delegated to NMFS. This rule implements certain provisions of Resolutions C–16–01 and C–16–06 for U.S. commercial fishing vessels that fish for tuna or tuna-like species in the IATTC Convention Area. The preamble of the proposed rule included a detailed description of the elements of this rule.

This rule includes four elements: Two elements regarding FADs and two elements regarding silky sharks. The first element requires the owner or operator of a U.S. purse seine vessel to ensure characters of a unique code be marked indelibly on each fish aggregating device (FAD) deployed or modified on or after January 1, 2017. The vessel owner or operator must select one of the following two options for the unique code for each FAD: (1) Obtain a unique code from NMFS West Coast Region that NMFS has obtained from the IATTC Secretariat, as specified in Annex I of Resolution C–16–01 or (2) use an existing unique identifier associated with the FAD (*e.g.,* the manufacturer identification code for the attached buoy).

The vessel owner or operator is required to ensure the characters for the unique code be at least five centimeters in height on the upper portion of the attached radio or satellite buoy in a location that does not cover the solar cells used to power the equipment. For FADs without attached radio or satellite buoys, the characters are required to be marked indelibly on the uppermost or emergent top portion of the FAD. In other words, the vessel owner or operator is required to ensure the marking is durable and will not fade or be erased (*e.g.,* marked using an epoxy-based paint or an equivalent in terms of lasting ability) and visible at all times during daylight. In circumstances where the observer is unable to view the unique code, the captain or crew is required to assist the observer (*e.g.,* by providing the unique code of the FAD to the observer).

The second element requires the owner or operator of a vessel to record and submit information about the FAD to the address specified by the Highly Migratory Species (HMS) Branch, Sustainable Fisheries Division, NMFS West Coast Region (Suite 4200, 501 W. Ocean Blvd., Long Beach, CA 90802). Owners and operators of a FAD are required to record this information on the standard form developed by the

IATTC Secretariat and provided to the owners and operators by the HMS Branch.

The third element prohibits the crew, operator, and owner of a commercial purse seine fishing vessel of the United States used to fish for tuna or tuna-like species from retaining on board, transshipping, storing, or landing any part or whole carcass of a silky shark that is caught in the Convention Area. U.S. purse seiners do not target silky sharks, yet they are caught incidentally and are primarily discarded as discussed in the Classification Section.

The fourth element requires the crew, operator, and owner of a U.S. longline fishing vessel to limit the retention of silky sharks caught in the IATTC Convention Area to a maximum of 20 percent by weight of the total catch of fish during any fishing trip that occurred in whole or in part in the IATTC Convention Area. U.S. longline vessels fishing in the IATTC Convention Area do not target, and infrequently catch, silky sharks. Data from 2008 to 2015 show that any incidentally caught silky sharks are released, and almost all are released alive. Silky sharks are commonly released by cutting the line or dehooking the shark before it is brought onboard the vessel.

Public Comments and Responses

NMFS received one comment letter during the 30-day public comment period that closed on November 10, 2016. The comment letter was from a representative of Tri-Marine Management Company, LLC (Tri-Marine). Three distinct comments are expressed in the letter, which NMFS responds to below.

Comment 1: Unfortunately, scientific data shows total mortality of silky sharks on purse seiners still exceeds 84 percent (*http://www.intres.com/articles/meps_oa/m521p143.pdf).* The conservation gain of this measure will be very limited given the poor survivability of released sharks.

Response: NMFS agrees that the anticipated conservation benefit for the U.S. purse seine fleet in the eastern Pacific Ocean (EPO) following these regulations is likely minimal. As noted in the preamble of the proposed rule, silky sharks are not targeted by U.S. purse seine vessels in the EPO and they are infrequently caught. However, this is not the case in other IATTC nations, where silky sharks are retained and consumed. The IATTC scientific staff has specifically recommended prohibiting retention in purse seine fisheries, similar to the measures adopted for oceanic whitetip sharks Resolution C–11–10 (*Resolution on the Conservation of Oceanic Whitetip Sharks Caught in Association with Fisheries in the Antigua Convention Area*).

Although studies in the Pacific Ocean have shown that a large percentage of silky sharks do not survive after undergoing the brailing process, restrictions on retention can remove the incentive for purse seine vessels to target silky sharks. Therefore, much of the conservation benefit from this Resolution is expected from implementing this restriction by IATTC nations with vessels that target silky sharks. NMFS is implementing this provision of the Resolution to comply with U.S. obligations as a member of the IATTC.

Comment 2: While we understand and respect the conservation aim of this proposed rule, the operational implications of demonstrating full compliance were not adequately accounted for by the IATTC and should be considered by NMFS in the development and enforcement of this rule. Silky sharks are often caught unintentionally in purse seine sets on schools of tuna that are associated with FADs, and also in unassociated sets. When tuna and other non-target species are caught in purse seine sets, the net is brought alongside the vessel and everything (including silky sharks) is scooped onto the deck using a brailer. Brails are screened for non-target species like sharks when they are brought onboard. When silky sharks are seen, the crew carefully releases them overboard using best practices, which they are trained on (*http://www.issfguidebooks.org/purseseine-3-14/*).

Brails are large, each containing as much as seven metric tons (mt) of fish, which are conveyed quickly from the brail to the fish wells to preserve the quality of the catch. While crew, officers, and onboard observers are diligent in identifying, releasing, and logging the catch of silky sharks, there are still instances where sharks are inadvertently loaded into fish wells, especially very small sharks. In order to demonstrate full compliance with this rule, each brail would need to be examined in its entirety (*e.g.,* dumped out on deck before being loaded into fish wells). For many vessels this is not feasible without greatly slowing operations to a point where fish quality may not meet acceptable standards.

The negative economic impacts due to slowed operations and fish waste because of poor quality would be significant. Therefore, if this proposed rule is adopted, we urge you to consider guidelines for implementation and enforcement that prohibit the *intended* retention of silky sharks, but do not penalize purse seine vessel operators in the rare event that silky sharks are identified at the point of offload.

Response: NMFS recognizes that methodically checking for and discarding silky sharks on the deck takes more time and effort than dropping the catch into wells without searching for sharks. However, the language in Resolution C–16–06 is not flexible enough to prohibit only the *intended retention* of silky sharks. The United States must implement Resolution C–16–06 to satisfy obligations as a member of the IATTC.

In addition, regulations to prohibit the retention onboard, transshipping, landing, or storing of sharks is not without precedent for purse seine vessels fishing for tuna in the Pacific Ocean. Many of the large U.S. purse seine vessels that could catch silky sharks also fish in the western and central Pacific Ocean and are subject to NMFS regulations at 50 CFR 300.226 that prohibit the retention of silky sharks in those waters (without an exception for unintentional retention). Therefore, the practice is feasible. U.S. purse seine vessels in the EPO are also subject to regulations at 50 CFR 300.27, which already prohibit retention of oceanic whitetip shark (without an exception for unintentional retention), which presumably present the same feasibility issues.

Comment 3: We encourage NMFS to promote more effective conservation measures for silky sharks at the IATTC, such as a measure that would require the fins of any sharks landed in any fishery in the Convention Area to be naturally attached rather than applying a fins-to-carcass ratio. In addition, we recognize that the catch of silky sharks is higher in FAD sets than in unassociated sets, and are highly supportive of scientifically based, equitably applied, FAD management.

Response: NMFS agrees with the commenter's suggestion to pursue shark measures in the IATTC that would prohibit landing with fins-attached. Such proposals have been tabled for consideration by the IATTC since 2012, and the United States has strongly supported these proposals.

Changes From the Proposed Rule

With the exception of a non-substantive adjustment to the wording of the new definition ''HMS Branch'' in 50 CFR 300.21, there are no changes to the regulatory text in the final rule from the proposed rule.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tuna Conventions Act and other applicable laws.

This action is categorically excluded from the requirement to prepare an Environmental Assessment in accordance with NOAA Administrative Order (NAO) 216–6. A memorandum for the file has been prepared that sets forth the decision to use a categorical exclusion, and a copy is available from NMFS (see **ADDRESSES**).

This rule has been determined to be not significant for purposes of Executive Order 12866.

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB Control Number 0648–0148. NMFS amended an existing supporting statement for the Pacific Tuna Fisheries Logbook to include the data collection requirements for FADs, as described in this rule. Public reporting burden for the additional collection of information is estimated to average ten minutes per form, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–5806.

Regarding the elements of the rule pertaining to silky sharks; there are no new collection-of-information requirements associated with this action that are subject to the PRA, and existing collection-of-information requirements still apply under the following Control Numbers: 0648–0593 and 0648–0214.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number. All currently approved NOAA collections of information may be viewed at: *http://www.cio.noaa.gov/services_programs/prasubs.html.*

The Chief Counsel for Regulation, Office of the General Counsel, Department of Commerce, determined that this rule would not have a significant economic impact on a substantial number of small entities. Although an Initial Regulatory Flexibility Analysis (IRFA) was published to aid the public in commenting upon the small business impact of the proposed regulations, that analysis concluded that the action will not have a significant adverse economic impact on a substantial number of small entities. Public comment was solicited on the IRFA and proposed rule, and no challenges to the conclusions or other substantive issues in the IRFA were received through public comment. Accordingly, a Final Regulatory Flexibility Analysis was not prepared. Because the actions contained in this final rule are not expected to have a significant economic impact on a substantial number of small entities, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant adverse impact on a substantial number of small entities. The factual basis for this determination is described below.

As described in the **SUPPLEMENTARY INFORMATION** section, the regulations require FAD identification and data reporting as well as fishing restrictions on silky sharks. The entities directly affected by the actions of this final rule are (1) U.S. purse seine vessels that use FADs to fish for tuna or tuna-like species in the IATTC Convention Area, and (2) U.S. purse seine and longline vessels that catch silky sharks.

The United States Small Business Administration (SBA) defines a ''small business'' (or ''small entities'') as one with annual revenue that meets or is below an established size standard. On December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194; December 29, 2015). The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. SBA current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. Id. at 81194. The new standard results in fewer commercial finfish businesses being considered small.

NMFS prepared analyses for this regulatory action in light of the new size standard. All of the entities directly regulated by this regulatory action are commercial finfish fishing businesses. Under the new size standards, the entities for which the action on FADs applies are considered large and small business, and the longline vessels for which the action on silky sharks applies to be small business.

As of July 2016, there are 15 large purse seine vessels (with at least 363 mt of fish hold volume) listed on the IATTC Regional Vessel Register. The number of U.S. large purse seine vessels on the IATTC Regional Vessel Register has increased substantially in the past two years due to negotiations regarding the South Pacific Tuna Treaty (SPTT) and the interest expressed by vessel owners that typically fish in the western and central Pacific Ocean (WCPO) in relocating to the EPO. Neither gross receipts nor ex-vessel price information specific to individual fishing vessels are available to NMFS, so NMFS applied indicative regional cannery prices—as approximations of ex-vessel prices—to annual catches of individual vessels to estimate their annual receipts. Indicative regional cannery prices are available through 2014 (developed by the Pacific Islands Forum Fisheries Agency; available at *https://www.ffa.int/node/425*). NMFS estimated vessels' annual receipts during 2012–2014. Using this approach, NMFS estimates that among the affected vessels, the range in annual average receipts in 2012–2014 was $3 million to $20 million and the median was about $13 million. Thus, NMFS estimates that slightly more than half of the affected large purse seine vessels are small entities.

Because only the large purse seine vessels fish with FADs and incidentally catch silky sharks in the EPO, the action is not expected to impact the coastal purse seine vessels. U.S. purse seiners do not target silky sharks in the EPO. Since 2005, the best available data from observers show that the incidental catches of silky sharks are primarily discarded. However, a small percentage has been landed in the past ten years. For example, in 2015, a year in which more than three large purse seine vessels fished in the EPO, about 3 percent of the total catches of silky sharks were landed and the rest were discarded either dead or alive. Since at least 2005, the observer coverage rate on class size 6 vessels in the EPO has been 100 percent.

As of August 2016, the IATTC Regional Vessel Register lists 158 U.S. longline vessels that have the option to fish in the IATTC Convention Area. The majority of these longline vessels possess Hawaii Longline Limited Access Permits (issued under 50 CFR 665.13). In addition, there are U.S. longline vessels based on the U.S. West Coast,

some of which operate solely under the Pacific HMS permit. U.S. West Coast-based longline vessels operating under the Pacific HMS permit fish primarily in the EPO and are currently restricted to fishing with deep-set longline gear outside of the U.S. West Coast exclusive economic zone (EEZ).

There have been less than three West Coast-based vessels operating under the HMS permit since 2005. Therefore, landings and ex-vessel revenue are confidential. However, the number of Hawaii-permitted longline vessels that have landed in West Coast ports has increased from 1 vessel in 2006 to 14 vessels in 2014. In 2014, 621 mt of highly migratory species were landed by Hawaii permitted longline vessels with an average ex-vessel revenue of approximately $247,857 per vessel. For the longline fishery, the ex-vessel value of catches by the Hawaii longline fleet in 2012 was about $87 million. With 129 active vessels in that year, per-vessel average revenues were about $0.7 million, well below the $11 million threshold for finfish harvesting businesses. NMFS considers all longline vessels, for which data is non-confidential, that catch silky sharks in the IATTC Convention Area to be small entities for the purposes of the RFA.

U.S. longline vessels fishing in the IATTC Convention Area, whether under the Hawaii Longline Limited Access Permit or the Pacific HMS permit, do not target silky sharks and all those caught incidentally are released. An evaluation of total catch per longline trip where silky sharks have been caught and released shows that, if the average weights of silky sharks are approximated, the amount of silky sharks caught by U.S. longline vessels fishing in the EPO do not come close to 20 percent by weight of the total catch of fish during a fishing trip.

An IRFA was prepared for the proposed rule, and the analysis concluded that the action will not have a significant adverse economic impact on a substantial number of small entities. Under the new size standards, the entities impacted by the action on FADs are considered large and small business. However, a disproportional economic effect between small and large businesses is not expected. There will be only a minimal additional time burden for owners and operators of large purse seine vessels to ensure characters of a unique code be marked indelibly on their FADs and to record data for FAD activities. And while the large purse seine vessels impacted by the actions with respect to treatment of silky sharks would be required to release all silky sharks, U.S. purse seine vessels do not target silky sharks, and primarily release those caught incidentally. However, there may be some modifications to the fishing practices of these large and small entities to release all catch of silky sharks. NMFS considers the longline vessels for which the action on silky sharks applies to be small entities. U.S. longline vessels fishing in the EPO do not target silky sharks and release all those incidentally caught. U.S. longline vessels only occasionally catch a small amount of silky sharks on fishing trips in the EPO. Therefore, this action is not expected to impact the fishing practices of these longline vessels.

Thus, these actions are not expected to substantially change the typical fishing practices of affected vessels. In addition, any impact to the income of U.S. vessels would be minor. Therefore, NMFS has determined that the action is not expected to have a significant economic impact on a substantial number of small entities. The action will also not have a disproportional economic impact on small business entities.

List of Subjects in 50 CFR Part 300

Fish, Fisheries, Fishing, Fishing vessels, International organizations, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: November 28, 2016.

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 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Eastern Pacific Tuna Fisheries

■ 1. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951 *et seq.*

■ 2. In § 300.21, add a definition for ''Highly Migratory Species (HMS) Branch'' in alphabetical order to read as follows:

§ 300.21 Definitions.

* * * * *

Highly Migratory Species (HMS) Branch means the Chief of the HMS Branch of the Sustainable Fisheries Division, National Marine Fisheries Service West Coast Region, Suite 4200, 501 W. Ocean Blvd., Long Beach, CA 90802.

* * * * *

■ 3. In § 300.24, add paragraphs (ee) through (hh) to read as follows:

§ 300.24 Prohibitions.

* * * * *

(ee) Fail to ensure characters of a unique code are marked indelibly on a FAD deployed or modified on or after January 1, 2017, in accordance with § 300.25(h).

(ff) Fail to record and report data on interactions or activities on FADs as required in § 300.25(i).

(gg) Use a commercial purse seine fishing vessel of the United States to retain on board, transship, store, or land any part or whole carcass of a silky shark (*Carcharhinus falciformis*) in contravention of § 300.27(e).

(hh) Use a U.S. longline vessel to catch silky shark in contravention of § 300.27(f).

■ 4. In § 300.25:

■ a. In paragraph (g)(4), remove ''(h)(1) and (2)'' and ''(h)(5)'' and add in their place ''(g)(1) and (2)'' and ''(g)(5)'';

■ b. In paragraph (g)(5), remove ''(h)(4)'' and add in its place ''(g)(4)''; and

■ c. Add paragraphs (h) and (i).

The additions read as follows:

§ 300.25 Eastern Pacific fisheries management.

* * * * *

(h) *FAD identification requirements for purse seine vessels.* (1) For each FAD deployed or modified on or after January 1, 2017, in the IATTC Convention Area, the vessel owner or operator must either: Obtain a unique code from HMS Branch; or use an existing unique identifier associated with the FAD (*e.g.,* the manufacturer identification code for the attached buoy).

(2) U.S. purse seine vessel owners and operators shall ensure the characters of the unique code or unique identifier be marked indelibly at least five centimeters in height on the upper portion of the attached radio or satellite buoy in a location that does not cover the solar cells used to power the equipment. For FADs without attached radio or satellite buoys, the characters shall be on the uppermost or emergent top portion of the FAD. The vessel owner or operator shall ensure the marking is visible at all times during daylight. In circumstances where the on-board observer is unable to view the code, the captain or crew shall assist the observer (*e.g.,* by providing the FAD identification code to the observer).

(i) *FAD data reporting for purse seine vessels.* U.S. vessel owners and operators must ensure that any interaction or activity with a FAD is reported using a standard format

provided by the HMS Branch. The owner and operator shall ensure that the form is submitted to the address specified by the HMS Branch.

■ 5. In § 300.27, redesignate paragraphs (e) through (h) as paragraph (g) through (j) and add paragraphs (e) and (f) to read as follows:

§ 300.27 Incidental catch and tuna retention requirements.

* * * * *

(e) *Silky shark restrictions for purse seine vessels.* The crew, operator, and owner of a commercial purse seine fishing vessel of the United States used to fish for tuna or tuna-like species is prohibited from retaining on board, transshipping, storing, or landing any part or whole carcass of a silky shark (*Carcharhinus falciformis*) that is caught in the Convention Area.

(f) *Silky shark restrictions for longline vessels.* The crew, operator, and owner of a longline vessel of the United States used to fish for tuna or tuna-like species must limit the retained catch of silky sharks caught in the IATTC Convention Area to a maximum of 20 percent in weight of the total catch during each fishing trip that occurs in whole or in part in the IATTC Convention Area.

* * * * *

[FR Doc. 2016–28968 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120815345–3525–02]

RIN 0648–XF046

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Re-Opening of Recreational Sector for the South Atlantic Other Jacks Complex

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; re-opening.

SUMMARY: NMFS announces the re-opening of the recreational sector for the other jacks complex (lesser amberjack, almaco jack, and banded rudderfish) in the exclusive economic zone (EEZ) of the South Atlantic through this temporary rule. The most recent recreational landings of the other jacks complex indicate that the recreational annual catch limit (ACL) for 2016 fishing year has not yet been reached. Therefore, NMFS re-opens the recreational sector for the other jacks complex in the South Atlantic EEZ through the end of the 2016 fishing year or until the ACL is reached, whichever happens first, to allow the recreational ACL to be caught, while minimizing the risk of the recreational ACL being exceeded.

DATES: This rule is effective 12:01 a.m., local time, December 2, 2016, until 12:01 a.m., local time, January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes the other jacks complex which is composed of lesser amberjack, almaco jack, and banded rudderfish and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The recreational ACL for other jacks complex in the South Atlantic is 267,799 lb (121,472 kg), round weight. Under 50 CFR 622.193(l)(2)(i), NMFS is required to close the recreational sector for the other jacks complex when landings reach, or are projected to reach, the recreational ACL by filing a notification to that effect with the Office of the Federal Register.

NMFS previously projected that the recreational ACL for the South Atlantic other jacks complex for the 2016 fishing year would be reached by August 9, 2016. Accordingly, NMFS published a temporary rule in the **Federal Register** to implement accountability measures (AMs) to close the recreational sector for the other jacks complex in the South Atlantic EEZ effective from August 9, 2016, until the start of the 2017 fishing year on January 1, 2017 (81 FR 52366, August 8, 2016).

However, the most recent landings data for the other jacks complex now indicate the recreational ACL has not been reached. Consequently, and in accordance with 50 CFR 622.8(c), NMFS temporarily re-opens the recreational sector for the other jacks complex on December 2, 2016. The recreational sector will remain open through the remainder of 2016 fishing year or until the recreational ACL is reached, whichever happens first. Re-opening the recreational sector allows for an additional opportunity to recreationally harvest the other jacks complex while minimizing the risk of the recreational ACL being exceeded.

Classification

The Regional Administrator, NMFS Southeast Region, has determined this temporary rule is necessary for the conservation and management of the other jacks complex and the South Atlantic snapper-grouper fishery and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.8(c) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. The Assistant Administrator for NOAA Fisheries (AA), finds that the need to immediately implement this action to temporarily re-open the recreational sector for the other jacks complex constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures are unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule implementing the recreational ACL and AMs has been subject to notice and comment, and all that remains is to notify the public of the re-opening. Such procedures are contrary to the public interest because of the need to immediately implement this action to allow recreational fishers to harvest the recreational ACL of species of the other jacks complex from the EEZ. Prior notice and opportunity for public comment would require time and would delay the re-opening of the recreational sector.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 28, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–28942 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 160630573–6999–02]

RIN 0648–BG19

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Red Snapper Management Measures

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 Amendment 45 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP), as prepared by the Gulf of Mexico Fishery Management Council (Council) (Amendment 45). This final rule extends the 3-year sunset provision for the Gulf of Mexico (Gulf) red snapper recreational sector separation measures for an additional 5 years. Additionally, this rule corrects an error in the Gulf red snapper recreational accountability measures (AMs). The purpose of this final rule is to extend the sector separation measures to allow the Council more time to consider and possibly develop alternative management strategies within the Gulf red snapper recreational sector.

DATES: This final rule is effective January 3, 2016.

ADDRESSES: Electronic copies of Amendment 45, which includes an environmental assessment, a fishery impact statement, a Regulatory Flexibility Act (RFA) analysis, and a regulatory impact review, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Peter Hood, Southeast Regional Office, NMFS, telephone: 727–824–5305; email: *Peter.Hood@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS and the Council manage the Gulf reef fish fishery, which includes red snapper, under the FMP. The Council prepared the FMP and NMFS implements the FMP through regulations at 50 CFR part 622 under the authority of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On August 25, 2016, NMFS published a notice of availability for Amendment 45 and requested public comment (81 FR 58466). On September 8, 2016, NMFS published a proposed rule for Amendment 45 and requested public comment (81 FR 62069). The proposed rule and Amendment 45 outline the rationale for the action contained in this final rule. A summary of the management measures described in Amendment 45 and implemented by this final rule is provided below.

Management Measure Contained in This Proposed Rule

Amendment 45 extends the 3-year sunset provision implemented through the final rule for Amendment 40 to the FMP (80 FR 22422, April 22, 2015) for an additional 5 years. Amendment 40 established distinct private angling and Federal for-hire (charter vessel and headboat) components of the Gulf reef fish recreational sector fishing for red snapper, and allocated red snapper resources between these recreational components. The purpose of establishing these separate recreational components was to provide a basis for increasing the stability for the for-hire component and the flexibility in future management of the recreational sector, and to reduce the likelihood of recreational red snapper quota overruns, which could jeopardize the rebuilding of the red snapper stock (the Gulf red snapper stock is currently overfished and is under a rebuilding plan). As a result of the stock status, the actions in Amendment 40 were also intended to prevent overfishing while achieving optimum yield, particularly with respect to recreational fishing opportunities, and while rebuilding the red snapper stock.

Amendment 40 defined the Federal for-hire component as including operators of vessels with Federal charter vessel/headboat permits for Gulf reef fish and their angler clients. The private angling component was defined as including anglers fishing from private vessels and state-permitted for-hire vessels. Amendment 40 also established accountability measures for the Gulf red snapper recreational components. In addition, Amendment 40 applied a 3-year sunset provision for the regulations implemented through its final rule. The sunset provision maintained the measures for sector separation through the end of the 2017 fishing year, ending on December 31, 2017.

This final rule extends Gulf recreational red snapper sector separation through the end of the 2022 fishing year, ending on December 31, 2022, rather than the current sunset date of December 31, 2017. Beginning on January 1, 2023, the red snapper recreational sector will be managed as a single entity without the separate Federal for-hire and private angling components. The Council would need to take further action for these recreational components and management measures to extend beyond the 5-year extension in Amendment 45.

Additionally, as a result of extending the sunset provision for sector separation, this final rule extends the respective red snapper recreational component quotas and ACTs through the 2022 fishing year, instead of through the 2017 fishing year as implemented through Amendment 40.

Comments and Responses

A total of 115 comments were received on the notice of availability and proposed rule for Amendment 45. Most of the comments (91 comments), including one from a recreational fishing organization, were not in favor of extending the sunset provision from Amendment 40. The primary reason given was an opposition to sector separation implemented through Amendment 40, including: The concern that sector separation was unfair to private anglers, particularly with respect to fishing season length in Federal waters; the position that all recreational fishermen, regardless of whether they use a private vessel or a for-hire vessel to harvest red snapper, should be managed under the same regulations; and opposition to any part of the recreational quota being privatized. These comments are duplicative of those provided on Amendment 40 and were addressed in the final rule implementing Amendment 40 (80 FR 22422, April 22, 2015). Those responses to comments are incorporated here by reference.

Other comments in opposition to Amendment 45 and the proposed rule expressed a preference for recreational red snapper fishing to be managed by the Gulf states or managed through the use of fish tags, or expressed opposition to the Federal for-hire component being managed under a catch share program in the future. These comments are outside the scope of Amendment 45. Amendment 45 only addresses extending Amendment 40's sunset provision, not the strategies or measures under which the separate components of the recreational sector may be managed.

Fifteen comments were received in favor of extending the sunset provision. Rationale in support included: That extending the sunset provides more time to develop Federal for-hire red snapper management measures, and that sector separation is providing a longer

Federal season for operators of federally permitted for-hire reef fish vessels. Eight comments did not indicate whether they were for or against extending the sunset provision and one comment from a Federal agency indicated they had no comments on Amendment 45 or the proposed rule.

Comment 1: The Council, when approving Amendment 40, established a 3-year sunset provision to ensure that the Council would evaluate the merits of sector separation within a specific time period. Extending sector separation now, before the Council has evaluated sector separation, violates the Council's intent to consider the merits of sector separation over the 3-year evaluation period.

Response: NMFS disagrees. As stated in the final rule for Amendment 40 (80 FR 22422, April 22, 2015), the purpose of separating the recreational sector into components was to provide a basis for increased flexibility in future management of the recreational sector and reduce the likelihood of recreational quota overruns, which could negatively impact the rebuilding of the red snapper stock. As described in Amendment 40, the Council established the 3-year sunset provision to encourage timely action to implement and evaluate alternative management structures. If such structures were under development, the Council also would have the opportunity to determine whether to to extend sector separation to continue to develop those structures or instead to let sector separation end under the sunset provision.

The Council is working toward developing altnerative management structures and will continue to evaluate sector separation as these structures develop. In view of its work on those structures, chose to extend the sunset provision to continue that work. Amendment 40 represented the first step toward developing alternative structures to manage the recreational sector. Since Amendment 40 was implemented, the Council has established three *ad hoc* advisory panels (APs) to help it develop management alternatives for recreational red snapper management in the Gulf. The Ad Hoc Red Snapper Charter For-hire AP and the Ad Hoc Reef Fish Headboat AP have convened on several occasions and are assisting the Council in developing management actions for their respective fishing modes. The Council also recently established the Ad Hoc Red Snapper Private Angler AP, which it charged with providing recommendations on private recreational red snapper management measures that would provide more quality access to the red snapper resource in Federal waters, reduce discards, and improve fisheries data collection. This AP has yet to meet.

Although the Council is making progress in its efforts to develop alternative red snapper recreational management measures, it is unlikely that the Council, with help from its APs, will approve any management measures prior to January 1, 2018, when Amendment 40 expires under the current sunset provision. Therefore, the Council decided to take action through Amendment 45 to extend the sunset provision for an additional 5-year period to give it additional time to develop the future red snapper management measures contemplated under Amendment 40. Extending the sunset provision in this final rule is consistent with the intent behind including the sunset provision in Amendment 40 as it provides the Council with additional time to develop alternative management structures and to continue to consider the merits of sector separation over an additional 5 years. Because of the time it would take to develop and implement an amendment to extend the sunset time period, rather than waiting any longer into the sunset period, the Council chose to act now to extend sector separation for an additional 5 years, and its action is consistent with the intent in including the sunset provision in Amendment 40.

Comment 2: Sector separation should not be extended for an additional 5 years because sector separation disproportionately harms private anglers by reducing the length of their Federal season; unreasonably creates a different set of rules for each recreational component fishing under the same recreational quota; is not based on the best scientific information available; creates derby-like conditions for the private angler component; allows the privatization of a portion of the recreational quota; and it is premature to extend sector separation before the litigation concerning sector separation is resolved.

Response: NMFS disagrees. The Council approved Amendment 40 and submitted the amendment to NMFS for review and Secretarial approval. During this process, NMFS received many comments in opposition to sector separation citing the same substantive reasons as those received on Amendment 45 and proposed rule. Responses to these comments are contained in the final rule for Amendment 40 (80 FR 22422, April 22, 2015) and are incorporated here by reference. In those responses, NMFS explained why it believed sector separation was appropriate. The Council chose to extend sector separation despite the concerns with sector separation itself and NMFS is approving that decision for the same reasons we approved Amendment 40.

With respect to the comment that it is premature to extend sector separation until the litigation concerning sector separation is resolved, NMFS disagrees. The final rule implementing Amendment 40 was challenged in both the United States District Court for the Eastern District of Louisiana, *Coastal Conservation Ass'n* v. *United States Department of Commerce,* No. 2:15–cv–01300, and in the United States District Court for the Middle District of Florida, *The Fishing Rights Alliance, Inc.* v. *Pritzker, No. 8:15–cv–01254.* On January 5, 2016, the United States District Court for the Eastern District of Louisiana ruled in favor of NMFS, dismissing the matter with prejudice. That decision is on appeal to the United States Court of Appeals for the Fifth Circuit and oral argument was held on November 1, 2016, *Coastal Conservation Ass'n* v. *United States Department of Commerce,* No. 16–30137. The other action is still pending. NMFS does not need to await the outcome of these legal challenges before approving the Council's decision to extend sector separation for an additional 5 years under Amendment 45. Amendment 40 continues to be valid and enforceable until a court rules to the contrary. Depending on the outcome of those challenges, the Council may revisit sector separation, as appropriate.

Additional Changes to Codified Text

On May 1, 2015, NMFS published the final rule for a framework action to revise the Gulf red snapper commercial and recreational quotas and ACTs, including the recreational component ACTs, and to announce the closure dates for the recreational sector components for the 2015 fishing year (80 FR 24832). However, during the implementation of the framework action, the term and regulatory reference for total recreational quota was inadvertently used instead of total recreational ACT when referring to the applicability of the recreational component ACTs after sector separation ends in § 622.41(q)(2)(iii)(B) and (C). This rule corrects this error by revising the text and regulatory references within the component ACTs in § 622.41(q)(2)(iii)(B) and (C) to reference the total recreational sector ACT instead of the total recreational quota.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that this final rule is consistent with Amendment 45, the FMP, the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by 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 rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination was published in the proposed rule and is not repeated here. No significant issues were received regarding the certification by public comments on the proposed rule, no changes were made to the rule in response to such comments, and NMFS has not received any new information that would affect its determination. As a result, a final regulatory flexibility analysis is not required and none was prepared.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Gulf, Quotas, Recreational, Red snapper.

Dated: November 28, 2016.

Samuel D. Rauch III,

Deputy Assustant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended 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 § 622.39, revise paragraphs (a)(2)(i)(B) and (C) to read as follows:

§ 622.39 Quotas.

* * * * *

(a) * * *

(2) * * *

(i) * * *

(B) *Federal charter vessel/headboat component quota.* The Federal charter vessel/headboat component quota applies to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. This component quota is effective for only the 2015 through 2022 fishing years. For the 2023 and subsequent fishing years, the applicable total recreational quota, specified in paragraph (a)(2)(i)(A) of this section, will apply to the recreational sector.

(*1*) For fishing year 2015—2.964 million lb (1.344 million kg), round weight.

(*2*) For fishing year 2016—3.042 million lb (1.380 million kg), round weight.

(*3*) For fishing years 2017 through 2022—2.993 million lb (1.358 million kg), round weight.

(C) *Private angling component quota.* The private angling component quota applies to vessels that fish under the bag limit and have not been issued a Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. This component quota is effective for only the 2015 through 2022 fishing years. For the 2023 and subsequent fishing years, the applicable total recreational quota, specified in paragraph (a)(2)(i)(A) of this section, will apply to the recreational sector.

(*1*) For fishing year 2015—4.043 million lb (1.834 million kg), round weight.

(*2*) For fishing year 2016—4.150 million lb (1.882 million kg), round weight.

(*3*) For fishing years 2017 through 2022—4.083 million lb (1.852 million kg), round weight.

* * * * *

■ 3. In § 622.41, revise paragraphs (q)(2)(iii)(B) and (C) to read as follows:

§ 622.41 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(q) * * *

(2) * * *

(iii) * * *

(B) *Federal charter vessel/headboat component ACT.* The Federal charter vessel/headboat component ACT applies to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. This component ACT is effective for only the 2015 through 2022 fishing years. For the 2023 and subsequent fishing years, the applicable total recreational ACT, specified in paragraph (q)(2)(iii)(A) of this section, will apply to the recreational sector.

(*1*) For fishing year 2015—2.371 million lb (1.075 million kg), round weight.

(*2*) For fishing year 2016—2.434 million lb (1.104 million kg), round weight.

(*3*) For fishing years 2017 through 2022—2.395 million lb (1.086 million kg), round weight.

(C) *Private angling component ACT.* The private angling component ACT applies to vessels that fish under the bag limit and have not been issued a Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. This component ACT is effective for only the 2015 through 2022 fishing years. For the 2023 and subsequent fishing years, the applicable total recreational ACT, specified in paragraph (q)(2)(iii)(A) of this section, will apply to the recreational sector.

(*1*) For fishing year 2015—3.234 million lb (1.467 million kg), round weight.

(*2*) For fishing year 2016—3.320 million lb (1.506 million kg), round weight.

(*3*) For fishing years 2017 through 2022—3.266 million lb (1.481 million kg), round weight.

[FR Doc. 2016–28905 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 101206604–1758–02]

RIN 0648–XF056

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2016 Commercial Accountability Measures and Closure for Atlantic Migratory Group Cobia

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for Atlantic migratory group cobia that are sold (commercial) and harvested from the exclusive economic zone (EEZ) of the Atlantic. NMFS projects that commercial landings of Atlantic migratory group cobia have reached the commercial quota. Therefore, NMFS closes the commercial sector for Atlantic migratory group cobia on December 6, 2016, and it will remain closed until the start of the next fishing year on January 1, 2017. This closure is necessary to protect the resource of Atlantic migratory group cobia.

DATES: This rule is effective from 12:01 a.m., local time, December 6, 2016, until 12:01 a.m., local time, January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Frank Helies, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *frank.helies@noaa.gov.*

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish includes king mackerel, Spanish mackerel, and cobia, and is managed under the Fishery Management Plan for Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Separate migratory groups of cobia were established in Amendment 18 to the FMP (76 FR 82058, December 29, 2011), and then revised in Amendment 20B to the FMP (80 FR 4216, January 27, 2015). The southern boundary for Atlantic migratory group cobia occurs at a line that extends due east of the Florida and Georgia state border at 30°42′45.6″ N. lat. The northern boundary for Atlantic migratory group cobia is the jurisdictional boundary between the Mid-Atlantic and New England Fishery Management Councils, as specified in 50 CFR 600.105(a).

Atlantic migratory group cobia are unique among federally managed species in the southeast region, because no Federal commercial permit is required to harvest and sell them. The distinction between commercial and recreational sectors is not as clear as other federally managed species in the southeast region. For example, regulations at 50 CFR part 622 specify quotas, annual catch limits, and AMs for cobia that are sold and cobia that are not sold. However, for purposes of this temporary rule, Atlantic migratory group cobia that are sold are considered commercially-caught, and those that are not sold are considered recreationally-caught.

The commercial quota for Atlantic migratory group cobia is 50,000 lb (22,680 kg), round or gutted weight, for the 2016 fishing year, from January 1 through December 31, as specified in 50 CFR 622.384(d)(2).

The AMs for the commercial sector of Atlantic migratory group cobia, specified at 50 CFR 622.388(f)(1)(i), require that NMFS file a notification with the Office of the Federal Register to prohibit the sale and purchase of cobia for the remainder of the fishing year if commercial landings reach or are projected to reach the commercial quota specified in § 622.384(d)(2). The commercial AM is triggered for 2016, because NMFS projects that commercial landings of Atlantic migratory group cobia have reached the commercial quota. Accordingly, the commercial sector for Atlantic migratory group cobia is closed at 12:01 a.m., local time, on December 6, 2016, and remains closed until 12:01 a.m., local time, January 1, 2017.

During the commercial closure, the sale and purchase of Atlantic migratory group cobia is prohibited. Additionally, on June 20, 2016, NMFS closed the recreational sector for Atlantic migratory group cobia for the remainder of the 2016 fishing year, because the recreational annual catch target was projected to be reached (81 FR 12601, March 10, 2016). Therefore, the possession limit for recreational Atlantic migratory group cobia is zero for the remainder of the 2016 fishing year. The prohibition on sale and purchase does not apply to Atlantic migratory group cobia that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, December 6, 2016, and were held in cold storage by a dealer or processor.

The commercial and recreational sectors for Atlantic migratory group cobia will re-open at the beginning of the 2017 fishing year on January 1, 2017.

Classification

The Regional Administrator for the NMFS Southeast Region has determined this temporary rule is necessary for the conservation and management of Atlantic migratory group cobia and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.388(f)(1)(i) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action is based on the best scientific information available. The Assistant Administrator for NOAA Fisheries finds good cause to waive the requirements to provide prior notice and opportunity for public comment, pursuant to the authority set forth at 5 U.S.C. 553(b)(B), as such prior notice and opportunity for public comment is unnecessary and contrary to the public interest. Such procedures are unnecessary because the AMs for Atlantic migratory group cobia have already been subject to notice and comment, and all that remains is to notify the public of the commercial closure for the remainder of the 2016 fishing year. Prior notice and opportunity for public comment on this action would be contrary to the public interest, because of the need to immediately implement the commercial closure to protect Atlantic migratory group cobia, since the capacity of the fishing fleet allows for rapid harvest of the commercial quota. Prior notice and opportunity for public comment would require time and would potentially result in a harvest that exceeds the commercial quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 28, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–28904 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 232
Friday, December 2, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9431; Directorate Identifier 2016–NM–104–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A321 series airplanes. This proposed AD was prompted by a determination from fatigue testing on the Model A321 airframe that cracks could develop on holes at certain fuselage frame locations. This proposed AD would require repetitive inspections for cracking on holes at certain fuselage frame locations, and repairs if necessary. We are proposing this AD to prevent the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 17, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9431; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9431; Directorate Identifier 2016–NM–104–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2016–0106, dated June 6, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition on all Airbus Model A321 series airplanes. The MCAI states:

> Following a new full scale fatigue test campaign on the A321 airframe, in the context of the A321 extended service goal, it was identified that cracks could develop on holes at frame (FR) 35.2A between stringers (STR) 22 and STR 23 on right hand (RH) and left hand (LH) sides, also on aeroplanes operated in the context of design service goal.
>
> This condition, if not detected and corrected, could reduce the structural integrity of the fuselage.
>
> Prompted by these findings, Airbus developed an inspection programme, published in Service Bulletin (SB) A320–53–1315 and SB A320–53–1316, each containing instructions for a different location.
>
> For the reasons described above, this [EASA] AD requires repetitive special detailed (rototest) inspections (SDI) of the affected holes [for cracking] and, depending on findings, accomplishment of a repair.
>
> This [EASA] AD is considered an interim action, pending development of a permanent solution.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9431.

Related Service Information Under 1 CFR Part 51

Airbus has issued Service Bulletin A320–53–1315, dated January 13, 2016; and Service Bulletin A320–53–1316, dated January 13, 2016. This service information describes procedures for doing a special detailed inspection for cracking at the tooling holes on FR 35.2A between STR 22 and STR 23 and repairs. These documents are distinct since they apply to different sides of the airplane. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another

country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD affects 175 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	12 work-hours × $85 per hour = $1,020 per inspection cycle.	$0	$1,020 per inspection cycle.	$178,500 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2016–9431; Directorate Identifier 2016–NM–104–AD.

(a) Comments Due Date

We must receive comments by January 17, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a determination from fatigue testing on the Model A321 airframe that cracks could develop on holes at certain fuselage frame locations. We are issuing this AD to detect and correct cracking at certain hole locations in the fuselage frame, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Repetitive Inspections

At the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD: Do a special detailed (rototest) inspection for cracking of the affected holes at frame 35.2A on the left-hand side and right-hand side between stringer 22 and stringer 23, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–53–1315, dated January 13, 2016 (right-hand side); and Airbus Service Bulletin A320–53–1316, dated January 13, 2016 (left-hand side). Repeat the inspection of the affected holes thereafter at intervals not to exceed 21,500 flight cycles or 43,100 flight hours, whichever occurs first.

(1) Before exceeding 25,400 total flight cycles or 50,900 total flight hours since first flight of the airplane, whichever occurs first.

(2) Within 3,300 flight cycles after the effective date of this AD.

(h) Repair

If any crack is found during any inspection required by paragraph (g) of this AD: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). Although the service information specified in paragraph (g) of this AD specifies to contact Airbus for repair instructions, and specifies that action as ''RC'' (Required for Compliance), this AD requires repair as specified in this paragraph. Repair of an airplane as required by this paragraph does not constitute terminating action for the repetitive actions required by paragraph (g) of this AD, unless specified otherwise in the instructions provided by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (h) of this AD: If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0106, dated June 6, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9431.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 16, 2016.

Phil Forde,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28621 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9394; Directorate Identifier 2016–NM–162–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 747–400, 747–400D, and 747–400F airplanes. This proposed AD was prompted by a report of a 13.4-inch crack in the left wing front spar web inboard of pylon number 2 between front spar station inboard (FSSI) 655.75 and FSSI 660, found following a fuel leak. This proposed AD would require repetitive detailed, ultrasonic, and high frequency eddy current inspections for cracking of the front spar web between FSSI 628 and FSSI 713, and repairs if necessary. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 17, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740; telephone 562–797–1717; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9394.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9394; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *nathan.p.weigand@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9394; Directorate Identifier 2016–NM–162–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We have received a report indicating that a fuel leak in one airplane led to the discovery of a 13.4-inch crack in the left wing front spar web inboard of pylon number 2 between FSSI 655.75 and FSSI 660. The airplane had accumulated 13,909 total flight cycles and 107,151 total flight hours. This condition, if not corrected, could result in fuel leaks and a consequent fire.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 747–57A2357, dated September 12, 2016. The service information describes procedures for repetitive detailed, ultrasonic, and high frequency eddy current inspections, and repairs of cracking of the front spar web between FSSI 628 and FSSI 713. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9394.

Differences Between This Proposed AD and the Service Information

Boeing Alert Service Bulletin 747–57A2357, dated September 12, 2016, specifies to contact the manufacturer for certain instructions, but this proposed AD would require using repair methods, modification deviations, and alteration deviations in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 137 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections	55 work-hours × $85 per hour = $4,675 per inspection cycle.	$0	$4,675 per inspection cycle.	$640,475 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2016–9394; Directorate Identifier 2016–NM–162–AD.

(a) Comments Due Date

We must receive comments by January 17, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 747–400, 747–400D, and 747–400F airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by a report of a 13.4-inch crack in the left wing front spar web inboard of pylon number 2 between front spar station inboard (FSSI) 655.75 and FSSI 660, found following a fuel leak. We are issuing this AD to detect and correct cracking in the front spar web, which could lead to fuel leaks and a consequent fire.

(f) Compliance

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

(g) Repetitive Detailed, Ultrasonic, and High Frequency Eddy Current Inspections

At the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–57A2357, dated September 12, 2016, except as provided by paragraph (i) of this AD, do detailed, ultrasonic, and high frequency eddy current

inspections for any cracking in the front spar web, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2357, dated September 12, 2016. Repeat the inspections thereafter at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–57A2357, dated September 12, 2016.

(h) Repair of Any Cracking

If any crack is found during any inspection required by paragraph (g) of this AD, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (j) of this AD. Thereafter, repeat the inspections specified by paragraph (g) of this AD at all unrepaired areas.

(i) Service Information Exceptions

Where paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–57A2357, dated September 12, 2016, specifies a compliance time ''after the original date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (k)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as required by paragraph (i) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (j)(4)(i) and (j)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Related Information

(1) For more information about this AD, contact Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *nathan.p.weigand@faa.gov*.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740; telephone 562–797–1717; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 17, 2016.

Phil Forde,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28620 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 401

[Docket No. SSA–2015–0014]

RIN 0960–AH82

Anti-Harassment and Hostile Work Environment Case Tracking and Records System

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Social Security Administration (SSA) separately published, in today's **Federal Register**, notice of a new system of records, entitled Anti-Harassment & Hostile Work Environment Case Tracking and Records System. Because this system will contain some investigatory material compiled for law enforcement purposes, the SSA proposes to exempt those records within this new system of records from specific provisions of the Privacy Act.

DATES: To ensure that your comments are considered, we must receive them no later than January 3, 2017.

ADDRESSES: You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2015–0014, so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the Search function to find docket number SSA–2015–0014. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Address your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Pamela J. Carcirieri, Supervisory Government Information Specialist, SSA, Office of Privacy & Disclosure, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, Phone: (410) 965–0355, for information about this rule. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

In accordance with the Privacy Act (5 U.S.C. 552a) we are issuing public notice of our intent to establish a new system of records entitled, Anti-Harassment & Hostile Work Environment Case Tracking and Records System (Anti-Harassment System) (60–0380). The Equal Employment Opportunity Commission (EEOC) requires that agencies implement anti-harassment policies and procedures separate from the Equal Employment

Opportunity process. As a result of implementing those policies and procedures, we propose establishing the Anti-Harassment system to manage information regarding allegations of workplace harassment filed by SSA employees and SSA contractors alleging harassment by another SSA employee, as well as allegations of workplace harassment filed by SSA employees alleging harassment by an SSA contractor.

We propose establishing the Anti-Harassment system as part of our compliance efforts under Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; the Americans with Disabilities Act of 1990 (ADA); the ADA Amendments Act of 2008; the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act); and the Genetic Information Nondiscrimination Act of 2008 (GINA); and Executive Orders 11478, 11246, 13152, and 13087. These legal authorities prohibit discrimination, including harassment, based on sex, race, color, religion, national origin, age, disability, genetic information, or other protected basis.

The Anti-Harassment System will capture and house information regarding allegations of workplace harassment filed by SSA employees and SSA contractors alleging harassment by another SSA employee, and any investigation, or response, we take because of the allegation. Due to the investigatory nature of information that will be maintained in this system of records, this proposed rule would add the Anti-Harassment System to the list of SSA systems that are exempt from specific provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

Rulemaking Analyses and Notices

All comments received on or before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. A final rule may be published at any time after close of the comment period.

Clarity of This Rule

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this proposed rule, we invite your comments on how to make the rule easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rule clearly stated?
- Have we organized the material to suit your needs?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand, *e.g.* grouping and order of sections, use of headings, paragraphing?

Regulatory Procedures

SSA will publish a final rule responding to any comments received and, if appropriate, will amend provisions of the rule.

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this proposed rule does not meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB did not review it.

We also determined that this proposed rule meets the plain language requirement of Executive Order 12866.

Executive Order 13132 (Federalism)

This proposed rule was analyzed in accordance with the principles and criteria established by Executive Order 13132, and SSA determined that the proposed rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. SSA also determined that this proposed rule will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

The regulations effectuating Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed rule.

Regulatory Flexibility Act

We certify that this proposed rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

This proposed rule does not create any new or affect any existing collections and, therefore, do not require Office of Management and Budget approval under the Paperwork Reduction Act.

List of Subjects in 20 CFR Part 401

Privacy and disclosure of official records and information.

Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons stated in the preamble, we are proposing to amend subpart B of part 401 of title 20 of the Code of Federal Regulations as set forth below:

PART 401—PRIVACY AND DISCLOSURE OF OFFICIAL RECORDS AND INFORMATION

Subpart B—[Amended]

■ 1. The authority citation for subpart B of part 401 continues to read as follows:

Authority: Secs. 205, 702(a)(5), 1106, and 1141 of the Social Security Act (42 U.S.C. 405, 902(a)(5), 1306, and 1320b–11); 5 U.S.C. 552 and 552a; 8 U.S.C. 1360; 26 U.S.C. 6103; 30 U.S.C. 923.

■ 2. Amend § 401.85, by adding paragraph (b)(2)(ii)(F) to read as follows:

§ 401.85 Exempt Systems.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(F) Anti-Harassment & Hostile Work Environment Case Tracking and Records System, SSA.

* * * * *

[FR Doc. 2016–28919 Filed 12–1–16; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2016–0012; Notice No. 166]

RIN 1513–AC33

Proposed Establishment of the Dahlonega Plateau Viticultural Area

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to

establish the 133-square mile ''Dahlonega Plateau'' viticultural area in portions of Lumpkin and White Counties, Georgia. The proposed viticultural area does not lie within or contain any established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed addition to its regulations.

DATES: Comments must be received by January 31, 2017.

ADDRESSES: Please send your comments on this notice to one of the following addresses:

- *Internet: http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2016–0012 at ''*Regulations.gov*,'' the Federal e-rulemaking portal);
- *U.S. Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; or
- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 400, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing or view or obtain copies of the petition and supporting materials.

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

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01, dated December 10, 2013, (superseding Treasury Order 120–01, dated January 24, 2003), to the TTB Administrator to perform the functions and duties in the administration and enforcement of these provisions.

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

Definition

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

Requirements

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

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

Dahlonega Plateau Petition

TTB received a petition from Amy Booker, President of the Dahlonega–Lumpkin Chamber & Visitors Bureau, on behalf of local vineyard and winery owners, proposing to establish the ''Dahlonega Plateau'' AVA. The proposed AVA is located in portions of Lumpkin and White Counties, in Georgia. The proposed AVA encompasses approximately 133 square miles. Seven wineries and 8 commercial vineyards covering a total of approximately 110 acres are distributed throughout the proposed AVA. The petition notes that there are an additional 12 acres of vineyards planned for planting within the proposed AVA in the next few years.

According to the petition, the distinguishing features of the proposed Dahlonega Plateau AVA are its topography and climate. Unless otherwise noted, all information and data pertaining to the proposed AVA contained in this document are from the petition for the proposed Dahlonega Plateau AVA and its supporting exhibits.

Name Evidence

The proposed Dahlonega Plateau AVA derives its name from a long, narrow, northeast-southwest trending plateau in the northern foothills of the Georgia Piedmont known as the Dahlonega Plateau. The plateau covers most of Lumpkin, Dawson, White, Pickens, and Cherokee Counties. However, the proposed AVA is limited to the northeastern portion of the plateau, in Lumpkin and White Counties, due to a lack of viticulture in the southwestern region of the plateau, as well topographical and climatic differences.

The town of Dahlonega, which is located within the proposed AVA, derived its name from the Cherokee word ''*dalonige,*'' which means ''yellow'' or ''golden,'' due to the presence of gold in the region. The town was named in 1837, and the geological feature derives its name, in part, from the name of the town. The petition states that the first written reference to the plateau was in a 1911 scientific paper by geologist L.C. Glenn, who

noted, ''In the Chestatee basin about [the town of] Dahlonega the upland is an old, well-dissected plateau * * *.''[1] The petition lists several other professional papers and books, both historical and contemporary, which describe a geological feature known as the ''Dahlonega Plateau.'' These sources are listed in the ''References'' section of the petition. Additionally, an excerpt from a contemporary travel guide describes the region of the proposed AVA as follows: ''In the northeastern section of the Piedmont lies the Dahlonega Plateau, a deeply eroded region of steep, forested hills and narrow valleys * * *.''[2] An online travel site states, ''A broad, high plain shadowed by some of Georgia's highest mountains, the Dahlonega Plateau offers near perfect growing conditions [for wine grapes].''[3] Finally, the petition includes a 1976 map of the physiographic regions of Georgia, from the Georgia Department of Natural Resources, which includes a region titled ''Dahlonega Uplands/Dahlonega Plateau.''

Boundary Evidence

The northern and northeastern boundaries of the proposed Dahlonega Plateau AVA follow the 1,800-foot elevation contour and separate the proposed AVA from the higher, steeper slopes of the Blue Ridge Mountains. The proposed eastern and southeastern boundaries follow a series of straight lines drawn between roads and elevation points marked on the USGS maps which separate the proposed AVA from the physiographic features known as the Hightower Ridges and the Central Uplands. The proposed southwestern and western boundaries also follow a series of straight lines drawn between roads and elevation points on the USGS maps in order to separate the proposed AVA from the southwestern portion of the plateau, which has a different topography and climate.

Distinguishing Features

The distinguishing features of the proposed Dahlonega Plateau AVA are its topography and climate.

Topography

The topography of the proposed AVA is characterized by broad, rounded hilltops separated by wide valleys. According to the petition, the distinctive topography is due to the underlying geology of the proposed AVA, which is comprised of layers of rocks that weather uniformly and are moderately resistant to erosion. Over time, wind and water have gradually worn down the underlying rocks and formed a gently rolling landscape with moderate elevations that are lower than the elevations to the north and east and higher than the elevations to the south and west.

By contrast, the geology of Blue Ridge Mountains to the north and northeast of the proposed AVA is comprised of rocks that are structurally higher and more erosion-resistant than those of the proposed AVA. Because the rocks do not erode as easily, the Blue Ridge Mountains generally have higher elevations than are found within the proposed Dahlonega Plateau AVA. Additionally, the peaks within the Blue Ridge Mountains are more rugged and the slopes are steeper because the surfaces have not been as softened or rounded by erosion as the hilltops of the proposed AVA.

To the immediate east and southeast of the proposed AVA are the Hightower Ridges. The geology of these ridges is characterized by strongly-layered, alternating zones of weak rocks and more resistant rocks. These alternating zones have a strong northeast-southwest orientation. Because these layers erode at different rates, the resulting topography has a ''washboard'' appearance, with steep, parallel ridges (formed from the more resistant layers) separated by narrow valleys (formed from the less resistant layers). Compared to the proposed AVA, the valleys generally have lower minimum elevations and the ridges generally have higher maximum elevations. Farther south and running parallel to the Hightower Ridges is the Central Uplands region. The topography of this region is similar to that of the proposed AVA, with broad valleys and rolling hills, but with a wider range of elevations.

To the west and southwest of the proposed AVA, in the southwestern portion of the geological feature known as the Dahlonega Plateau, the underlying geology is comprised of rocks that are less erosion-resistant and structurally lower than the rocks in the northeastern portion of the plateau, which are within the proposed AVA. Because the rocks are more susceptible to erosion, the topography of the southwestern portion of the plateau is generally flatter and lower than within the proposed AVA.

The following table shows the minimum, maximum, and mean elevations for the proposed Dahlonega Plateau AVA and the surrounding areas, which were described in the petition.[4]

TABLE 1—ELEVATIONS[5]

Region (direction)	Elevations (in feet)		
	Minimum	Maximum	Mean
Proposed AVA	1,141.7	2,345.8	1,554.2
Blue Ridge Mountains (north)	1,651.7	4,460.2	2,455.4
Blue Ridge Mountains (northeast)	1,441.1	4,418.8	2,449.6
Hightower Ridges (east)	1,317.1	2,386.4	1,565.2
Central Uplands (east)	1,088.2	3,164.5	1,446.5
Hightower Ridges (southeast)	1,053.3	2,180.8	1,315.0
Central Uplands (southeast)	1,069.5	2,584.4	1,256.8
Southwestern Dahlonega Plateau (west)	858.6	2,033.2	1,386.3

The topography of the proposed Dahlonega Plateau AVA and the surrounding regions has an effect on viticulture. Because the hills within the proposed AVA are gently sloped and have moderate elevations, the floors of

[1] Glenn, L.C., 1911, Denudation and Erosion in the Southern Appalachian Region and in the Monongahela Basin: U.S. Geological Survey, Prof. Paper 72.

[2] Howard, Blair. *Georgia Travel Adventures*. West Palm Beach, FL: Hunter Publishing, Inc., 2011.

[3] *http://www.offbeattravel.com/dahlonega-georgia.html*.

[4] Figure 7 of the petition shows the location of the comparison regions in relation to the proposed AVA.

[5] This information is also presented as a map in Figure 8 of the petition.

the intervening valleys are not highly shadowed and receive adequate sunlight for vineyards. The hillsides within the proposed AVA are also suitable for vineyards because they are not so steep as to make mechanical cultivation difficult or dangerous. The petition also states that the proposed AVA's location between higher and lower elevations allows cool nighttime air draining from the higher elevations of the Blue Ridge Mountains to flow through the proposed AVA and into the lower elevations to the south and west. As a result, vineyards within the proposed AVA benefit from cool nighttime temperatures but do not have a high risk of frost because the cool air does not settle.

By contrast, the petition states that the topography of the regions surrounding the proposed AVA is less suitable for vineyards. Within the Blue Ridge Mountains and Hightower Ridges to the north, east, and southeast of the proposed AVA, the narrow valleys are often shadowed by the surrounding steep, high slopes, meaning less light would reach any vineyard planted on the valley floors. The steepness of the slopes would also make mechanical cultivation of any vineyard planted on the sides of the mountains impractical. In the lower elevations of the regions to the south and west of the proposed AVA, cool air draining from higher elevations eventually settles and pools and would increase the risk of frost damage in any vineyard planted there.

Climate

Topography, and more specifically elevation, also affects the climate of the proposed Dahlonega Plateau AVA and the surrounding regions. The petition included information on the length of the growing season, growing degree day accumulations, and precipitation amounts within the proposed AVA and the surrounding regions. According to the petition, the proposed AVA's location between higher elevations to the north, east, and southeast and lower elevations to the southwest and west create climatic conditions that are ideal for growing grape varietals such as Cabernet Franc, Cabernet Sauvignon, Chardonnay, and Merlot.

Length of Growing Season: The petition states that the length of the growing season within the proposed Dahlonega Plateau AVA provides ample time for most *Vitis vinifera* (*V. vinifera*) varietals of grapes to ripen. The petition included the average minimum, maximum, and mean length of the growing season within the proposed AVA and the surrounding areas. Because the growing season length within a given region may fluctuate based on the range of elevations within that region, the petition also listed the percentage of terrain within each region that is within a given range of growing season length. The growing season data is shown in the following tables.

TABLE 2—LENGTH OF GROWING SEASON (DAYS) 1981–2010 [6]

Region (direction)	Minimum	Maximum	Mean
Proposed AVA	167	209	195
Blue Ridge Mountains (north)	94	192	164
Blue Ridge Mountains (northeast)	95	199	164
Hightower Ridges (east)	166	203	195
Central Uplands (east)	139	211	199
Hightower Ridges (southeast)	173	212	203
Central Uplands (southeast)	159	211	205
Southwestern Dahlonega Plateau (west)	178	219	201

TABLE 3—PERCENTAGE OF TERRAIN WITHIN GIVEN RANGE OF GROWING SEASON LENGTH [7]

Region (direction)	Growing season length					
	<160 days	160–170 days	170–180 days	180–190 days	190–200 days	>200 days
Proposed AVA		0.02	0.33	19.40	60.82	19.43
Blue Ridge Mountains (north)	39.86	21.45	23.96	14.69	0.04	
Blue Ridge Mountains (northeast)	44.04	16.90	14.32	16.39	8.35	
Hightower Ridges (east)		0.05	1.00	11.79	76.50	10.66
Central Uplands (east)	0.25	0.40	1.07	5.02	44.62	48.63
Hightower Ridges (southeast)			0.04	0.45	22.91	76.60
Central Uplands (southeast)		0.07	0.49	1.40	9.84	88.19
Southwestern Dahlonega Plateau (west)			0.01	6.80	42.74	50.45

The data in Table 2 shows that the mean growing season length is shorter in regions with high elevations and longer in regions with lower elevations. The proposed Dahlonega Plateau AVA, with its moderate elevations, has a mean growing season length that is longer than the regions to the north and northeast, which have higher elevations, and is shorter than the regions to the south and west, which have lower elevations.

Table 3 shows that over 60 percent of the terrain within the proposed AVA has a growing season length of 190 to 200 days, which is a higher percentage of terrain with that length of a growing season than any of the surrounding regions except the Hightower Ridges region to the east. The petition states that guidelines for selecting vineyard sites based on growing season lengths, published by the College of Agriculture and Life Sciences at Cornell University in conjunction with the Institute for the Application of Geospatial Technology,[8] do not recommend planting vineyards in regions with growing seasons shorter

[6] Growing season length calculated using 1981–2010 climate normals. Locations of weather stations are shown in Figure 15 of the petition. ''Growing season'' is defined as the number of days between the last 28 degree F day of the spring and the first occurrence of that temperature in the fall. Plant tissue freezes at 28 degrees F. This information is also presented as a map in Figure 17 of the petition.

[7] This information is also presented as a map in Figure 17 of the petition.

[8] *http://arcserver2.iagt.org/vll/downloads/BasicSiteEvaluation-2015.pdf.*

than 160 days because most grape varietals will not have time to ripen fully. Sites with growing seasons of between 180 and 190 days are described as ''good,'' while sites with growing seasons between 190 and 200 days are ''not limited by growing season.'' Sites with growing seasons of over 200 days are considered suitable for growing varietals that need a long time to mature. Based on this guidance, vineyard owners can plant many different grape varietals in the majority of the proposed AVA without the fear of having too short of a growing season for the grapes to ripen.

Growing Degree Days: The petition notes that although growing season length is important because it reflects the number of frost-free days, the temperatures that are reached during that frost-free period are just as important to viticulture. The petition states that grape vines do not grow and fruit does not mature when temperatures are below 50 degrees Fahrenheit (F). Therefore, a region that has a 180-day frost-free growing season would still be unsuitable for viticulture if temperatures seldom or never rise above 50 degrees F.

Growing degree day (GDD) accumulations are a way of describing the frequency that temperatures within a region exceed 50 degrees F during the growing season.[9] The Winkler zone scale ranges from the very cool Zone I, for regions accumulating 2,500 or fewer GDDs in a growing season, to the very warm Zone V, for regions accumulating over 4,000 GDDs. The petition included the information in the following table which shows the percentage of the proposed AVA and the surrounding areas that can be categorized into each of the five Winkler zones.[10]

TABLE 4—PERCENTAGE OF TERRAIN WITHIN EACH WINKLER ZONE [11]

Region (direction)	Zone I	Zone II	Zone III	Zone IV	Zone V
	Cooler to warmer				
Proposed AVA	.....	.....	0.16	98.84	.....
Blue Ridge Mountains (north)	.....	0.76	90.91	8.33	.....
Blue Ridge Mountains (northeast)	0.20	5.83	83.94	10.03	.....
Hightower Ridges (east)	.....	.....	9.02	90.98	.....
Central Uplands (east)	.....	.....	2.35	97.65	.....
South:					
Hightower Ridges (southeast)	.....	.....	0.05	90.12	9.83
Central Uplands (southeast)	.....	.....	0.50	41.46	58.04
Southwestern Dahlonega Plateau (west)	.....	.....	.....	68.39	31.61

The data in the table shows that all of the terrain within the proposed Dahlonega Plateau AVA is classified in the intermediate ranges of the Winkler scale (Zones III and IV). The proposed AVA has a higher percentage of terrain within Zone IV than any of the surrounding regions and lacks any terrain in the very cool Zone I, the cool Zone II, or the very warm Zone V. According to the petition, regions classified as Zones III or IV, such as the proposed AVA, are suitable for growing a diverse range of late-ripening varietals of *V. vinifera,* including Cabernet Sauvignon and Merlot. Regions that are categorized as Zones I and II have temperatures that are too low to ripen the varietals grown within the proposed AVA and are more suitable for growing cold-hardy French–American hybrid varietals and early ripening *V. vinifera* varietals such as Riesling and Pinot Noir. Finally, the petition states that regions categorized as the very warm Zone V are best suited for growing long-season varietals of wine grapes that tolerate the high heat, such as Muscadine, and for growing table grapes.

Precipitation: According to the petition, the rising elevations of the proposed AVA and the regions to the north and east cause the moisture-laden winds travelling inland from the Gulf of Mexico and Atlantic Ocean to drop their rain. Areas with higher elevations typically receive more annual rainfall than regions with lower elevations. The petition included information on the mean annual, growing season, and winter precipitation amounts for the proposed Dahlonega Plateau AVA and the surrounding regions. The following table is derived from information included in the petition. All data was gathered from 1981–2010 climate normals.

TABLE 5—MEAN PRECIPITATION AMOUNTS

[In inches] [12]

Region (direction)	Annual			Growing season (April–October)			Winter (December–February)		
	Minimum	Maximum	Mean	Minimum	Maximum	Mean	Minimum	Maximum	Mean
Proposed AVA	60.36	69.94	62.34	34.42	38.40	34.09	16.39	19.65	17.40
Blue Ridge Mountains (north)	59.48	80.73	68.10	32.19	44.52	37.59	15.63	22.43	18.80

[9] In the Winkler climate classification system, annual heat accumulation during the growing season, measured in annual GDDs, defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees F, the minimum temperature required for grapevine growth. See Albert J. Winkler, *General Viticulture* (Berkeley: University of California Press, 1974), pages 61–64.

[10] The growing degree day data for the proposed AVA and the surrounding regions was calculated using the PRISM Climate Group's 1981–2010 climate normals. The Parameter Elevation Regression on Independent Slopes Model (PRISM) climate data mapping system combined climate normals gathered from weather stations, along with other factors such as elevation, longitude, slope angles, and solar aspect to estimate the general climate patterns for the proposed AVA and the surrounding regions. Climate normals are only calculated every 10 years, using 30 years of data, and at the time the petition was submitted, the most recent climate normals available were from the period of 1981–2010. (PRISM Climate Group, Oregon State University, *http://prism.oregonstate.edu,* created 4 February 2004).

[11] This information is also presented as a map in Figure 19 of the petition.

[12] This information is also presented as a map in Figure 20 of the petition.

TABLE 5—MEAN PRECIPITATION AMOUNTS—Continued

[In inches] [12]

Region (direction)	Annual			Growing season (April–October)			Winter (December–February)		
	Minimum	Maximum	Mean	Minimum	Maximum	Mean	Minimum	Maximum	Mean
Blue Ridge Mountains (northeast)	65.31	79.74	70.00	36.41	46.53	39.81	16.92	20.04	18.53
Hightower Ridges (east)	61.86	68.96	64.97	34.07	38.86	36.29	17.10	18.30	17.52
Central Uplands (east)	57.03	68.25	60.78	31.52	38.45	33.74	15.50	18.23	16.54
Hightower Ridges (southeast)	56.81	62.66	59.59	31.06	34.61	32.46	15.70	17.35	16.65
Central Uplands (southeast)	53.87	62.85	67.14	29.39	34.73	31.30	14.91	17.35	15.86
Southwestern Dahlonega Plateau (west)	52.91	65.08	58.77	28.93	35.87	32.20	14.49	18.00	16.27

The data in the table shows that annual rainfall amounts within the proposed AVA are in the intermediate range. The regions to the north and east generally receive more rainfall annually than the proposed AVA, and the regions to the south and west generally receive less. The petition states that vineyard irrigation within the proposed AVA is seldom necessary because the average annual amount of rainfall within the proposed AVA is sufficient for the adequate hydration of grapevines.

Finally, the petition states that the amount of rainfall a region receives during the winter months has an effect on viticulture. Excessive precipitation during the winter months can delay bud break and/or pruning in vineyards, which can lead to a late harvest and a higher probability of fruit remaining on the vine when damaging fall frosts occur. Delayed bud break is less likely within the proposed AVA than in the higher elevations to the north and east because the proposed AVA has lower winter rainfall amounts. However, the possibility of delayed bud break within the proposed AVA is higher than within the lower elevations of the regions to the south and west, because those regions typically receive less winter precipitation.

Summary of Distinguishing Features

In summary, the evidence provided in the petition indicates that the viticulturally significant geographic features of the proposed Dahlonega Plateau AVA distinguish it from the surrounding regions in each direction. With respect to topography, the proposed AVA is characterized by broad, rounded hilltops, wide valleys, gentle slopes, and moderate elevations. By contrast, the regions to the north and northeast of the proposed AVA, within the Blue Ridge Mountains, feature high elevations and steep, rugged slopes. To the east and southeast of the proposed AVA, within the Hightower Ridges, the topography has a ''washboard'' appearance, with high, steep ridges separated by narrow valleys. To the west and southwest of the proposed AVA, the topography is generally flatter and elevations are lower.

Temperatures within the proposed Dahlonega Plateau are suitable for growing most *V. vinifera* varietals of grapes. The mean growing season length within the proposed AVA is longer than within the regions to the north and northeast and shorter than within the regions to the south and west. With respect to GDDs, the proposed AVA is classified in the intermediate Winkler Zones III and IV, with the majority of the proposed AVA classified as Zone IV. The regions to the north and northeast of the proposed AVA are primarily classified as Zone III and also contain areas classified as Zones I and II. The regions to the southeast and west have areas that are classified as the very warm Zone V.

Finally, precipitation amounts within the proposed AVA provide sufficient hydration for grapevines, making irrigation seldom necessary. The regions to the north and east of the proposed AVA generally receive more rainfall, and regions to the south and west generally receive less.

TTB Determination

TTB concludes that the petition to establish the Dahlonega Plateau viticultural area merits consideration and public comment, as invited in this notice of proposed rulemaking.

Boundary Description

See the narrative description of the boundary of the petitioned-for viticultural area in the proposed regulatory text published at the end of this proposed rule.

Maps

The petitioner provided the required maps, and they are listed below in the proposed regulatory text.

Impact on Current Wine Labels

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

If TTB establishes this proposed viticultural area, its name, ''Dahlonega Plateau,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the proposed regulation clarifies this point. Consequently, wine bottlers using the name ''Dahlonega Plateau'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, would have to ensure that the product is eligible to use the viticultural name as an appellation of origin if this proposed rule is adopted as a final rule. TTB is not proposing to designate the term ''Dahlonega,'' standing alone, as a term of viticultural significance if the AVA is established, in order to avoid potentially affecting a current label holder.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether it should establish the proposed viticultural area. TTB is also interested in receiving comments on the

sufficiency and accuracy of the name, boundary, soils, climate, and other required information submitted in support of the petition. Please provide any available specific information in support of your comments.

Because of the potential impact of the establishment of the proposed Dahlonega Plateau AVA on wine labels that include the term ''Dahlonega Plateau'' as discussed above under Impact on Current Wine Labels, TTB is particularly interested in comments regarding whether there will be a conflict between the proposed area name and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed viticultural area will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example, by adopting a modified or different name for the viticultural area.

Submitting Comments

You may submit comments on this notice by using one of the following three methods:

• *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this notice within Docket No. TTB–2016–0012 on ''*Regulations.gov*,'' the Federal e-rulemaking portal, at *http://www.regulations.gov*. A direct link to that docket is available under Notice No. 166 on the TTB Web site at *https://www.ttb.gov/wine/wine-rulemaking.shtml*. Supplemental files may be attached to comments submitted via *Regulations.gov*. For complete instructions on how to use *Regulations.gov*, visit the site and click on the ''Help'' tab.

• *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005.

• *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 400, Washington, DC 20005.

Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 166 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and TTB considers all comments as originals.

In your comment, please clearly indicate if you are commenting on your own behalf or on behalf of an association, business, or other entity. If you are commenting on behalf of an entity, your comment must include the entity's name, as well as your name and position title. If you comment via *Regulations.gov,* please enter the entity's name in the ''Organization'' blank of the online comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

TTB will post, and you may view, copies of this notice, selected supporting materials, and any online or mailed comments received about this proposal within Docket No. TTB–2016–0012 on the Federal e-rulemaking portal, *Regulations.gov,* at *http://www.regulations.gov*. A direct link to that docket is available on the TTB Web site at *https://www.ttb.gov/wine/wine-rulemaking.shtml* under Notice No. 166. You may also reach the relevant docket through the *Regulations.gov* search page at *http://www.regulations.gov*. For information on how to use *Regulations.gov,* click on the site's ''Help'' tab.

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that the Bureau considers unsuitable for posting.

You may also view copies of this notice, all related petitions, maps and other supporting materials, and any electronic or mailed comments that TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. You may also obtain copies at 20 cents per 8.5- x 11-inch page. Please note that TTB is unable to provide copies of USGS maps or other similarly-sized documents that may be included as part of the AVA petition. Contact TTB's information specialist at the above address or by telephone at 202–453–2265 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

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

Executive Order 12866

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

Drafting Information

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

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

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

PART 9—AMERICAN VITICULTURAL AREAS

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

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.____ to read as follows:

§ 9.____ Dahlonega Plateau.

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

(b) *Approved maps.* The 9 United States Geological Survey (USGS) 1:24,000 scale topographic maps used to determine the boundary of the Dahlonega Plateau viticultural area are titled:

(1) Dawsonville, GA, 1997;
(2) Campbell Mountain, GA, 2014;
(3) Nimblewill, GA, 1997;
(4) Noontootla, GA, 1988;
(5) Suches, GA, 1988;
(6) Neels Gap, GA, 1988;
(7) Dahlonega, GA, 1951;
(8) Cowrock, GA, 1988; and
(9) Cleveland, GA, 1951; photorevised 1973; photoinspected 1981.

(c) *Boundary.* The Dahlonega Plateau viticultural area is located in Lumpkin and White Counties, Georgia. The boundary of the Dahlonega Plateau viticultural area is as described below:

(1) The beginning point is found on the Dawsonville map at the marked 1,412-foot elevation point at the intersection of an unnamed light-duty road known locally as Castleberry Bridge Road and an unimproved road known locally as McDuffie River Road.

(2) From the beginning point, proceed north-northeast in a straight line approximately 0.89 mile to the marked 1,453-foot elevation point; then

(3) Proceed northwest in a straight line approximately 1.94 miles, crossing onto the Campbell Mountain map, to the intersection of Arrendale Road and Windy Oaks Road; then

(4) Proceed northwest in a straight line approximately 0.77 mile to the intersection of the 1,400-foot elevation contour and Dennson Branch; then

(5) Proceed northwest in a straight line approximately 0.79 mile to the intersection of the 1,360-foot elevation contour and Mill Creek; then

(6) Proceed northwest in a straight line approximately 0.48 mile to the intersection of the 1,500-foot elevation contour and Sheep Wallow Road; then

(7) Proceed northwest in a straight line approximately 1.74 miles to the intersection of State Route 52 and the Chattahoochee National Forest boundary; then

(8) Proceed northwest in a straight line approximately 1.89 miles, crossing onto the Nimblewill map and then crossing over the marked 1,749-foot elevation point along an unnamed light-duty road known locally as Nimblewill Church Road, to the line's intersection with the 1,800-foot elevation contour; then

(9) Proceed generally east-northeast along the 1,800-foot elevation contour approximately 170.72 miles (straight-line distance between points is approximately 20.43 miles), crossing over the Noontootla, Suches, Neels Gap, and Dahlonega maps and onto the Cowrock map, to the intersection of the 1,800-foot elevation contour with Tom White Branch; then

(10) Proceed southeast along Tom White Branch approximately 0.73 mile to the 1,600-foot elevation contour; then

(11) Proceed southeast in a straight line approximately 1.10 miles to the intersection of Cathey Creek and the secondary highway marked Alt. 75; then

(12) Proceed southwest in a straight line approximately 3.77 miles, crossing onto the Cleveland map, to the intersection of two unnamed light-duty roads known locally as Dockery Road and Town Creek Road; then

(13) Proceed south in a straight line approximately 0.58 mile to the marked 1,774-foot elevation point; then

(14) Proceed southwest in a straight line approximately 0.60 mile to the 1,623-foot benchmark (BM); then

(15) Proceed southwest in a straight line approximately 2.73 miles, crossing onto the Dahlonega map, to the 1,562-foot benchmark; then

(16) Proceed southwest in a straight line approximately 3.46 miles to the marked 1,480-foot elevation point near the Mt. Sinai Church; then

(17) Proceed southwest in a straight line approximately 2.13 miles to the summit of Crown Mountain; then

(18) Proceed west in a straight line approximately 1.28 miles, crossing onto the Campbell Mountain map, to the intersection of the 1,160-foot elevation contour and Cane Creek; then

(19) Proceed southwest in a straight line approximately 1.61 miles to the intersection of the 1,300-foot elevation contour and Camp Creek; then

(20) Proceed southwest in a straight line approximately 2.02 miles, crossing onto the Dawsonville map, to the intersection of the 1,200-foot elevation contour with the Etowah River; then

(21) Proceed southwest in a straight line approximately 1.29 miles to the beginning point.

November 22, 2016.

John J. Manfreda,

Administrator.

[FR Doc. 2016–28839 Filed 12–1–16; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1904, 1910, 1915 and 1926

[Docket No. OSHA–2012–0007]

RIN 1218–AC67

Standards Improvement Project-Phase IV

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of proposed rulemaking; extension of written comment period.

SUMMARY: On October 4, 2016, OSHA published a Notice of Proposed Rulemaking (NPRM) titled ''Standards Improvement Project-Phase IV.'' The period for submitting comments is being extended 30 days to allow parties affected by the rule more time to review the proposed rule and collect information and data necessary for comments.

DATES: Comments must be submitted by January 4, 2017. All submissions must bear a postmark or provide other evidence of the submission date.

ADDRESSES: Submit comments and additional material using any of the following methods:

Electronic. Submit comments and attachments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions online for making electronic submissions.

Facsimile. Commenters may fax submissions, including any attachments that are no longer than 10 pages in length to the OSHA Docket Office at (202) 693–1648; OSHA does not require hard copies of these documents. Commenters must submit lengthy attachments that supplement these documents (*e.g.,* studies, journal articles) to the OSHA Docket Office, Technical Data Center, Room N3653, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210. These attachments must clearly identify the commenter's name, date, subject, and docket number (OSHA–2012–0007) so the Agency can attach them to the appropriate comments.

Regular mail, express mail, hand (courier) delivery, or messenger service. Submit a copy of comments and any additional material (*e.g.,* studies, journal articles) to the OSHA Docket Office, Docket No. OSHA–2012–0007, Technical Data Center, Room N3653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–2350 (TDY number: (877) 889–5627). Note that security procedures may result in significant delays in receiving comments and other written materials by regular mail. Contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express mail, hand delivery, or messenger service. The hours of operation for the OSHA Docket Office are 10:00 a.m.–3:00 p.m., e.t.

Instructions. All submissions received must include the Agency name and the docket number for this rulemaking (OSHA–2012–0007). OSHA places all submissions, including any personal information provided, in the public

docket without change; this information will be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting information they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

OSHA requests comments on all issues related to this proposed rule, including whether these revisions will have any economic, paperwork, or other regulatory impacts on the regulated community.

Docket. To read or download submissions or other material in the docket (including material referenced in the preamble), go to *http://www.regulations.gov,* or contact the OSHA Docket Office at the address listed above. While the Agency lists all documents in the docket in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are accessible at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

Press inquiries. Frank Meilinger, Director, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information. Blake Skogland, Office of Construction Standards and Guidance, OSHA Directorate of Construction, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3468, Washington, DC 20210; telephone: (202) 693–2020; fax: (202) 693–1689; email: *skogland.blake@dol.gov.*

Copies of this Federal Register notice. Electronic copies are available at *http://www.regulations.gov.* This Federal Register notice, as well as news releases and other relevant information, also are available at OSHA's Web page at *http://www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Extension of the Comment Period

On October 4, 2016, at 81 FR 68504, OSHA published a Notice of Proposed Rulemaking (NPRM) titled ''Standards Improvement Project-Phase IV.'' In this NPRM, OSHA continues its efforts to remove or revise outdated, duplicative, unnecessary, and inconsistent requirements in its safety and health standards by proposing 18 revisions to existing standards in its recordkeeping, general industry, maritime, and construction standards, with most of the revisions to its construction standards. The NPRM provides an explanation of the rule and its economic analysis, and solicits comments from the public regarding the contents of the proposal. The period for submitting comments was to expire on December 5, 2016. However, two stakeholders have requested an extension of 45 days for submitting written comments and information. Both stakeholders noted that the NPRM addresses 18 separate standards that each require separate analysis of the proposed changes.

OSHA believes that a 30 day extension is sufficient to facilitate the submission of thorough reviews and provide OSHA with a complete record for this proposed rule so that OSHA has all the information needed to develop a final rule. Accordingly, OSHA extends the comment period by 30 days, and written comments must be submitted by January 4, 2017.

II. Submission of Comments and Access to the Docket

OSHA invites comments on the proposed revisions described, and the specific issues raised, in the NPRM. These comments should include supporting information and data. OSHA will carefully review and evaluate these comments, information, and data, as well as any other information in the rulemaking record, to determine how to proceed. When submitting comments, parties must follow the procedures specified in the previous sections titled **DATES** and **ADDRESSES**. The comments must provide the name of the commenter and docket number (OSHA–2012–0007). The comments also should identify clearly the provision of the proposal each comment is addressing, the position taken with respect to the proposed provision or issue, and the basis for that position. Comments, along with supporting data and references, submitted on or before the end of the specified comment period will become part of the proceedings record, and will be available for public inspection and copying at *http://www.regulations.gov.*

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, authorized the preparation of this notice pursuant to Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), 29 CFR part 1911, and Secretary's Order 1–2012 (77 FR 3912).

Signed at Washington, DC, on November 28, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2016–28924 Filed 12–1–16; 8:45 am]

BILLING CODE 4510–26–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–R09–OAR–2016–0339; FRL–9955–92–Region 9]

Revisions to the Source-Specific Federal Implementation Plan for Four Corners Power Plant, Navajo Nation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing limited revisions to the source-specific Federal Implementation Plan (FIP) that was promulgated to regulate air pollutant emissions from the Four Corners Power Plant (FCPP), a coal-fired power plant located on the reservation lands of the Navajo Nation, near Farmington, New Mexico. These limited revisions propose to make certain provisions of the FIP consistent with national actions and rulemakings promulgated since 2012; update the FIP to reflect recent operating changes; and add new provisions to the FIP to include the air pollution control requirements for FCPP of a Consent Decree entered in the United States District Court for the District of New Mexico on August 17, 2015.

DATES: Any comments on this proposal must arrive by January 3, 2017.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–R09–OAR–2016–0339, at *http://www.regulations.gov,* or via email to *lee.anita@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment.

The written comment is considered the official comment and should include discussion of all points you wish to make. 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 EPA's full public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Anita Lee, EPA Region IX, (415) 972–3958, *lee.anita@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Background
A. Action
B. Facility
C. Attainment Status
D. The EPA's Authority To Promulgate a FIP in Indian Country
E. Historical Overview of FCPP FIP Actions
II. Basis for Proposed Action
III. Summary of FIP Revisions
A. Proposed FIP Revisions
B. Justification for Proposed FIP Revisions
C. Compliance Schedule
IV. Proposed Action and Solicitation of Comments
V. Environmental Justice Considerations
VI. Administrative Requirements
A. Executive Order 12866
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments Executive Order 12875: Enhancing the Intergovernmental Partnership
G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. Background

A. Action

In today's action, the EPA is proposing limited revisions to the FIP for FCPP that we promulgated on May 7, 2007 (''2007 FIP'') and August 24, 2012 (''2012 FIP'').[1] The 2007 and 2012 regulations are codified in the Code of Federal Regulations (CFR) at 40 CFR 49.5512, and we refer collectively to the provisions from the 2007 and 2012 actions as the ''FIP'' or the ''FCPP FIP.'' The EPA established federally enforceable emission limitations for particulate matter (PM), sulfur dioxide (SO_2), oxides of nitrogen (NO_X), and opacity in the FCPP FIP.

The EPA is proposing revisions to the FIP for several reasons: (1) To make certain provisions in the FIP consistent with national actions and rulemakings promulgated since 2012; (2) to update the FIP to reflect recent operating changes; and (3) to add new provisions to the FIP to include the air pollution control requirements for FCPP of a Consent Decree (''Consent Decree'') entered in the United States District Court for the District of New Mexico on August 17, 2015.[2]

To update the FCPP FIP for consistency with national actions and rulemakings, we are proposing to remove: (1) Emission limit exemptions that apply during periods of startup and shutdown; (2) a provision allowing for an affirmative defense during periods of malfunctions; and (3) exemptions for water vapor from the opacity standard and monitoring and reporting requirements.[3] These revisions, if finalized, would make the FCPP FIP consistent with the EPA's interpretations of Clean Air Act (CAA, or ''the Act'') requirements, as reflected in the Agency's recent action concerning how provisions in state implementation plans (SIPs) treat excess emissions during startup, shutdown, and malfunctions (''2015 SSM Action'').[4]

The EPA is also proposing to update the testing requirements for PM in the FCPP FIP to be consistent with PM testing requirements promulgated nationally in the Mercury and Air Toxics Standards (MATS) Rule.[5] The revisions to the PM testing requirements, if finalized, would increase the frequency of PM testing in the FIP to match the MATS Rule, allow the operator the option to demonstrate compliance using alternative methods, *e.g.,* PM continuous emission monitoring systems (PM CEMS), and streamline the existing PM testing requirements.

In order to update the FIP to reflect the current operation of FCPP, we are proposing to add a statement to the applicability section of the FIP to clarify that Units 1, 2 and 3 have been permanently retired, and to remove certain provisions related to Units 1, 2, and 3 from the FIP that are no longer applicable following the permanent retirement of those units. The operator of FCPP removed those units from service by January 1, 2014 to comply with the requirements in the 2012 FIP that the EPA promulgated to address the Best Available Retrofit Technology (BART) provisions of the Regional Haze Rule for NO_X.[6] These revisions, if finalized, would enhance regulatory clarity by removing requirements that apply to emission units that have permanently ceased operation.

The final changes in this proposed rulemaking are to add new provisions to the FCPP FIP to reflect requirements in the Consent Decree. Generally, the Consent Decree requires greater emission reductions of SO_2, NO_X, and PM by establishing lower emission limitations than the existing limitations in the FIP for these pollutants. The Consent Decree requires the operator of the facility to request that the EPA amend the FCPP FIP to incorporate the requirements and limitations from the Consent Decree. These proposed revisions, if finalized, would make the emission limitations and other requirements from the Consent Decree federally enforceable.

B. Facility

FCPP is a coal-fired power plant located on the Navajo Nation Indian Reservation, just west of Farmington, New Mexico, and it is co-owned by several entities and operated by Arizona Public Service (APS).[7] The facility includes two units, Units 4 and 5, each with a capacity of 770 megawatts (MW) net generation, providing a total capacity of 1540 MW.[8] Operations at the facility produce emissions of air pollutants, including SO_2, NO_X, and PM. Existing pollution control equipment on Units 4 and 5 include

[1] *See* 72 FR 25698 (May 7, 2007) and 77 FR 51620 (August 24, 2012).

[2] *See* Consent Decree for *Dine CARE* v. *Arizona Public Service Company* and *EPA* v. *Arizona Public Service Company,* US District Court for the District of New Mexico, Case No. 1:11–cv–00889–JB–SCY (August 17, 2015).

[3] *See* 72 FR 25705 (May 7, 2007) and 40 CFR 49.5512(h)(2) and (h)(3), and 40 CFR 49.5512(c)(7).

[4] *See* 80 FR 33840 (June 12, 2015).

[5] *See* 77 FR 9303 (February 16, 2012) and 81 FR 20172 (April 6, 2016) (Final Technical Corrections).

[6] *See* 77 FR 51620 (August 24, 2012) and 40 CFR 49.5512(i)(3).

[7] FCPP is currently co-owned by Arizona Public Service, Public Service Company of New Mexico, Salt River Project, Tucson Electric Power, and El Paso Electric Company.

[8] APS retired Units 1–3 (total capacity of 560 MW) at FCPP in January 2014 as part of a ''better than BART'' alternative it suggested to the EPA. For more information on the EPA's ''better than BART'' determination, please *see* 77 FR 51620 (August 24, 2012).

baghouses for PM control, lime spray towers (''scrubbers'') for SO_2 control, and low-NO_X burners for limiting NO_X formation during the combustion process. FCPP is in the process of installing selective catalytic reduction (SCR) on Units 4 and 5 for additional NO_X emission reductions to comply with the ''better than BART'' provisions of the 2012 FIP (under 40 CFR 49.5512(i)(3)) and with the Consent Decree.

C. Attainment Status

FCPP is located in the Four Corners Interstate air quality control region, which is designated attainment for all criteria pollutants under the CAA.[9]

D. The EPA's Authority To Promulgate a FIP in Indian Country

When the CAA was amended in 1990, Congress included a new provision, section 301(d), granting the EPA authority to treat tribes in the same manner as states where appropriate.[10] In 1998, the EPA promulgated regulations known as the Tribal Authority Rule (TAR).[11] The EPA's promulgation of the TAR clarified, among other things, that state air quality regulations generally do not, under the CAA, apply to facilities located anywhere within the exterior boundaries of Indian reservations.[12] Prior to the addition of section 301(d) and promulgation of the TAR, some states had mistakenly included emission limitations in their SIPs that they may have believed could apply under the CAA to private facilities operating on adjacent Indian reservations.

In the preambles to the proposed and final 1998 TAR, the EPA generally discusses the legal basis in the CAA that authorizes the EPA to regulate sources of air pollution in Indian country.[13] The EPA concluded that the CAA authorizes the EPA to protect air quality throughout Indian country.[14] In fact, in promulgating the TAR, the EPA specifically provided that, pursuant to the discretionary authority explicitly granted to the EPA under sections 301(a) and 301(d)(4) of the Act, the EPA ''[s]hall promulgate without unreasonable delay such federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) [sic] and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.'' [15]

E. Historical Overview of FCPP FIP Actions

On September 8, 1999, the EPA proposed a source-specific FIP for FCPP.[16] The 1999 proposed FIP stated: ''Although the facility has been historically regulated by New Mexico since its construction, the state lacks jurisdiction over the facility or its owners or operations for CAA compliance or enforcement purposes.'' The EPA intended for the 1999 FIP to ''federalize'' the emission limitations that New Mexico had erroneously included in its SIP.[17] The EPA received comments on the proposed 1999 FIP. However, at that time, concurrent negotiations between an environmental non-governmental organization, APS, and the Navajo Nation resulted in an agreement by APS to voluntarily increase the SO_2 removal efficiency from the scrubbers at FCPP. The EPA did not take final action on the 1999 proposal.

In 2006, the EPA proposed a new source-specific FIP for FCPP and took action to finalize it in 2007.[18] This new FIP imposed federally enforceable emission limitations for SO_2, based on the increased scrubber SO_2 removal efficiency (72 to 88 percent), and for PM, based on the PM emission limitation from the New Mexico SIP. The 2006 proposed FIP also established an emission limitation for opacity and a requirement for control measures to limit dust emissions from coal handling and storage facilities, flyash handling and storage facilities, and from road-sweeping activities. In addition, the 2006 proposed FIP contained NO_X emission limitations that already applied to FCPP as part of the Acid Rain Program created in the 1990 CAA Amendments.

On August 24, 2012, the EPA promulgated a final rule that established limits for NO_X emissions from FCPP under the BART provision of the Regional Haze Rule, as well as control measures to limit emissions of dust.[19] The final rule required the owners of FCPP to choose between two strategies for BART compliance: (1) Compliance with a plant-wide BART emission limitation of 0.11 pounds of NO_X per million British thermal units of heat input (lb/MMBtu) by October 23, 2017, or (2) retirement of Units 1, 2, and 3 by January 1, 2014 and compliance with a BART emission limitation for NO_X of 0.098 lb/MMBtu on Units 4 and 5 by July 31, 2018. The second BART compliance strategy, involving retirement of Units 1, 2, and 3, was based on a plan originally put forth by APS. This compliance strategy was proposed and finalized as an alternative emission control strategy that achieved greater reasonable progress than BART (''better than BART'').[20] APS permanently ceased operation of Units 1, 2, and 3 at FCPP by January 1, 2014, and is currently engaged in the process of installing SCR on Units 4 and 5 to meet the applicable NO_X emission limitations.

The provisions of the 2007 FIP are codified at 40 CFR 49.5512(a)–(h).[21] The BART provisions of the 2012 FIP are codified at 40 CFR 49.5512(i), and the dust control measures from the 2012 FIP are codified at 40 CFR 49.5512(j).

II. Basis for Proposed Action

In this proposed FIP revision, the EPA is exercising its discretionary authority under sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a). The EPA is proposing to find that it is ''necessary or appropriate'' to revise the FCPP FIP, because it contains certain provisions

[9] *See* 40 CFR 81.332.

[10] *See* 40 U.S.C. 7601(d).

[11] *See* 40 CFR parts 9, 35, 49, 50 and 81. See also 63 FR 7254 (February 12, 1998).

[12] *See* 63 FR 7254 at 7258 (noting that unless a state has explicitly demonstrated its authority and has been expressly approved by the EPA to implement CAA programs in Indian country, the EPA is the appropriate entity to implement CAA programs prior to tribal primacy), *Arizona Public Service Company* v. *EPA.,* 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied sub nom, Michigan* v. *EPA.,* 532 U.S. 970 (2001) (upholding the TAR); *see* also *Alaska* v. *Native Village of Venetie Tribal Government,* 533 U.S. 520, 526 n.1 (1998) (primary jurisdiction over Indian country generally lies with federal government and tribes, not with states).

[13] *See* 59 FR 43956 (August 25, 1994); 63 FR 7253 (February 12, 1998).

[14] *See* 63 FR 7253 at 7262 (February 12, 1998); 59 FR 43956 at 43960–43961 (August 25, 1994) (citing, among other things, to CAA sections 101(b)(1), 301(a), and 301(d)).

[15] *See* 63 FR at 7273 (codified at 40 CFR 49.11(a)). In the preamble to the final TAR, the EPA explained that it was inappropriate to treat Tribes in the same manner as states with respect to section 110(c) of the Act, which directs the EPA to promulgate a FIP within 2 years after the EPA finds a state has failed to submit a complete state plan or within 2 years after the EPA disapproval of a state plan. Although the EPA is not required to promulgate a FIP within the 2-year period for tribes, the EPA promulgated 40 CFR 49.11(a) to clarify that the EPA will continue to be subject to the basic requirement to issue any necessary or appropriate FIP provisions for affected tribal areas within some reasonable time. *See* 63 FR at 7264–65.

[16] *See* 64 FR 48731 (September 8, 1999).

[17] *Id.* at 48733.

[18] *See* 72 FR 25698 (May 7, 2007), codified at 40 CFR 49.5512(a)–(h).

[19] *See* 77 FR 51620 (August 24, 2012).

[20] For additional information regarding the EPA's analyses regarding BART and the alternative emission control strategy, see the EPA's BART proposal (75 FR 64221, October 29, 2010), supplemental proposal (76 FR 10530, February 25, 2011) and final rule (77 FR 51620, August 24, 2012).

[21] The 2007 FIP was originally codified at 40 CFR 49.23. On April 29, 2011, the FCPP FIP was redesignated to 40 CFR 49.5512 at 76 FR 23879 (April 29, 2011).

that are inconsistent with more recent actions and rulemakings promulgated by the EPA in the MATS Rule and the statutory requirements of the CAA, as reflected in the 2015 SSM Action. Thus, these provisions of the current FCPP FIP are inconsistent with current requirements and need to be revised to make them consistent with regulatory and statutory requirements. The EPA is also concerned that that these inconsistencies create confusion and could lead to regulatory uncertainty by the source, regulators, courts, or affected members of the public. Additionally, the Consent Decree requires APS to submit a request to the EPA to amend its FIP to include requirements of the Consent Decree. APS submitted its request on June 9, 2016.[22] The EPA is also proposing to find that it is ''necessary or appropriate'' to revise the FIP at this time to include the Consent Decree provisions. For the reasons set forth above, we are proposing to find that limited revisions to the FIP for FCPP are ''necessary or appropriate'' to further protect air quality on the Navajo Nation.

III. Summary of Proposed FIP Revisions

A. Proposed FIP Revisions

The EPA is proposing limited revisions to the FCPP FIP at 40 CFR 49.5512 described as follows. We have included a document in the docket for this rulemaking that shows the original text of 40 CFR 49.5512 and the EPA's proposed revisions to that text.[23]

1. Revisions to 40 CFR 49.5512(a)

In the applicability section of the FIP, the EPA is proposing to add a statement that Units 1, 2, and 3 at FCPP permanently ceased operation by January 1, 2014 pursuant to the requirements of 40 CFR 49.5512(i)(3).

2. Revisions to 40 CFR 49.5512(c)

The EPA is proposing to: (1) Specify that the definitions in paragraph (c) of 40 CFR 49.5512(c) apply to paragraphs (a) through (j) of 40 CFR 49.5512; (2) delete the definition of affirmative defense at 40 CFR 49.5512(c)(1); and (3) delete the portion of the definition of malfunction that provides for an affirmative defense for malfunctions at 40 CFR 49.5512(c)(7). We are also proposing to delete portions of the definitions for shutdown (at 40 CFR 49.5512(c)(12)) and startup (at 40 CFR 49.5512(c)(13)) that relate to Units 1, 2, and 3.

3. Revisions to 40 CFR 49.5512(d)

The EPA is proposing to add a statement that the emission limitations under 40 CFR 49.5512(d) apply to FCPP at all times. Under 40 CFR 49.5512(d)(2), we are proposing to delete the portion of the PM emission limitation that provides detailed specifications, *i.e.,* test duration and minimum collection volume, related to PM testing. The EPA is also proposing to delete the dust provisions in 40 CFR 49.5512(d)(3). Under 40 CFR 49.5512(d)(4), we are proposing to delete the exclusion of uncombined water droplets from the opacity standard and to add a provision stating that any unit for which the owner or operator installs, calibrates, maintains, and operates a PM CEMS to demonstrate compliance with emission limitations for PM will be exempt from the opacity standard. Finally, the EPA is proposing to delete the portion of the emission limitation for NO_X under 40 CFR 49.5512(d)(5)(i) that applied to Units 1, 2, and 3.

4. Revisions to 40 CFR 49.5512(e)

Paragraph (e) of 40 CFR 49.5512 addresses testing and monitoring and generally uses sub-paragraphs (e)(1)–(e)(8) to outline pollutant-specific requirements to ensure compliance with the emission limitations in paragraph (d). Under 40 CFR 49.5512(e), the EPA is proposing to delete specific provisions for PM testing and move revised provisions for PM testing to 40 CFR 49.5512(e)(3). Also under 40 CFR 49.5512(e), we are proposing to remove provisions that exempt units from opacity monitoring requirements during periods when the stack is saturated and also to remove a presumption that high opacity readings that occur when the baghouse is operating within normal parameters are caused by water vapor and shall not be considered a violation. In addition, we are proposing to move the opacity monitoring requirements from 40 CFR 49.5512(e) to 40 CFR 49.5512(e)(6). In paragraph 49.5512(e)(1), we are proposing to delete provisions that specify the compliance deadline for installing CEMS for SO_2 and NO_X because CEMS for those pollutants have already been installed at FCPP. In paragraph (e)(3), we are proposing to revise the testing requirements for PM to be consistent with the three options for PM testing under the MATS Rule in 40 CFR part 63 subpart UUUUU. In paragraph (e)(6), we are proposing to clarify that (e)(6) applies if the opacity standard in paragraph (d)(4) is applicable, *i.e.,* if the owner or operator has not elected to install and certify PM CEMS for demonstrating compliance with PM emission limitations. In addition, we are revising the opacity monitoring requirements in (e)(6) to provide three options for determining compliance with the opacity standard, if the opacity standard applies. Because Units 1, 2, and 3 at FCPP have permanently ceased operation, the EPA is also proposing to delete the testing requirements for those units in paragraph (e)(8).

5. Revisions to 40 CFR 49.5512(f)

The EPA is proposing revisions to the reporting and recordkeeping requirements to provide additional clarity that all reports and notifications required in paragraph (f), (f)(4), and (f)(4)(ii) should be reported to the Navajo Nation Environmental Protection Agency (NNEPA) and the EPA. We are also revising paragraph (f) to require that the Air Division and the Enforcement Division within the Region IX office of the EPA be provided reports and notifications. Paragraph (f)(1) includes CEMS notification and recordkeeping requirements, and we are proposing to add notification and recordkeeping requirements for the Continuous Opacity Monitoring Systems (COMS) and visible emission testing. In addition, we are also proposing to delete the water vapor exemptions in paragraphs (f)(4)(i) and (f)(4)(i)(H). Finally, paragraph (f)(4)(i)(G) requires written reports to include opacity exceedances from the COMS, and we are proposing to also require reporting of opacity exceedances from the visible emission performance tests.

6. Revisions to 40 CFR 49.5512(h)

The EPA is proposing to delete the startup and shutdown exemptions for opacity and PM at paragraph (h)(2), and to delete the provisions related to an affirmative defense for malfunctions in paragraph (h)(3).

7. Revisions to 40 CFR 49.5512(i)

The EPA is proposing to delete the technical specifications in paragraph (i)(1) for annual PM testing and require that PM testing be performed in accordance with paragraph (e)(3) of 49.5512, which requires either testing using procedures in accordance with the MATS Rule at 40 CFR part 63 subpart UUUUU, or the installation, calibration, maintenance, and operation of a continuous parametric monitoring system (CPMS) or a CEMS for PM. In

[22] *See* ''Request to Include Consent Decree in Four Corners Federal Implementation Plan'' from Thomas H. Livingston, Fossil Plant Manager and Responsible Official, to Elizabeth Adams, Acting Director, Air Division, EPA Region IX, dated June 9, 2016.

[23] *See* document titled ''2016_1118 FCPP FIP existing reg text RLSO'' in the docket for this proposed rulemaking.

addition, under paragraph (i)(2)(iii), we are proposing to correct a typographical error.

8. Addition of 40 CFR 49.5512(k)

The EPA is proposing to promulgate paragraph (k) to add emission limitations and other provisions from the Consent Decree to the FCPP FIP.

B. Justification for Proposed FIP Revisions

1. Revisions to 40 CFR 49.5512(a)

The EPA is proposing to add a statement to the applicability paragraph of the FIP that Units 1, 2, and 3 at the Four Corners Power Plant permanently ceased operation by January 1, 2014 pursuant to the requirements of 40 CFR 49.5512(i)(3). This proposed revision is intended to update the FIP to reflect current operation at FCPP.

The EPA's 2012 FIP for Regional Haze required FCPP to comply with either emission limitations for BART, achievable with the installation of SCR on all five units at FCPP, or a ''better than BART'' alternative.[24] The operator of FCPP elected to comply with the alternative. Under the alternative, the operator retired Units 1, 2, and 3 by January 1, 2014, and has begun the process to install SCR on the Units 4 and 5.

Units 1, 2, and 3 have not been operated since January 1, 2014, and the operator has been begun the process to dismantle those units. Accordingly, it is reasonable to add a statement regarding the status of those units. This revision, if finalized as proposed, would not relax any requirement or affect the stringency of the FIP. This proposed change to update the FIP would not have any effect on air quality in the area surrounding FCPP.

2. Revisions to 40 CFR 49.5512(c)

Paragraph (c) defines certain terms used in the FIP. As discussed elsewhere, the EPA is proposing to add a new paragraph (k) that includes provisions, including a separate set of definitions, from the Consent Decree. Therefore, to avoid confusion associated with slight differences that may exist between terms common to both sets of definitions, we are proposing to specify that the definitions in paragraph (c) apply to paragraph (a) through (j). This revision, if finalized as proposed, would not relax any requirement or affect the stringency of the FIP, and would not have any effect on air quality in the area surrounding FCPP.

Consistent with the proposed revisions to paragraph (a), the EPA is proposing to remove portions of definitions for shutdown and startup (at paragraph (c)(12) and (13)), related to Units 1, 2, and 3, in order to update the FIP to reflect current operating conditions. Because these units were retired by January 1, 2014, these revisions, if finalized as proposed, would not relax any requirements or affect the stringency of the FIP as contemplated by CAA section 110(l). These proposed changes to update the FIP would not have any effect on air quality in the area surrounding FCPP.

The EPA is also proposing to remove definitions and provisions in paragraph 49.5512(c) that provide an affirmative defense for malfunction episodes. After the EPA's promulgation of the 2007 FIP, the United States Court of Appeals for the District of Columbia (''D.C. Circuit'') ruled that CAA sections 113 (federal enforcement) and 304 (citizen suits) preclude EPA from creating affirmative defense provisions in the Agency's own regulations imposing emission limitations on sources.[25] The D.C. Circuit found that such affirmative defense provisions purport to alter the jurisdiction of federal courts to assess liability and impose penalties for violations of those limits in private civil enforcement cases. The D.C. Circuit's holding makes clear that the CAA does not authorize promulgation of such a provision by the EPA. In particular, the D.C. Circuit's decision turned on an analysis of CAA sections 113 and 304. These provisions apply with equal force to a civil action brought to enforce the provisions of a FIP. The logic of the D.C. Circuit's decision thus applies to the promulgation of a FIP, and precludes the EPA from including an affirmative defense provision in a FIP.[26] For these reasons, the EPA is proposing to delete the provision in the FIP that provides an affirmative defense for exceedances of emission limitations that occur during malfunctions at FCPP. This proposed revision, if finalized, will not relax any requirements in the FIP and would not have any adverse effects on air quality in the area. Additionally, by removing an inconsistency between the FIP and the EPA's more recently promulgated regulations and the 2015 SSM Action, the proposed revision provides more clarity and certainty.

3. Revisions to 40 CFR 49.5512(d)

The EPA is proposing to add a statement to make clear that the emission limitations under 40 CFR 49.5512(d) apply continuously and at all times. Exemptions from emission limitations during any mode of source operation are contrary to CAA requirements. CAA section 110(a)(2)(A) requires SIPs to include, among other requirements, ''enforceable emission limitations.'' Section 302(k) of the CAA defines an emission limitation as: ''a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this Act.'' The courts have held that the plain meaning of the term ''continuous'' does not allow exemptions from emission limitations.[27] For these reasons, the EPA is proposing to add a statement to clarify in 40 CFR 49.5512(d) that the emission limitations in that paragraph apply at all times. This proposed revision, if finalized, would strengthen the existing emission limitations by clarifying that the limits are applicable at all times, including during periods of startup and shutdown.

Under paragraph (d)(2), the EPA is proposing to delete the portion of the PM emission limitation that specifies requirements related to the test duration and minimum collection volume for PM testing. Generally, the testing requirements for PM and other pollutants are found in paragraph (e). To improve clarity of the regulation, the EPA is proposing to delete the provisions in paragraph (d)(2) that relate to testing and rely solely on paragraph (e) to specify the requirements for test methods. This proposed revision, if finalized, would not relax any requirements and would not affect air quality in the area surrounding FCPP.

Under paragraph (d)(3), we are proposing to delete the requirements for dust control. The EPA promulgated paragraph (d)(3) as part of the 2007 FIP. Following final action on the 2007 FIP, the operator of FCPP filed a petition for review, claiming, among other things,

[24] See 40 CFR 49.5512(i)(2) and (3). See also 77 FR 51620 (August 24, 2012).

[25] *See NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014).

[26] *See* February 4, 2013 Memorandum to Docket EPA–HQ–OAR–2012–0322: ''State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Statutory, Regulatory, and Policy Context for this Rulemaking.''

[27] *See, e.g., Sierra Club* v. *Johnson,* 551 F.3d 1019 (D.C. Cir. 2008); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157 (10th Cir. 2012). This issue is discussed at length in ''Memorandum to Docket EPA–HQ–OAR–2012–0322, Statutory, Regulatory, and Policy Context for this Rulemaking,'' February 4, 2013.

that the EPA had not provided an adequate explanation for promulgating the dust control requirements.[28] In the litigation, the EPA agreed that the dust control requirements should be remanded and vacated because the 2007 FIP did not contain an adequate explanation of its rationale. On November 13, 2008, the EPA issued a final rule to stay the effectiveness of the dust control requirements at paragraph (d)(3).[29] In the EPA's 2012 action to implement the BART requirements for FCPP, the EPA proposed and finalized dust control measures in the FCPP FIP at paragraph (j) that were consistent with the requirements in paragraph (d)(3) requiring submission of a dust control plan and compliance with a 20-percent opacity limit.[30] The proposal provided the EPA's rationale for establishing dust control requirements, and these requirements were not challenged in the final 2012 FIP. Because the requirements in paragraph (d)(3) were stayed in 2008 and replaced by paragraph (j) in 2012, which remains in effect, the EPA's proposal to remove the dust control requirements at paragraph (d)(3) would not relax any requirements and would not have any effects on air quality in the area surrounding FCPP.

Paragraph (d)(4) establishes a requirement that the discharge of emissions from the stacks of Units 4 and 5 shall not exhibit greater than 20 percent opacity, excluding uncombined water droplets. We are proposing to delete the exclusion of uncombined water droplets from the opacity standard. This specific exclusion of water vapor is inconsistent with the 2015 SSM Action. The exclusion is also inconsistent with the EPA's treatment of opacity in other rulemakings. For example, although FCPP is not subject to the New Source Performance Standard (NSPS) for electric generating units at 40 CFR part 60 subpart Da, the subpart Da standard does not include a specific exclusion for water vapor in the opacity standard.[31] However, it does include provisions for addressing interference of water vapor with the COMS by providing alternative monitoring requirements to assure continuous monitoring of baghouse performance.[32] In addition, subpart B to 40 CFR part 75 includes an exemption from the opacity monitoring requirements of part 75 (*i.e.,* COMS) for units with wet flue gas pollution control systems where it is demonstrated that condensed water is present and impedes the accuracy of opacity measurements.[33] Generally, these alternatives for addressing water vapor interference would be invoked for systems that consistently experience saturated stack conditions.

The EPA promulgated the exclusion of uncombined water droplets in the 2007 FIP to address the technical challenge at FCPP associated with the use of COMS to monitor opacity when the stacks are saturated.[34] Currently, the scrubbers for SO_2 control at FCPP operate with a bypass specifically to avoid saturated stack conditions given the physical limitations of the existing unlined stacks.[35] Furthermore, we understand from the operator of FCPP that Units 4 and 5 infrequently experience high opacity readings as a result of water vapor interference, and the limited instances generally resulted from equipment or process issues.[36]

The EPA is proposing to remove the provisions exempting water vapor from the opacity standard and the associated monitoring and reporting requirements because these exemptions are inconsistent with the 2015 SSM Action, stating that emission standards must apply at all times, including periods of malfunction. Our proposal, to remove the water vapor exemption from the opacity standard and monitoring requirements, represents a strengthening of the FIP. Therefore, we anticipate that this proposed revision would not have any adverse effects on air quality in the surrounding area.

Under paragraph (d)(4), we are also proposing to add a provision that any unit for which the owner or operator installs, calibrates, maintains, and operates a PM CEMS to demonstrate compliance with a PM emission limitation shall be exempt from the opacity standard in paragraph (d)(4), and the associated monitoring and recordkeeping requirements in paragraphs (e) and (f). This provision is consistent with the provisions of the NSPS at 60.42Da(b)(1) and the Acid Rain Program requirements at 40 CFR 75.14(e), which generally provides that any owner or operator that elects to install, calibrate, maintain, and operate a CEMS for measuring PM emissions is exempt from the opacity standard and monitoring requirements.[37] The PM CEMS is a monitoring system that provides a continuous assessment of compliance with a PM limit. Generally, opacity standards and COMS have been used as a surrogate to ensure continuous compliance with a PM emission standard that would otherwise be subject to periodic source testing.[38] As noted above, FCPP is not subject to the NSPS at 60.42Da. However, we are proposing to follow the same rationale from Subpart Da to exempt any unit from the opacity standard and COMS requirement if a PM CEMS is installed on that unit and used for determining continuous compliance with its PM emission limitation.

As discussed elsewhere in this proposed rule, the Consent Decree requires the operator of FCPP, by early 2017, to install PM CEMS and, by mid-2018, to make modifications to the stacks to withstand saturated conditions to allow greater SO_2 removal efficiency (by reducing or eliminating the existing scrubber bypass). After these stack modifications are made in 2018, we anticipate that the units at FCPP will more consistently experience saturated stack conditions that may impede the accuracy of opacity measurements. We consider the use of PM CEMS to be an improvement upon the use of an opacity standard and COMS as a surrogate for measuring continuous compliance with PM limits, particularly for wet stacks. Therefore, the EPA does not consider these revisions to relax any requirements or to result in any adverse effects on air quality in the surrounding area.

The last proposed revision under paragraph (d) is to remove the emission limitation for NO_X that applied to Units 1, 2, and 3 at FCPP under 40 CFR 49.5512(d)(5)(i). The owner or operator permanently ceased operation of Units 1, 2, and 3 by January 1, 2014; therefore, removal of the emission limitations for these retired units specified in

[28] *Arizona Public Service Company* v. *EPA et al.,* 562 F.3d 1116, Case No. 07–9546, (10th Circuit, Apr. 14, 2009).

[29] See 73 FR 67107 (November 13, 2008).

[30] See 75 FR 64211 (October 19, 2010) and 77 FR 51620 (August 12, 2012).

[31] *See* 40 CFR part 60 subpart Da at 60.42Da(b). Subpart Da to part 60 is the ''Standard of Performance for Electric Utility Steam Generating Units'' and applies to units that are capable of combusting more than 73 MW heat input of fossil fuel and for which construction, modification, or reconstruction commenced after September 18, 1978. The units at FCPP were constructed prior to 1978 and are not subject to part 60 subpart Da.

[32] *See* 40 CFR part 60 subpart Da 60.49Da(a).

[33] *See* 40 CFR part 75 subpart B at 75.14.

[34] *See* 72 FR 25698 at 25701 (May 7, 2007).

[35] We note that the Consent Decree requires the operator to modify the existing ductwork at FCPP to withstand saturated conditions in order to eliminate the bypass. *See* proposed regulatory text at 40 CFR 49.5512(k)(3)(ii).

[36] *See* document titled ''Opacity Exceedances due to Saturated Stack.docx,'' in the docket for this rulemaking, showing three opacity exceedances from Units 4 and 5 combined due to wet stack conditions over 2011–2015, generally resulting from equipment malfunction.

[37] *See* also 77 FR 9304 (February 16, 2012).

[38] *See, e.g.,* discussion of opacity in the 2007 FIP for FCPP, 72 FR 25698 at 25701 (May 7, 2007), stating that opacity limits are generally applied to ensure a unit is meeting its PM limit.

paragraph (d)(5)(i) would not relax any requirements or have any effect on air quality in the area surrounding FCPP.

4. Revisions to 40 CFR 49.5512(e)

Paragraph (e) of 40 CFR 49.5512 generally relates to testing and monitoring requirements that follow in subparagraphs (e)(1)–(e)(8). Under paragraph (e), prior to subparagraph (e)(1), we are proposing to remove specific provisions for particulate matter testing and to move revised provisions for PM to subparagraph (e)(3). The EPA is proposing this revision to improve the clarity of the regulatory requirements. Therefore, this proposed revision, to address testing and monitoring requirements elsewhere, within specific sub-paragraphs in paragraph (e), would not relax any requirements or affect air quality in the surrounding area. We address the specific provisions related to revisions to the PM testing and monitoring provisions in a separate discussion on paragraph (e)(3).

In paragraph (e), we are also proposing to remove provisions related to opacity and move revised opacity monitoring requirements to paragraph (e)(6). We are proposing to remove the existing opacity monitoring exemption for periods when the stack is saturated and to remove the presumption that high opacity readings that occur when the baghouse is operating within normal parameters is caused by water vapor and shall not be considered a violation. As outlined in our justification for proposed revisions to paragraph (d)(4), the existing exemptions for opacity monitoring for periods of saturated stacks are inconsistent with the EPA's interpretation of CAA requirements to prohibit emission limitation exemptions and affirmative defenses applicable to excess emissions during malfunctions. The proposed revisions to the opacity standard and monitoring requirements strengthen the FIP and therefore, these changes would not affect air quality in the surrounding area.

In paragraph (e)(1), we are proposing to remove the provision specifying a compliance deadline for installing CEMS for SO_2, NO_X, and a diluent because the CEMS for those pollutants have already been installed. The EPA is not revising the provisions related to the required operation, maintenance, or certification of the CEMS. Because we are proposing to delete a requirement that merely establishes a compliance date that has already been met, this proposed revision would not relax any requirements or affect air quality in the surrounding area.

In paragraph (e)(3), the EPA is proposing to revise the annual PM testing requirements to require the owner or operator to either: Conduct PM testing in accordance with the quarterly testing specifications in the MATS Rule (*see* Table 5, 40 CFR part 63, subpart UUUUU); to install, calibrate, maintain, and operate a CPMS on each unit in accordance with the MATS Rule (*see* 40 CFR part 63, subpart UUUUU); or to install, calibrate, maintain, and operate a PM CEMS on each unit, in accordance with the MATS Rule (*see* 40 CFR part 63, subpart UUUUU). Currently, paragraph (e)(3) requires annual PM testing. We are proposing to align the PM testing requirement in the 2007 FIP with the testing requirements in the MATS Rule, which includes either quarterly testing or continuous monitoring. Therefore, this proposed revision would increase the frequency of PM testing required in the FIP from an annual basis to either a quarterly or a continuous basis. In addition, the testing provisions in the MATS Rule generally refer to the same test methods as those already referenced elsewhere in the FCPP FIP in paragraphs (e) and (i)(1), *e.g.,* 40 CFR part 60 Appendices A–1 through A–3, Methods 1 through 4, and Method 5. Therefore, this proposed revision streamlines testing for PM, does not relax any other requirements, and makes the testing requirements for PM under the FIP consistent with the PM testing requirements in a recent national rulemaking. This proposed revision would not have adverse impacts on air quality in the surrounding area.

In paragraph (e)(6), we are proposing to clarify that this opacity monitoring provision applies only to units at FCPP that are subject to the opacity standard at paragraph (d)(4). As discussed elsewhere in this proposed rule, we are proposing that the opacity standard would apply only if the owner or operator does not elect to monitor compliance with the PM limit using PM CEMS. If the opacity standard applies, under paragraph (e)(6) we are proposing three options for determining compliance with the opacity standard. The first option specifies separate compliance demonstrations for the opacity standard under dry and wet conditions. When the stack is dry (unsaturated), we are proposing to continue to require use of the existing COMS. However, during periods of wet (saturated) stack conditions, which are currently infrequent, the condensed water vapor may impede the accuracy of opacity measurements. Therefore, anticipating that saturated stack conditions at FCPP may occur more frequently in the future, we are proposing to require the owner or operator to demonstrate compliance with the opacity standard during saturated stack conditions using visible emission performance testing. We consider the visible emission compliance demonstrations to provide reasonable demonstrations of compliance with the opacity standard during these infrequent occurrences. However, when the stacks at FCPP are lined to eliminate the scrubber bypass and result in consistently saturated stacks, continuous visible emission performance tests may be impractical. Therefore, we are proposing two additional options for determining compliance with the opacity standard. Both options are provided in 40 CFR part 60 subpart Da as alternatives to COMS for units experiencing interference from water vapor.[39] In paragraph (e)(6)(ii), we are proposing a second option that requires the installation and maintenance of a CPMS, in accordance with the MATS Rule at 40 CFR part 63 subpart UUUUU, combined with periodic visible emission testing in accordance with 40 CFR 60.49Da(a)(3). In paragraph (e)(6)(iii), we are proposing a third option that requires monitoring performance of the existing baghouses using a bag leak detection system in accordance with 40 CFR 60.48Da(o)(4), or an alternative bag leak detection system approved by the EPA, combined with periodic visible emission testing in accordance with 40 CFR 60.49Da(a)(3).[40] As discussed elsewhere in this notice, the proposed revisions to the opacity standard and monitoring requirements would strengthen the FIP and benefit air quality in the surrounding area because they remove existing exemptions in the FIP and provide reasonable alternatives to address saturated stack conditions in a manner that is consistent with other national rulemakings.

Because Units 1, 2, and 3 have permanently ceased operation, we are proposing to delete the testing requirements for those units in paragraph (e)(8). Removal of the testing requirements for these retired units would not relax any requirements or have any effect on air quality in the area surrounding FCPP.

5. Revisions to 40 CFR 49.5512(f)

The EPA is proposing revisions to the reporting and recordkeeping requirements to provide additional clarity that all reports and notifications

[39] *See* 40 CFR 60.49Da(2)(i) and 60.49Da(a)(4)(ii).

[40] Under 40 CFR 60.13(h)(3)(i), the Administrator may approve alternatives to any monitoring procedures or requirements of part 60.

required in paragraph (f), (f)(4), and (f)(4)(ii) must be submitted to the NNEPA and the EPA. Within the recordkeeping and reporting requirements in paragraph (f), we are proposing changes to clarify that any reports that are required to be submitted to the Regional Administrator or the Administrator must be submitted to the Director of NNEPA and to the Air Division Director at Region IX office of the EPA. We are also revising paragraph (f) to require that the Director of the Enforcement Division, in addition to the Director of the Air Division, at the Region IX office of the EPA, be provided reports and notifications. These proposed revisions do not relax any requirements or have any effect on air quality in the area surrounding FCPP.

Paragraph (f)(1) requires notification and recordkeeping requirements for the CEMS. The EPA is proposing to add the COMS and visible emission testing to the notification and recordkeeping requirements in this paragraph. These proposed revisions do not relax any requirements and would not adversely affect air quality in the area surrounding FCPP.

In paragraph (f)(3), we are proposing to delete the specification related to the frequency of particulate matter testing but are not proposing to modify any provisions related to PM testing reports to the EPA. As discussed elsewhere, we are proposing modifications to the PM testing requirements to align with the MATS Rule, which provides three options for demonstrating compliance with the PM emission limitations: Quarterly stack tests, CPMS, or PM CEMS. Deleting the specification in paragraph (f)(3) that PM testing occurs annually is consistent with the proposed revision to align the PM testing and monitoring requirements for FCPP with those of the MATS Rule.

In addition, in paragraphs (f)(4)(i) and (f)(4)(ii), we are proposing to delete the mailing addresses and other details related to reporting requirements, as they are redundant to the provisions in paragraph (f). All reports and notifications under paragraph (f) must be submitted to the NNEPA and the EPA, and we are proposing to clarify under paragraph (f) that all references to the Regional Administrator in that paragraph mean the Directors of the NNEPA and two divisions within the EPA Region IX office. Paragraph (f)(4) repeats addresses and other details already stated in paragraph (f). The EPA is proposing to delete these redundant provisions in paragraph (f)(4). We anticipate this revision would improve regulatory clarity and would have no impact on air quality in the surrounding area.

Consistent with the proposed revisions to the opacity standard and COMS requirement in paragraphs (d) and (e), we are proposing to delete references to saturated stack conditions in paragraphs (f)(4)(i) and (f)(4)(i)(H). In paragraph (f)(4)(i)(G), we are also proposing to require the owner or operator to report opacity exceedances determined from the visible emission performance tests. As discussed elsewhere in this notice, because provisions in the existing FCPP FIP exempt the units from the opacity limit during periods where the stacks were saturated, the removal of the exemption represents a strengthening of the FIP and would not relax other requirements in the FCPP FIP.

6. Revisions to 40 CFR 49.5512(h)

The EPA is proposing to delete the startup and shutdown exemptions for the opacity and PM emission limitations at paragraph (h)(2) and to delete the provisions related to an affirmative defense for malfunctions in paragraph (h)(3). As discussed previously, exemptions from emission limitations and provisions that allow an affirmative defense are inconsistent with CAA requirements. Using the same rationale we provided elsewhere in this notice, for the proposed revisions to 40 CFR 52.5512(c) and (d), the EPA is proposing to delete the provisions at paragraph (h)(2) that provide an exemption from emission limitations during periods of startup and shutdown and also to delete the provisions in the paragraph (h)(3) that provide an affirmative defense for malfunctions at FCPP. The proposed removal of these provisions strengthens the FIP and does not relax any other requirements in the FIP. Therefore, the removal of these revisions would not adversely affect air quality in the surrounding area.

7. Revisions to 40 CFR 49.5512(i)

Under paragraph (i)(1), promulgated in the 2012 FIP, the EPA is proposing to delete the existing provisions related to annual PM testing and add a provision that PM testing shall be performed in accordance with paragraph (e)(3), which requires quarterly PM testing, or installation, calibration, and operation of CPMS, or PM CEMS, in accordance with the MATS Rule. This proposed revision would increase the frequency of PM testing from an annual basis to either a quarterly or continuous basis. The testing provisions in the MATS Rule generally refer to the same test methods already referenced in the FIP in paragraphs (e) and (i)(1), *e.g.,* 40 CFR part 60 Appendices A–1 through A–3, Methods 1 through 4, and Method 5. This proposed revision would not relax any requirements and would make the testing requirements for PM under the FIP consistent with the PM testing requirements in recent national rulemakings. Therefore, this revision would not have adverse impacts on air quality in the surrounding area.

In addition, under paragraph (i)(2)(iii) of the 2012 FIP, we are proposing to correct a typographical error in a citation. Paragraph (i)(2)(iii) provides the schedule for the installation of add-on post-combustion NO_X controls and refers to interim emission limitations for NO_X at paragraph (i)(2)(ii)(A). However, the interim emission limitations are found in paragraph (i)(2)(ii), and subparagraph (A) to paragraph (i)(2)(ii) does not exist. Although the interim limits under paragraph (i)(2)(ii) do not apply because the owner or operator elected to implement paragraph (i)(3) in lieu of paragraph (i)(2) for NO_X, the EPA is proposing to correct this error in order to improve regulatory clarity. This proposed revision would have no effect on air quality in the surrounding area.

8. Addition of 40 CFR 49.5513(k)

The EPA is proposing to add paragraph (k) to include provisions required for compliance with the Consent Decree. The EPA is not revisiting or opening for comment any of the specific requirements of the Consent Decree and is requesting comment only on whether the EPA has incorporated all appropriate requirements from the Consent Decree into the FIP. Generally, the Consent Decree established emission limitations and other requirements to reduce emissions of SO_2, NO_X and PM. The Consent Decree requires the owner or operator to modify the existing ductwork and stacks for Units 4 and 5 to accommodate a wet stack in order to eliminate the need to bypass flue gas around the scrubbers and to achieve and maintain an SO_2 removal efficiency of at least 95 percent, which is more stringent than the requirement to achieve an 88 percent removal efficiency in paragraph (d)(1)(i). The Consent Decree also established an emission limitation for NO_X of 0.080 lb/MMBtu, which is more stringent than the NO_X limit of 0.098 lb/MMBtu in 40 CFR 49.5512(i)(3) from the 2012 FIP. Finally, the Consent Decree established a PM emission limitation of 0.0150 lb/MMBtu for Units 4 and 5, which is more stringent than the PM limit of 0.015 lb/MMBtu that was applied to those units in the 2012 FIP. Because the Consent Decree set more

stringent emission limitations, the proposed revision to incorporate the provisions of the Consent Decree into the FIP for FCPP strengthens the FIP and would not relax any existing requirements. In this action, the EPA is merely proposing to incorporate the existing Consent Decree requirements into the FIP for FCPP and is requesting comment only on whether the EPA has incorporated all appropriate requirements from the Consent Decree into the FIP. The Consent Decree is anticipated to benefit air quality, and the proposed inclusion of the Consent Decree requirements in the FIP would make those requirements continue to be federally enforceable after the Consent Decree is terminated.

C. Compliance Schedule

The EPA proposes that the requirements contained in this proposal will become enforceable on the effective date following final promulgation of this FIP revision unless otherwise provided in a specific provision of the FIP.

IV. Proposed Action and Solicitation of Comments

As described above, the EPA proposes revisions to the FCPP FIP for several reasons: (1) To make certain provisions in the FIP consistent with national rulemakings and other actions since 2012; (2) to update the FIP to reflect recent operating changes; and (3) to add new provisions to the FIP to include the requirements of the Consent Decree.

The EPA solicits comments on the limited revisions of the FCPP FIP that we are proposing in this rulemaking. We are also soliciting comment on whether the EPA has accurately incorporated the requirements from the Consent Decree into paragraph (k) of the FIP. We are not accepting comment on any provisions of the FCPP FIP that we are not proposing to revise, and we are not accepting comment on the specific requirements of the Consent Decree. Accordingly, please limit your comments to those specific provisions recited above that we are proposing to revise in today's action.

V. Environmental Justice Considerations

The Four Corners Power Plant is located on the reservations lands of the Navajo Nation, and the EPA recognizes there is significant community interest in the emissions and environmental effects of this facility. As discussed elsewhere in this document, the proposed revisions to the FCPP FIP would: Strengthen the FIP by removing emission limitation exemptions for periods of startup, shutdown, and saturated stacks; remove an affirmative defense applicable to excess emissions during malfunctions; and codify more stringent emission limitations for SO_2, NO_X, and PM from a Consent Decree dated August 17, 2015. Additional revisions to the FCPP FIP proposed in this notice, including to streamline certain testing requirements to be consistent with national rulemakings promulgated since 2008 and to remove requirements for units that have permanently ceased operation, would not relax any condition in the FCPP FIP. Therefore, the EPA considers this proposed action to be beneficial for human and environmental health, and to have no potential disproportionately high and adverse effects on minority, low-income, or indigenous populations.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule applies to only one facility. Therefore, its recordkeeping and reporting provisions do not constitute a ''collection of information'' as defined under 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

C. Regulatory Flexibility Act (RFA)

I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. This action will not impose any requirements on small entities. Firms primarily engaged in the generation, transmission, and/or distribution of electric energy for sale are small if, including affiliates, the total electric output for the preceding fiscal year did not exceed four million megawatt-hours. Each of the owners of the facility (*i.e.,* Arizona Public Service, Salt River Project, Tucson Electric Power, and El Paso Electric) affected by this rule exceed this threshold.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. Although this proposed action affects a facility located in Indian country, the proposed limited revisions to existing provisions in the FIP for FCPP, and the incorporation of provisions into the FIP from a Consent Decree, which has already undergone public review and was the subject of tribal consultation, will not have substantial direct effects on any 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. Thus, Executive Order 13175 does not apply to this action. However, we note that we have engaged in numerous discussions with the NNEPA during the development of this proposed rule and continue to invite consultation on this proposed action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 as applying only to those regulatory actions that concern health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This action involves technical standards. The technical standards in this action are based on the technical standards used in other rulemakings promulgated by the EPA. We refer to the

discussion of the technical standards and voluntary consensus standards in the final rule for 40 CFR part 60 subpart Da and 40 CFR part 63 subpart UUUUU at 77 FR 9304 at 9441 (February 16, 2012).

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. If this rule is finalized as proposed, we expect that the limited revisions to the FIP will strengthen requirements for periods of startup, shutdown, and malfunction and will not relax any other existing requirements. Additional revisions related to streamlining of PM testing and providing options for PM and opacity testing that are in accordance with other rulemakings from the EPA will not affect air quality in the area surrounding FCPP.

List of Subjects in 40 CFR Part 49

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Indians, Intergovernmental relations, Reporting and recordkeeping requirements, Startup shutdown and malfunction.

Dated: November 22, 2016.

Alexis Strauss,

Acting Regional Administrator, Region IX.

Chapter I, title 40, of the Code of Federal Regulations is proposed to be amended as follows:

PART 49—INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT

■ 1. The authority citation for part 49 continues to read as follows:

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

Subpart L—Implementation Plans for Tribes—Region IX

■ 2. Section 49.5512 is amended by:
■ a. Revising paragraph (a);
■ b. Revising paragraph (c) introductory text;
■ c. Removing and reserving paragraph (c)(1);
■ d. Revising paragraph (c)(7);
■ e. Revising paragraph (c)(12);
■ f. Revising paragraph (c)(13);
■ g. Revising paragraph (d) introductory text;
■ h. Revising paragraph (d)(2);
■ i. Removing and reserving paragraph (d)(3);
■ j. Revising paragraph (d)(4);
■ k. Revising paragraph (d)(5);
■ l. Revising paragraph (e) introductory text;
■ m. Revising paragraph (e)(1);
■ n. Revising paragraph (e)(3);
■ o. Revising paragraph (e)(6);
■ p. Removing and reserving paragraph (e)(8);
■ q. Revising paragraph (f) introductory text;
■ r. Revising paragraph (f)(1);
■ s. Revising paragraph (f)(3) introductory text;
■ t. Revising paragraphs (f)(4)(i) introductory text, (f)(4)(i)(G) and (H) and (f)(4)(ii);
■ u. Removing and reserving paragraphs (h)(2) and (3);
■ v. Revising paragraph (i)(1);
■ w. Revising paragraph (i)(2)(iii)(A); and
■ x. Adding paragraph (k).

The text to read as follows:

§ 49.5512 Federal Implementation Plan Provisions for Four Corners Power Plant, Navajo Nation.

(a) Applicability. The provisions of this section shall apply to each owner or operator of the coal burning equipment designated as Units 1, 2, 3, 4, and 5 at the Four Corners Power Plant (the Plant) on the Navajo Nation Indian Reservation located in the Four Corners Interstate Air Quality Control Region (see 40 CFR 81.121). Units 1, 2, and 3 at the Four Corners Power Plant permanently ceased operation by January 1, 2014, pursuant to the requirements of paragraph (i)(3).

* * * * *

(c) *Definitions.* For the purposes of paragraphs (a)–(j):

(1) [Reserved]

* * * * *

(7) Malfunction means any sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner.

* * * * *

(12) Shutdown means the cessation of operation of any air pollution control equipment, process equipment, or process for any purpose. For Units 4 or 5, shutdown begins when the unit drops below 300 MW net load with the intent to remove the unit from service.

(13) Startup means the setting into operation of any air pollution control equipment, process equipment, or process for any purpose. For Units 4 or 5, startup ends when the unit reaches 400 MW net load.

* * * * *

(d) *Emissions Standards and Control Measures.* The following emission limits shall apply at all times.

* * * * *

(2) *Particulate Matter.* No owner or operator shall discharge or cause the discharge of particulate matter from any coal burning equipment into the atmosphere in excess of 0.050 pounds per million British thermal unit (lb/MMBtu) of heat input (higher heating value).

(3) [Reserved].

(4) *Opacity.* No owner or operator shall discharge or cause the discharge of emissions from the stacks of Units 4 and 5 into the atmosphere exhibiting greater than 20 percent opacity, averaged over any six (6) minute period, except for one six (6) minute period per hour of not more than 27 percent opacity. Any unit for which the owner or operator installs, calibrates, maintains, and operates particulate matter CEMS under paragraph (e)(3) of this section shall be exempt from this opacity standard in this paragraph (d)(4) and associated requirements in paragraphs (e) and (f) to demonstrate compliance with the opacity standard.

(5) *Oxides of nitrogen.* No owner or operator shall discharge or cause the discharge of NO_X into the atmosphere in excess of the amounts specified below.

(i) 0.65 lb/MMBtu of heat input per unit averaged over any successive thirty (30) boiler operating-day period from Units 4 and 5;

(ii) 335,000 lb per 24-hour period when coal-burning equipment is operating, on a plant-wide basis; for each hour when coal-burning equipment is not operating, this limitation shall be reduced. If the unit which is not operating is Unit 1, 2, or 3, the limitation shall be reduced by 1,542 lb per hour for each unit which is not operating. If the unit which is not operating is Unit 4 or 5, the limitation shall be reduced by 4,667 lb per hour for each unit which is not operating.

(e) Testing and Monitoring. Compliance with the emissions limits set for SO_2 and NO_X shall be determined by using data from a CEMS unless otherwise specified in paragraphs (e)(2) and (e)(4) of this section.

(1) The owner or operator shall maintain and operate CEMS for SO_2, NO or NO_X, and a diluent, and for Units 4 and 5 only, COMS, in accordance with 40 CFR 60.8 and 60.13, and appendix B of 40 CFR part 60. Completion of 40 CFR part 75 monitor certification requirements shall be deemed to satisfy the requirements under 40 CFR 60.8 and 60.13 and appendix B of part 60. The owner or operator shall comply with the

quality assurance procedures for CEMS found in 40 CFR part 75, and all reports required thereunder shall be submitted to the Regional Administrator. The owner or operator shall provide the Regional Administrator notice in accordance with 40 CFR 75.61.

* * * * *

(3) To assure continuous compliance with the particulate matter limits in paragraph (d)(2), the owner or operator shall either conduct particulate matter testing in accordance with the testing specifications outlined in Table 5 of 40 CFR part 63 subpart UUUUU, or install, calibrate, operate, and maintain a continuous parametric monitoring system (CPMS) for that unit in accordance with 40 CFR part 63 subpart UUUUU, or install, calibrate, maintain, and operate particulate matter CEMS in accordance with 40 CFR part 63 subpart UUUUU. The owner or operator shall submit a written notification, in accordance with paragraph (f), of intent to demonstrate compliance with this paragraph by using a CPMS or PM CEMS. This notification shall be sent at least 30 calendar days before the initial startup of the monitor for compliance determination purposes. The owner or operator may discontinue operation of the monitor and instead return to demonstration of compliance with this paragraph using quarterly PM testing by submitting written notification, in accordance with paragraph (f), of such intent at least 30 calendar days before shutdown of the monitor for compliance determination purposes. Nothing in this paragraph replaces or supersedes the requirements for PM CEMS in the August 17, 2015 Consent Decree under paragraph (k).

* * * * *

(6) If the opacity standard in paragraph (d)(4) applies, the owner or operator shall demonstrate compliance with the opacity standard using one of the following options:

(i) Operate Continuous Opacity Monitoring Systems (COMS) and maintain a set of opacity filters to be used as audit standards. Compliance with the opacity standard during periods of dry (unsaturated) stack conditions shall be determined using COMS. Compliance with the opacity standard during periods of wet (saturated) stack conditions shall be determined using visible emission performance testing specified in 40 CFR part 60 appendix A–4 Method 9 during the duration of the saturated stack condition, or

(ii) Install, calibrate, operate, and maintain a continuous parametric monitoring system (CPMS) for that unit in accordance with 40 CFR part 63 subpart UUUUU, including the requirements for the development of site-specific monitoring plans and recordkeeping and reporting; and conduct periodic performance testing of visible emissions using the procedures specified in paragraphs 40 CFR 60.49Da(a)(3), or

(iii) monitor performance of the baghouses using a bag leak detection system in accordance with 40 CFR 60.48Da(o)(4), or an alternative bag leak detection system approved by the EPA, including requirements for the development of site-specific monitoring plans and recordkeeping and reporting; and conduct periodic performance testing of visible emissions using the procedures specified in paragraphs 40 CFR 60.49Da(a)(3).

* * * * *

(8) [Reserved]

(f) *Reporting and Recordkeeping Requirements.* All requests, reports, submittals, notifications, and other communications to the Regional Administrator or Administrator required by this paragraph (f) and references therein shall be submitted to the Director, Navajo Nation Environmental Protection Agency, P.O. Box 339, Window Rock, Arizona 86515, (928) 871–7692, (928) 871–7996 (facsimile); to the Director, Air Division, U.S. Environmental Protection Agency, Region IX, to the attention of Mail Code: AIR–3, at 75 Hawthorne Street, San Francisco, California 94105, (415) 972–397490, (415) 947–3579 (facsimile); and to the Director, Enforcement Division, U.S. Environmental Protection Agency, to the attention of Mail Code ENF–2–1, at 75 Hawthorne Street, San Francisco, California, 94105, (415) 972–3982, or by email to *r9.aeo@epa.gov.* For each unit subject to the emissions limitation in this section and upon completion of the installation of CEMS and COMS as required in this section, the owner or operator shall comply with the following requirements:

(1) For each emissions limit in this section, comply with the notification and recordkeeping requirements for CEMS and COMS compliance monitoring in 40 CFR 60.7(c) and (d), and for visible emissions testing, if applicable under paragraph (e)(6), record and report results of the test in accordance with 40 CFR 60.7(d).

* * * * *

(3) Furnish the Regional Administrator with reports describing the results of the particulate matter emissions tests postmarked within sixty (60) days of completing the tests. Each report shall include the following information:

* * * * *

(4) * * *

(i) For excess emissions, the owner or operator shall notify the Regional Administrator by telephone or in writing within one business day (initial notification). A complete written report of the incident shall be submitted within ten (10) working days of the initial notification. The complete written report shall include:

* * * * *

(G) For an opacity exceedance, the 6-minute average opacity monitoring data or visible emission performance test results greater than 20 percent opacity for the 24 hours prior to and during the exceedance for Units 4 and 5; and

(H) The efforts taken or being taken to minimize the excess emissions and to repair or otherwise bring the Plant into compliance with the applicable emissions limit(s) or other requirements.

(ii) If the period of excess emissions extends beyond the submittal of the written report, the owner or operator shall also notify the Regional Administrator in writing of the exact time and date when the excess emissions stopped. Compliance with the excess emissions notification provisions of this section shall not excuse or otherwise constitute a defense to any violations of this section or of any law or regulation which such excess emissions or malfunction may cause.

* * * * *

(i) * * *

(1) Particulate Matter from Units 4 and 5 shall be limited to 0.015 lb/MMBtu for each unit. Particulate matter testing shall be performed in accordance with paragraph (e)(3) of this section.

(2) * * *

(iii) * * *

(A) Within 4 years of the effective date of this rule, FCPP shall have installed add-on post-combustion NO_X controls on at least 750 MW (net) of generation to meet the interim emission limit in paragraph (i)(2)(ii) of this section.

* * * * *

(k) Emission limitations from August 17, 2015 Consent Decree. The emission limitations and other requirements from this paragraph (k), originally contained in a Consent Decree filed on August 17, 2015 in the United States District Court for the District of New Mexico, are in addition to the requirements in paragraphs (a) through (j) of this section.

(1) *Definitions.* Every term expressly defined in this paragraph (k) shall have the meaning given that term herein. Every other term used in this paragraph

(k) that is also a term used under the Act or in a federal regulation implementing the Act shall mean what such term means under the Act or those regulations.

(i) A ''30-Day Rolling Average NO_X Emission Rate'' for a Unit shall be expressed in lb/MMBtu and calculated in accordance with the following procedure: First, sum the total pounds of NO_X emitted from the Unit during the current Unit Operating Day and the previous twenty nine (29) Unit Operating Days; second, sum the total heat input to the Unit in MMBtu during the current Unit Operating Day and the previous twenty-nine (29) Unit Operating Days; and third, divide the total number of pounds of NO_X emitted during the thirty (30) Unit Operating Days by the total heat input during the thirty (30) Unit Operating Days. A new 30-Day Rolling Average NO_X Emission Rate shall be calculated for each new Unit Operating Day. Each 30-Day Rolling Average NO_X Emission Rate shall include all emissions that occur during all periods within any Unit Operating Day, including emissions from startup, shutdown, and Malfunction.

(ii) A ''30-Day Rolling Average SO_2 Removal Efficiency'' means the percent reduction in the mass of SO_2 achieved by a Unit's FGD system over a thirty (30) Unit Operating Day period and shall be calculated as follows: Step one, sum the total pounds of SO_2 emitted as measured at the outlet of the FGD system for the Unit during the current Unit Operating Day and the previous twenty-nine (29) Unit Operating Days as measured at the outlet of the FGD system for that Unit; step two, sum the total pounds of SO_2 delivered to the inlet of the FGD system for the Unit during the current Unit Operating Day and the previous twenty-nine (29) Unit Operating Days as measured at the inlet to the FGD system for that Unit (this shall be calculated by measuring the ratio of the lb/MMBtu SO_2 inlet to the lb/MMBtu SO_2 outlet and multiplying the outlet pounds of SO_2 by that ratio); step three, subtract the outlet SO_2 emissions calculated in step one from the inlet SO_2 emissions calculated in step two; step four, divide the remainder calculated in step three by the inlet SO_2 emissions calculated in step two; and step five, multiply the quotient calculated in step four by 100 to express as a percentage of removal efficiency. A new 30-Day Rolling Average SO_2 Removal Efficiency shall be calculated for each new Unit Operating Day, and shall include all emissions that occur during all periods within each Unit Operating Day, including emissions from startup, shutdown, and Malfunction.

(iii) ''Annual Tonnage Limitation'' means the limitation on the number of tons of the pollutant in question that may be emitted from FCPP during the relevant calendar year (*i.e.,* January 1 through December 31), and shall include all emissions of the pollutant emitted during periods of startup, shutdown and Malfunction.

(iv) ''Baghouse'' means a full stream (fabric filter) particulate emissions control device.

(v) ''Clean Air Act'' and ''the Act'' mean the federal Clean Air Act, 42 U.S.C. 7401–7671q, and its implementing regulations.

(vi) ''CEMS'' and ''Continuous Emission Monitoring System,'' mean, for obligations involving the monitoring of NO_X and SO_2 emissions under this paragraph (k), the devices defined in 40 CFR 72.2, and the SO_2 monitors required by this paragraph (k) for determining compliance with the 30-Day Rolling Average SO_2 Removal Efficiency requirement set forth in this paragraph (k).

(vii) ''Continuous Operation,'' ''Continuously Operate,'' and ''Continuously Operating'' mean that when a pollution control technology or combustion control is required to be used at a Unit pursuant to this paragraph (k) (including, but not limited to, SCR, FGD, or Baghouse), it shall be operated at all times such Unit is in operation, consistent with the technological limitations, manufacturers' specifications, good engineering and maintenance practices, and good air pollution control practices for minimizing emissions (as defined in 40 CFR 60.11(d)) for such equipment and the Unit.

(viii) ''Day'' means calendar day unless otherwise specified in this paragraph (k).

(ix) ''Emission Rate'' means, for a given pollutant, the number of pounds of that pollutant emitted per million British thermal units of heat input (''lb/MMBtu''), measured in accordance with this paragraph (k).

(x) ''Flue Gas Desulfurization System'' and ''FGD'' mean a pollution control device that employs flue gas desulfurization technology, including an absorber utilizing lime slurry, for the reduction of SO_2 emissions.

(xi) ''Fossil Fuel'' means any hydrocarbon fuel, including coal, petroleum coke, petroleum oil, or natural gas.

(xii) ''lb/MMBtu'' means one pound of a pollutant per million British thermal units of heat input.

(xiii) ''Make-Right Vendor Guarantee'' means, for an SCR, a guarantee offered by an SCR vendor that covers the SCR, including the catalyst, ammonia injection system, and support structure, under operating conditions (excluding any Malfunctions) above minimum operating temperature for the SCR, the achievement of which is demonstrated solely during two performance tests: One performance test no later than 90 Days after initial operation of the SCR, and one performance test after no fewer than 16,000 hours of SCR operation, but no later than December 31, 2020 regardless of the number of operating hours achieved. If the SCR does not meet the guarantee in one of these two performance tests, a Make-Right Vendor Guarantee requires the SCR vendor to repair, replace, or correct the SCR to meet the specified guaranteed Emission Rate, which is demonstrated by successful achievement of a performance test.

(xiv) ''Malfunction'' means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not Malfunctions.

(xv) ''NO_X Allowance'' means an authorization or credit to emit a specified amount of NO_X that is allocated or issued under an emissions trading or marketable permit program of any kind established under the Clean Air Act or an applicable implementation plan. Although no NO_X Allowance program is applicable to FCPP as of the promulgation of this paragraph (k), this definition of ''NO_X Allowance'' includes authorizations or credits that may be allocated or issued under emissions trading or marketable permit programs that may become applicable to FCPP in the future.

(xvi) ''Operating Day'' means any Day on which a Unit fires Fossil Fuel.

(xvii) ''PM'' means total filterable particulate matter, measured in accordance with the provisions of this paragraph (k).

(xviii) ''PM CEMS'' and ''PM Continuous Emission Monitoring System'' mean, for obligations involving the monitoring of PM emissions under this paragraph (k), the equipment that samples, analyzes, measures, and provides, by readings taken at frequent intervals, an electronic and/or paper record of PM emissions.

(xix) ''Removal Efficiency'' means, for a given pollutant, the percentage of that pollutant removed by the applicable emission control device, measured in

accordance with the provisions of this paragraph (k).

(xx) ''Selective Catalytic Reduction'' and ''SCR'' mean a pollution control device that destroys NO_X by injecting a reducing agent (*e.g.,* ammonia) into the flue gas that, in the presence of a catalyst (*e.g.,* vanadium, titanium, or zeolite), converts NO_X into molecular nitrogen and water.

(xxi) ''Semi-annual reports'' are periodic reports that are submitted to EPA within 60 days after the end of each half of the calendar year.

(xxii) ''SO_2 Allowance'' means an authorization to emit a specified amount of SO_2 that is allocated or issued under an emissions trading or marketable permit program of any kind established under the Clean Air Act or an applicable implementation plan, including as defined at 42 U.S.C. 7651a(3).

(xxiii) ''Surrender'' means to permanently surrender SO_2 Allowances so that such SO_2 Allowances can never be used to meet any compliance requirement under the Clean Air Act or this paragraph (k).

(xxiv) ''Unit'' means, solely for purposes of this paragraph (k), collectively, the coal pulverizer, stationary equipment that feeds coal to the boiler, the boiler that produces steam for the steam turbine, the steam turbine, the generator, equipment necessary to operate the generator, steam turbine and boiler, and all ancillary equipment, including pollution control equipment, at or serving a coal-fired steam electric generating unit at FCPP.

(xxv) ''Wet Stack'' means a stack designed to be capable of use with a saturated gas stream constructed with liner material(s) consisting of one or more of the following: Carbon steel with a protective lining (organic resin, fluoroelastomers, borosilicate glass blocks or a thin cladding of a corrosion-resistant alloy), fiberglass-reinforced plastic, solid corrosion-resistant alloy, or acid-resistant brick and mortar.

(2) *NO_X Emission Limitations and Control Requirements.* (i) The owner or operator shall install and commence Continuous Operation of an SCR on or FCPP Unit 5 by no later than March 31, 2018. Commencing no later than 30 Operating Days thereafter, the owner or operator shall Continuously Operate the SCR so as to achieve and maintain a 30-Day Rolling Average NO_X Emission Rate of no greater than 0.080 lb/MMBtu, subject to the petition process paragraph (k)(2)(iii).

(ii) The owner or operator shall install and commence Continuous Operation of an SCR on the FCPP Unit 4 by no later than July 31, 2018. Commencing no later than 30 Operating Days thereafter, the owner or operator shall Continuously Operate the SCR so as to achieve and maintain a 30-Day Rolling Average NO_X Emission Rate of no greater than 0.080 lb/MMBtu, subject to the petition process in paragraph (k)(2)(iii).

(iii) At any time after March 31, 2019 but before December 31, 2020, the owner or operator may submit to EPA a petition for a proposed revision to the 30-Day Rolling Average NO_X Emission Rate of 0.080 lb/MMBtu for either or both of the FCPP Units. The petition must demonstrate all of the following:

(A) That the design of the SCR system met the following parameters:

(*1*) The SCR system was designed to meet a NO_X emission rate of 0.049 lb/MMBtu, on an hourly average basis, under normal operating conditions once the minimum operating temperature of the SCR catalyst is achieved; and

(*2*) The owner or operator obtained a Make-Right Vendor Guarantee for a NO_X emission rate of 0.049 lb/MMBtu;

(B) That best efforts have been taken to achieve the 30-Day Rolling Average NO_X Emission Rate of 0.080 lb/MMBtu. Best efforts include but are not limited to exhausting the Make-Right Vendor Guarantee and obtaining independent outside support from a registered professional engineer expert in SCR design. To demonstrate best efforts have been taken, the petition shall also include:

(*1*) The request for bid for the subject SCR;

(*2*) Winning bid documents, including all warranties and design information;

(*3*) NO_X, NH_3, and heat rate CEMS data and all related stack tests;

(*4*) Daily coal quality data, including sulfur, ash, and heat content;

(*5*) Operating and maintenance logs documenting all exceedances of the 0.080 lb/MMBtu 30-Day Rolling Average NO_X Emission Rate and measures taken to correct them;

(*6*) Vendor certification pursuant to a Make-Right Vendor Guarantee that the 0.080 lb/MMBtu 30-Day Rolling Average NO_X Emission Rate cannot be met by the SCR as designed;

(*7*) A signed and sealed report by a registered professional engineer expert in SCR design confirming the 0.080 lb/MMBtu 30-Day Rolling Average NO_X Emission Rate cannot be met by the SCR as designed; and

(*8*) Affidavits documenting causes of failure to meet the 0.080 lb/MMBtu 30-Day Rolling Average NO_X Emission Rate, signed and sealed by a licensed professional engineer;

(C) That the SCR system was properly operated and maintained pursuant to the manufacturer's specifications for achieving and Continuously Operating to meet the design NO_X emission rate of 0.049 lb/MMBtu; and

(D) That the owner or operator Continuously Operated the SCR and maximized the percent of flue gas or water bypassed around the economizer during any startup and shutdown events in a manner to attain minimum operating temperature as quickly as reasonably possible during startup and to maintain minimum operating temperature during shutdowns as long as reasonably possible;

(E) That the owner or operator Continuously Operated the SCR and controlled the percent of flue gas or water bypassed around the economizer to maintain minimum operating temperature during load changes.

(iv) In any petition submitted pursuant to paragraph (k)(2)(iii), the owner or operator shall include an alternate 30-Day Rolling Average NO_X Emission Rate, but in no event may the owner or operator propose a 30-Day Rolling Average NO_X Emission Rate more than 0.085 lb/MMBtu. The owner or operator shall also submit all studies, reports, and/or recommendations from the vendor and contractor(s) required by this paragraph and paragraph (k)(2)(iii), evaluating each measure undertaken in an effort to meet a 30-Day Rolling Average NO_X Emission Rate of no greater than 0.080 lb/MMBtu. The owner or operator shall also deliver with each submission all pertinent documents and data that support or were considered in preparing such submission, as well as all data pertaining to the performance of the SCR in question since August 17, 2015 and the operational history of the Unit since August 17, 2015.

(v) In addition to meeting the emissions rates set forth in paragraphs (k)(2)(i) and (k)(2)(ii), all Units at FCPP, collectively, shall not emit NO_X in excess of the following Annual Tonnage Limitation: 31,060 tons of NO_X per year in 2016 and 2017; 12,165 tons of NO_X per year in 2018; and 4,968 tons of NO_X per year in 2019 and thereafter. However, if the 30-Day Rolling Average NO_X Emission Rate of 0.080 lb/MMBtu required under Paragraphs (k)(2)(i) and (k)(2)(ii) is revised pursuant to the petition process set forth in paragraphs (k)(2)(iii) and (k)(2)(iv), the annual NO_X tonnage limitations set forth as follows shall increase by the ratio of the new NO_X rate in lb/MMBtu determined pursuant to paragraphs (k)(2)(iii) and (k)(2)(iv) divided by 0.080 lb/MMBtu.

(vi) In determining the 30-Day Rolling Average NO_X Emission Rate, the owner or operator shall use CEMS in

accordance with the procedures of 40 CFR part 75, except that NO_X emissions data for the 30-Day Rolling Average NO_X Emission Rate need not be bias adjusted and the missing data substitution procedures of 40 CFR part 75 shall not apply. Diluent capping (*i.e.,* 5 percent CO_2) will be applied to the NO_X emission calculation for any hours where the measured CO_2 concentration is less than 5 percent following the procedures in 40 CFR part 75, Appendix F, Section 3.3.4.1. The owner or operator shall report semiannually all hours where diluent capping procedures were applied during the reporting period.

(vii) For purposes of determining compliance with the Annual Tonnage Limitations in paragraph (k)(2)(v), the owner or operator shall use CEMS in accordance with the procedures specified in 40 CFR part 75.

(viii) The owner or operator shall not sell, trade, or transfer any surplus NO_X Allowances allocated to FCPP that would otherwise be available for sale or trade as a result of the actions taken by the owner or operator to comply with the requirements of this rule.

(3) *SO_2 Emission Limitations and Control Requirements.* (i) Beginning on August 17, 2015, the owner or operator shall continuously operate the existing FGDs at FCPP Unit 4 and Unit 5 so as to emit SO_2 from FCPP at an amount no greater than 10.0 percent of the potential combustion concentration assuming all of the sulfur in the coal is converted to SO_2. Compliance with this emissions standard shall be determined on a rolling 365-Operating Day basis using the applicable methodologies set forth in paragraph (e)(2) of this section. The first day for determining compliance with this emissions standard shall be 365 Days after August 17, 2015. The requirements of this paragraph shall remain in effect until the owner or operator achieve compliance with the requirements set forth in paragraphs (k)(3)(ii) and (k)(3)(iii).

(ii) By no later than March 31, 2018, the owner or operator shall convert the existing ductwork and stack at FCPP Unit 5 to a Wet Stack, so as to eliminate the need to bypass flue gas around the FGD absorbers for reheat purposes. Commencing no later than 30 Operating Days thereafter, the owner or operator shall continuously operate the existing FGD at FCPP Unit 5 so as to achieve and maintain a 30-Day Rolling Average SO_2 Removal Efficiency of at least 95.0 percent.

(iii) By no later than July 31, 2018, the owner or operator shall convert the existing ductwork and stack at FCPP Unit 4 to a Wet Stack, so as to eliminate the need to bypass flue gas around the FGD absorbers for reheat purposes. Commencing no later than 30 Operating Days thereafter, the owner or operator shall Continuously Operate the existing FGD at FCPP Unit 4 so as to achieve and maintain a 30-Day Rolling Average SO_2 Removal Efficiency of at least 95.0 percent.

(iv) In addition to meeting the emission rates set forth in paragraphs (k)(3)(i), (k)(3)(ii) and (k)(3)(iii), all Units at FCPP, collectively, shall not emit SO_2 in excess of the following Annual Tonnage Limitations: 13,300 tons of SO_2 per year in 2016 and 2017; 8,300 tons of SO_2 per year in 2018; 6,800 tons of SO_2 per year in 2019 and thereafter.

(v) By each of the dates by which the owner or operator must comply with the 30-Day Rolling Average SO_2 Removal Efficiency required under paragraphs (k)(3)(ii) and (k)(3)(iii), the owner or operator shall install, certify, maintain, and operate FGD inlet SO_2 and any associated diluent CEMS with respect to that Unit in accordance with the requirements of paragraph (e)(1) of this section.

(vi) In determining the 30-Day Rolling Average SO_2 Removal Efficiency, the owner or operator shall use CEMS in accordance with the procedures of 40 CFR part 75, except that SO_2 emissions data for the 30-Day Rolling Average SO_2 Removal Efficiency need not be bias adjusted, and the missing data substitution procedures of 40 CFR part 75 shall not apply. Diluent capping (*i.e.,* 5 percent CO_2) will be applied to the SO_2 emission calculation for any hours where the measured CO_2 concentration is less than 5 percent following the procedures in 40 CFR part 75, Appendix F, Section 3.3.4.1. The owner or operator shall submit a semi-annual report that includes all hours where diluent capping procedures were applied during the reporting period.

(vii) For purposes of determining compliance with the Annual Tonnage Limitations in paragraph (k)(3)(iv), the owner or operator shall use CEMS in accordance with the procedures specified in 40 CFR part 75.

(4) *Use and Surrender of SO_2 Allowances.* (i) The owner or operator shall not use SO_2 Allowances to comply with any requirement of paragraph (k), including by claiming compliance with any emission limitation required paragraph (k) by using, tendering, or otherwise applying SO_2 Allowances to offset any excess emissions.

(ii) Except as provided in paragraph (k), the owner or operator shall not sell, bank, trade, or transfer any SO_2 Allowances allocated to FCPP.

(iii) Beginning with calendar year 2015, and continuing each calendar year thereafter, the owner or operator shall surrender to EPA, or transfer to a non-profit third party selected by the owner or operator for Surrender, all SO_2 Allowances allocated to FCPP for that calendar year that the owner or operator does not need in order to meet their own federal and/or state Clean Air Act statutory or regulatory requirements for the FCPP Units.

(iv) Nothing in paragraph (k)(4) shall prevent the owners or operator from purchasing or otherwise obtaining SO_2 Allowances from another source for purposes of complying with Clean Air Act requirements to the extent otherwise allowed by law.

(v) For any given calendar year, provided that FCPP is in compliance for that calendar year with all emissions limitations for SO_2 set forth in this section, nothing in paragraph (k), including the provisions of paragraphs (k)(4)(ii) and (k)(4)(iii) pertaining to the Use and Surrender of SO_2 Allowances, shall preclude the owner or operator from selling, trading, or transferring SO_2 Allowances allocated to FCPP that become available for sale or trade that calendar year solely as a result of:

(A) The installation and operation of any pollution control technology or technique at Unit 4 or Unit 5 that is not otherwise required by paragraph (k); or

(B) Achievement and maintenance of a 30-Day Rolling Average SO_2 Removal Efficiency at Unit 4 or Unit 5 at a higher removal efficiency than the 30-Day Rolling Average SO_2 Removal Efficiency required by paragraph (k)(3); so long as the owner or operator submits a semi-annual report of the generation of such surplus SO_2 Allowances that occur after August 17, 2015.

(vi) The owner or operator shall Surrender, or transfer to a non-profit third party selected by the owner or operator for Surrender, all SO_2 Allowances required to be Surrendered pursuant to paragraph (k)(4)(iii) by April 30 of the immediately following calendar year. Surrender need not include the specific SO_2 Allowances that were allocated to FCPP, so long as the owner or operator Surrender SO_2 Allowances that are from the same year and that are equal to the number required to be Surrendered under paragraph (k)(4)(vii).

(vii) If any SO_2 Allowances are transferred directly to a non-profit third party, the owner or operator shall include a description of such transfer in the next semi-annual report submitted to EPA. Such report shall:

(A) Provide the identity of the non-profit third-party recipient(s) of the SO_2

Allowances and a listing of the serial numbers of the transferred SO_2 Allowances; and

(B) Include a certification by the third-party recipient(s) certifying under the penalty of law that the recipient(s) will not sell, trade, or otherwise exchange any of the allowances and will not use any of the SO_2 Allowances to meet any obligation imposed by any environmental law. The certification must also include a statement that the recipient understands that there are significant penalties for submitting false, inaccurate or incomplete information to the United States.

(C) No later than the third semi-annual report due after the transfer of any SO_2 Allowances, the owner or operator shall include a statement that the third-party recipient(s) Surrendered the SO_2 Allowances for permanent Surrender to EPA in accordance with the provisions of paragraph (k)(4)(ix) within one (1) year after the owner or operator transferred the SO_2 Allowances to them. The owner or operator shall not have complied with the SO_2 Allowance Surrender requirements of subparagraph (k)(4)(viii) until all third-party recipient(s) shall have actually Surrendered the transferred SO_2 Allowances to EPA.

(viii) For all SO_2 Allowances Surrendered to EPA, the owner or operator or the third-party recipient(s) (as the case may be) shall first submit an SO_2 Allowance transfer request form to the EPA Office of Air and Radiation's Clean Air Markets Division directing the transfer of such SO_2 Allowances to the EPA Enforcement Surrender Account or to any other EPA account that EPA may direct in writing. Such SO_2 Allowance transfer requests may be made in an electronic manner using the EPA's Clean Air Markets Division Business System or similar system provided by EPA. As part of submitting these transfer requests, the owner or operator or the third-party recipient(s) shall irrevocably authorize the transfer of these SO_2 Allowances and identify—by name of account and any applicable serial or other identification numbers or station names—the source and location of the SO_2 Allowances being Surrendered.

(5) PM Emission Reduction Requirements.

(i) The owner or operator shall operate each FCPP Unit in a manner consistent with good air pollution control practice for minimizing PM emissions, as set forth in paragraph (g). In addition, with respect to FCPP Units 4 and 5, the owner or operator shall, at a minimum, to the extent practicable:

(A) Operate each compartment of the Baghouse for each Unit (except the compartment provided as a spare compartment under the design of the baghouse), regardless of whether those actions are needed to comply with opacity limits;

(B) Repair any failed Baghouse compartment at the next planned Unit outage (or unplanned outage of sufficient length);

(C) Maintain and replace bags on each Baghouse as needed to achieve the required collection efficiency;

(D) Inspect for and repair during the next planned Unit outage (or unplanned outage of sufficient length) any openings in Baghouse casings, ductwork, and expansion joints to minimize air leakage; and

(E) Ensure that a bag leak detection program is developed and implemented to detect leaks and promptly repair any identified leaks.

(ii) The owner or operator shall Continuously Operate a Baghouse at FCPP Unit 4 and Unit 5 so as to achieve and maintain a filterable PM Emission Rate no greater than 0.0150 lb/MMBtu.

(iii) Once in each calendar year, the owner or operator shall conduct stack tests for PM at FCPP Units 4 and 5. Alternatively, following the installation and operation of PM CEMS as required by paragraph (k)(6), the owner or operator may seek written approval to forego stack testing and instead demonstrate continuous compliance with an applicable filterable PM Emission Rate using CEMS on a 24-hour rolling average basis.

(iv) Unless EPA approves a request to demonstrate continuous compliance using CEMS under paragraph (k)(5)(iii) to determine compliance with the PM Emission Rate established in subparagraph (k)(5)(ii), the owner or operator shall use the reference methods and procedures (filterable portion only) specified in 40 CFR part 60, App. A–3, Method 5, Method 5 as described in subpart UUUUU, Table 5, or App. A–6, Method 17 (provided that Method 17 shall only be used for stack tests conducted prior to conversion of an FCPP Unit to a Wet Stack), or alternative stack tests or methods that are requested by the owner or operator and approved by EPA. Each test shall consist of three separate runs performed under representative operating conditions not including periods of startup, shutdown, or Malfunction. The sampling time for each run shall be at least 120 minutes and the volume of each run shall be at least 1.70 dry standard cubic meters (60 dry standard cubic feet). The owner or operator shall calculate the PM Emission Rate from the stack test results in accordance with 40 CFR 60.8(f). The results of each PM stack test shall be submitted to EPA and NNEPA within 60 Days of completion of each test.

(v) Once each calendar year, the owner or operator shall conduct a PM stack test for condensable PM at FCPP Units 4 and 5, using the reference methods and procedures set forth at 40 CFR part 51, Appendix M, Method 202 and as set forth in paragraph (vi). This test shall be conducted under as similar operating conditions and as close in time as reasonably possible as the test for filterable PM in paragraph (k)(5)(iv). Each test shall consist of three separate runs performed under representative operating conditions not including periods of startup, shutdown, or Malfunction. The sampling time for each run shall be at least 120 minutes and the volume of each run shall be at least 1.70 dry standard cubic meters (60 dry standard cubic feet). The owner or operator shall calculate the number of pounds of condensable PM emitted in lb/MMBtu of heat input from the stack test results in accordance with 40 CFR 60.8(f). The results of the PM stack test conducted pursuant to this paragraph shall not be used for the purpose of determining compliance with the PM Emission Rates required by paragraph (k). The results of each PM stack test shall be submitted to EPA within sixty (60) Days of completion of each test. If EPA approves a request to demonstrate continuous compliance with an applicable PM Emission Rate at a Unit using PM CEMS under paragraph (k)(5)(iii), annual stack testing for condensable PM using the reference methods and procedures set forth at 40 CFR part 51, Appendix M, Method 202 is not required for that Unit.

(6) *PM CEMS.* (i) The owner or operator shall install, correlate, maintain, and operate a PM CEMS for FCPP Unit 4 and FCPP Unit 5 as specified below. The PM CEMS shall comprise a continuous-particle mass monitor measuring particulate matter concentration, directly or indirectly, on an hourly average basis and a diluent monitor used to convert the concentration to units expressed in lb/MMBtu. The PM CEMS installed at each Unit must be appropriate for the anticipated stack conditions and capable of measuring PM concentrations on an hourly average basis. Each PM CEMS shall complete a minimum of one cycle of operations (sampling, analyzing and data recording) for each successive 15-minute period. The owner or operator shall maintain, in an electronic database, the hourly-average emission values of all PM CEMS in lb/MMBtu. Except for periods of monitor

malfunction, maintenance, or repair, the owner or operator shall continuously operate the PM CEMS at all times when the Unit it serves is operating.

(ii) By no later than February 16, 2017, the owner or operator shall ensure that the PM CEMS are installed, correlated, maintained and operated at FCPP Units 4 and 5.

(iii) The owner or operator shall ensure that performance specification tests on the PM CEMS are conducted and shall ensure compliance with the PM CEMS installation plan and QA/QC protocol submitted to and approved by EPA. The PM CEMS shall be operated in accordance with the approved plan and QA/QC protocol.

(iv) The data recorded by the PM CEMS during Unit operation, expressed in lb/MMBtu on a 3-hour, 24-hour, and 30-Day rolling average basis, shall be included in the semiannual report submitted to EPA in electronic format (Microsoft Excel-compatible).

(v) Notwithstanding any other provision of paragraph (k), exceedances of the PM Emission Rate that occur as a result of detuning emission controls as required to achieve the high-level PM test runs during the correlation testing shall not be considered a violation of the requirements of this section provided that the owner or operator made best efforts to keep the high-level PM test runs during such correlation testing below the applicable PM Emission Rate.

(vi) Stack testing conducted pursuant to paragraph (k)(5)(iv) shall be the compliance method for the PM Emission Rates established by paragraph (k)(5), unless EPA approves a request under paragraph (k)(5)(iii), in which case PM CEMS shall be used to demonstrate continuous compliance with an applicable PM Emission Rate on a 24-hour rolling average basis. Data from PM CEMS shall be used, at a minimum, to monitor progress in reducing PM emissions on a continuous basis.

(7) *Reporting.* The owner or operator shall submit all notifications, petitions, and reports under paragraph (k), unless otherwise specified, to EPA and NNEPA in accordance with paragraph (f).

[FR Doc. 2016–28870 Filed 12–1–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2016–0069; FRL–9955–22–OAR]

RIN 2060–AT17

Revisions to Method 301: Field Validation of Pollutant Measurement Methods From Various Waste Media

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In this action, the Environmental Protection Agency (EPA) proposes editorial and technical revisions to the EPA's Method 301 ''Field Validation of Pollutant Measurement Methods from Various Waste Media'' in order to correct and update the method. In addition, the EPA is clarifying the applicability of Method 301 as well as its utility to other regulatory provisions. The proposed revisions include ruggedness testing for validation of test methods for application at multiple sources, determination of limit of detection for all method validations, incorporating procedures for determining the limit of detection, revising the sampling requirements for the comparison procedure, adding storage and sampling procedures for sorbent sampling systems, and clarifying acceptable statistical results for candidate test methods. We also propose to clarify the applicability of Method 301 to our regulations and to add equations to clarify calculation of the correction factor, standard deviation, estimated variance of a validated test method, standard deviation of differences, and t-statistic for all validation approaches.

Changes made to the Method 301 field validation protocol under this proposed action would apply only to methods submitted to the EPA for approval after the effective date of this action.

DATES: *Comments.* Comments must be received on or before January 31, 2017.

Public Hearing. If anyone contacts the EPA requesting a public hearing by December 12, 2016, the EPA will hold a public hearing on January 3, 2017 from 1:00 p.m. (Eastern Standard Time) to 5:00 p.m. (Eastern Standard Time) at the U.S. Environmental Protection Agency building located at 109 T.W. Alexander Drive, Research Triangle Park, NC 27711. Information regarding a hearing will be posted at *http://www3.epa.gov/ttn/emc/methods/.*

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0069, to the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: For information concerning this proposal, contact Ms. Kristen J. Benedict, Office of Air Quality Planning and Standards, Air Quality Assessment Division (E143–02), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–1394; fax number: (919) 541–0516; email address: *benedict.kristen@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. General Information
- A. Does this action apply to me?
- B. What should I consider as I prepare my comments?
- C. Where can I get a copy of this document and other related information?

II. Background

III. Summary of Proposed Revisions
- A. Technical Revisions
- B. Clarifying and Editorial Changes

IV. Request for Comments

V. Statutory and Executive Order Reviews
- A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
- B. Paperwork Reduction Act (PRA)
- C. Regulatory Flexibility Act (RFA)
- D. Unfunded Mandates Reform Act (UMRA)
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
- G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
- H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

I. National Technology Transfer and Advancement Act (NTTAA)
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. Does this action apply to me?

Method 301 affects/applies to you, under 40 CFR 63.7(f) or 40 CFR 65.158(a)(2)(iii), when you want to use an alternative to a required test method to meet an applicable requirement or when there is no required or validated test method. In addition, the validation procedures of Method 301 are an appropriate tool for demonstration of the suitability of alternative test methods under 40 CFR 59.104 and 59.406, 40 CFR 60.8(b), and 40 CFR 61.13(h)(1)(ii). If you have any questions regarding the applicability of the proposed changes to Method 301, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments?

Submitting CBI: Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the 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 marked as CBI will not be disclosed except in accordance with procedures set forth in title 40 CFR part 2.

Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. Send or deliver information identified as CBI to: OAQPS Document Control Officer (Room C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2016–0069.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA/DC, EPA WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of the proposed method revisions is available on the Technology Transfer Network (TTN) Web site at *http://www3.epa.gov/ttn/emc/methods/.* The TTN provides information and technology exchange in various areas of air pollution control.

II. Background

The EPA originally published Method 301 (appendix A to 40 CFR part 63, Test Methods) on December 29, 1992 (57 FR 61970), as a field validation protocol method to be used to validate new test methods for hazardous air pollutants in support of the Early Reductions Program of Part 63 when test methods were unavailable. On March 16, 1994, the EPA incorporated Method 301 into 40 CFR 63.7 (59 FR 12430) as a means to validate a candidate test method as an alternative to a test method specified in a standard or for use where no test method is provided in a standard. To date, subsequent revisions of Method 301 have not distinguished requirements for source-specific applications of a candidate method versus application of a candidate test method at multiple sources. The EPA's Method 301 specifies procedures for determining and documenting the bias and precision of a test method that is a candidate for use as an alternative to a test method specified in an applicable regulation, or for use as a means for showing compliance with a regulatory standard in absence of a validated test method. Method 301 is required for these purposes under 40 CFR 63.7(f) and 40 CFR 65.158(a)(2)(iii), and would be considered an appropriate tool for demonstration and validation of alternative methods under 40 CFR 59.104 and 59.406, 40 CFR 60.8(b), and 40 CFR 61.13(h)(1)(ii). The procedures specified in Method 301 are applicable to various media types (*e.g.,* sludge, exhaust gas, wastewater).

Bias (or systemic error) is established by comparing measurements made using a candidate test method against reference values, either reference materials or a validated test method. Where needed, a correction factor for source-specific application of the method is employed to eliminate/minimize bias. This correction factor is established from data obtained during the validation test. Methods that have bias correction factors outside a specified range are considered unacceptable. Method precision (or random error) must be demonstrated to be as precise as the validated method for acceptance or less than or equal to 20 percent when the candidate method is being evaluated using reference materials.

Additionally, the EPA recognized that there were a number of ways Method 301 could be clarified while reviewing submitted data and answering questions from facilities, environmental labs, and technology vendors on the application and requirements of the method.

III. Summary of Proposed Revisions

In this action, we propose clarifications to the applicability and utility of Method 301 to additional regulatory provisions, and propose technical revisions and editorial changes intended to clarify and update the requirements and procedures specified in Method 301.

A. Technical Revisions

1. Applicability of Ruggedness Testing and Limit of Detection Determination

In the current version of Method 301, the procedures for conducting ruggedness testing in sections 3.1 and 14.0, and for determining the limit of detection (LOD) in sections 3.1 and 15.0, are optional procedures that are not required for validation of a candidate test method. In this action, we propose to amend sections 3.1 and 14.0 to require ruggedness testing when using Method 301 to validate a candidate test method intended for application to multiple sources. Ruggedness testing would continue to be optional for validation of methods intended for source-specific applications. We also propose to amend sections 3.1 and 15.0 to require determination of the LOD for validation of all methods (*i.e.,* those intended for both source and multi-source application). Additionally, we propose clarifications to the LOD definition in section 15.1.

Ruggedness testing of a test method is a laboratory study to determine the sensitivity of the method by measuring its capacity to remain unaffected by small, but deliberate variations in method parameters such as sample collection rate and sample recovery temperature to provide an indication of its reliability during normal usage. Requiring ruggedness testing and determination of the LOD for validation of a candidate test method that is intended for use at multiple sources will further inform the EPA's determination of whether the candidate test method is valid across a range of source emission matrices, varying method parameters, and conditions. Additionally, conducting an LOD determination for source-specific validations will account for the sensitivity of the candidate test method to ensure it meets applicable regulatory requirements.

2. Limit of Detection Procedures

The EPA proposes revisions to the requirements for determining the LOD specified in section 15.2 and Table 301–5 (Procedure I) to incorporate procedures of the EPA's proposed revisions to 40 CFR part 136, appendix B (80 FR 8955). The proposed revisions address laboratory blank contamination and account for intra-laboratory variability, consistent with the proposed changes to 40 CFR part 136. We propose to require Procedure I of Table 301–5 for determining an LOD when an analyte in a sample matrix is collected prior to an analytical measurement or the estimated LOD is no more than twice the calculated LOD.

For the purposes of this proposed rule, LOD would be equivalent to the calculated method detection limit (MDL) determined using the procedures specified in proposed 40 CFR part 136, appendix B. Through this proposed change, laboratories would be required to consider media blanks when performing LOD calculations. If the revisions to 40 CFR part 136, appendix B are finalized as proposed prior to a final action on this proposal, we will cross-reference appendix B. If appendix B is finalized before this action and the revisions do not incorporate the procedures as described above, the EPA intends to incorporate the specific procedures for determining the LOD in the final version of Method 301 consistent with this proposal. If appendix B is not finalized before these proposed revisions, the EPA also intends to incorporate the specific procedures directly into Method 301. Other than the proposed revisions to 40 CFR part 136, appendix B, as discussed above, changes addressed under that rulemaking are outside the scope of this proposed action.

3. Storage and Sampling Procedures

Currently, the number of samples required by Method 301 when using a quadruplicate sampling system for conducting the analyte spiking procedure and for conducting the comparison procedure is not consistent. In this action, we propose revisions to section 11.1.3 and Table 301–1 to require six sets of quadruplicate samples (a total of 24 samples for the analyte spiking or comparison procedures) rather than four sets. This proposed revision will ensure the bias and precision requirements are consistent in the method and decrease the amount of uncertainty in the calculations for bias and precision when comparing an alternative test method with a validated method. Bias and precision (standard deviation and variance) are all inversely related to the number of sampling trains (sample results) used to estimate the difference between the alternative test method and the validated method. As the number of trains goes up, the bias and precision estimates go down. Larger data sets provide better estimates of the standard deviation or variance and the distribution of the data. The proposed revision to collect a total of 24 samples when using the analyte spiking approach is also consistent with the number of samples required for the isotopic spiking approach. The 12 samples collected when conducting the isotopic spiking approach are equivalent to the 24 samples collected using the analyte spiking approach because the isotopic labelling of the spike allows each of the 12 samples to yield two results, one for an unspiked sample and one for a spiked sample.

In this action, we also propose revisions to section 9.0 to specify that either paired sampling or quadruplicate sampling systems may be used for isotopic spiking, while only quadruplicate sampling systems may be used to establish precision for analyte spiking or when comparing an alternative method to a validated method.

For validations conducted by comparing the candidate test method to a validated test method, we propose to add: (1) Storage and sampling procedures for sorbent systems requiring thermal desorption to Table 301–2; and (2) a new Table 301–4 to provide a look-up table of F values for the one-sided confidence level used in assessing the precision of the candidate test method. We also propose an amendment to the reference list in section 18.0 to include the source of the F values.

4. Bias Criteria for Multi-Source Versus Source-Specific Validation

In this action, we propose clarification to sections 8.0, 10.3, and 11.1.3 to specify that candidate test methods intended for use at multiple sources must have a bias less than or equal to 10 percent. We propose that candidate test methods with a bias greater than 10 percent, but less than 30 percent, apply only at the source at which the validation testing was conducted and that data collected in the future be adjusted for bias using a source-specific correction factor. A source-specific correction factor is not necessarily appropriate for use at multiple sources. This proposed change provides flexibility for source-specific Method 301 application while limiting the acceptance criteria for use of the method at multiple sources. We believe that the Method 301 results from a single source are not sufficient to allow us to establish a correction factor that can be applied at multiple sources.

5. Relative Standard Deviation Assessment

In this action, we propose amendments to sections 9.0 and 12.2 to clarify the interpretation of the relative standard deviation (RSD) when determining the precision of a candidate test method using the analyte spiking or isotopic spiking procedures. For a test method to be acceptable, we propose that the RSD of a candidate test method must be less than or equal to 20 percent. Accordingly, we propose to remove the sampling provisions for cases where the RSD is greater than 20 percent, but less than 50 percent. Poor precision makes it difficult to detect potential bias in a test method. For this reason, we are proposing an acceptance criteria of less than or equal to 20 percent for analyte and isotopic spiking sampling procedures.

6. Applicability of Method 301

Currently, Method 301 states that it is applicable for determining alternative test methods for standards under 40 CFR part 63 (National Emission Standards for Hazardous Air Pollutants for Source Categories). Although 40 CFR 65.158(a)(2)(iii) specifically cross-references Method 301, Method 301 has not previously been revised to reference Part 65. For parts 63 and 65, Method 301 must be used for establishing an alternative test method. In this action, we propose revisions clarifying that Method 301 is applicable to both parts 63 and 65 and that Method 301 is also

appropriate for validating alternative test methods for use under the following parts under title 40 of the Clean Air Act:

- Part 59 (National Volatile Organic Compound Emission Standards for Consumer and Commercial Products)
- Part 60 (Standards of Performance for New Stationary Sources)
- Part 61 (National Emission Standards for Hazardous Air Pollutants)

We believe that the Method 301 procedures for determining bias and precision provide a suitable technical approach for assessing candidate or alternative test methods for use under these regulatory parts as the testing provisions are very similar to those under parts 63 and 65. To accommodate the expanded applicability and suitability, we propose to revise the references in sections 2.0, 3.2, 5.0, 13.0, 14.0, and 16.1 to refer to all five regulatory parts.

7. Equation Additions

In this action, we propose to clarify the procedures in Method 301 by adding the following equations:

- Equation 301–8 in section 10.3 for calculating the correction factor
- Equation 301–11 in section 11.1.1 and Equation 301–19 in section 12.1.1 for calculating the numerical bias
- Equation 301–12 in section 11.1.2 and Equation 301–20 in section 12.1.2 for determining the standard deviation of differences
- Equation 301–13 in section 11.1.3 and Equation 301–21 in section 12.1.3 for calculating the t-statistic
- Equation 301–15 in section 11.2.1 to estimate the variance of the validated test method
- Equation 301–23 in section 12.2 for calculating the standard deviation

We also propose revisions to the denominator of Equation 22 to use the variable ''CS'' rather than ''VS.'' Additionally, we propose revisions to the text of Method 301, where needed, to list and define all variables used in the method equations. These proposed changes are intended to improve the readability of the method and ensure that required calculations and acceptance criteria for each of Method 301's three validation approaches are clear.

B. Clarifying and Editorial Changes

In this action, we propose minor edits throughout the text of Method 301 to clarify the descriptions and requirements for assessing bias and precision, to ensure consistency when referring to citations within the method, to renumber equations and tables (where necessary), and to remove passive voice.

We propose edits to clarify several definitions in section 3.2. In the definition of ''Paired sampling system,'' we propose a minor edit to note that the system is collocated. For the definition of ''Quadruplet sampling system,'' we propose to replace the term ''Quadruplet'' with ''Quadruplicate'' and to add descriptive text to the definition to provide examples of replicate samples. We are also proposing companion edits throughout the method text to reflect the change in terminology from ''quadruplet'' to ''quadruplicate.'' Additionally, we propose clarifying edits to the definition of ''surrogate compound.''

We also propose replacing the term ''alternative test method'' with ''candidate test method'' in section 3.2 and throughout Method 301 to maintain consistency when referring to a test method that is subject to the validation procedures specified in Method 301.

Additionally, the EPA proposes the following updates and corrections by:

- Updating the address for submitting waivers in section 17.2.
- Adding the t-value for 11 degrees of freedom to Table 301–2.
- Correcting the t-value for four degrees of freedom in Table 301–2.

IV. Request for Comments

The EPA specifically requests public comments on the expanded applicability of Method 301 to 40 CFR part 59 and to note the suitability of Method 301 for validation of alternative test methods under 40 CFR parts 60 and 61. In addition, we specifically request comment on the following proposed technical amendments to Method 301:

(A) Requiring ruggedness testing and determination of LOD for validation of test methods intended for multi-source and source-specific applications.

(B) Incorporating the procedures specified in the proposed revisions to 40 CFR part 136, appendix B, into the Method 301 procedures for determining LOD.

(C) Revising the sampling requirements for the method comparison procedure to require six sets of quadruplicate samples rather than four sets, and adding storage and sampling procedures for sorbent systems that require thermal desorption.

(D) Clarifying that candidate test methods that are intended for use at multiple sources must have a bias less than or equal to 10 percent and that test methods, where the bias is greater than 10 percent but less than to 30 percent, are applicable only on a source-specific basis with the use of a correction factor.

(E) Clarifying that the RSD of a candidate test method validated using the analyte spiking or isotopic spiking procedure must be less than or equal to 20 percent for the method to be acceptable.

(F) Adding equations to calculate the: (1) Correction factor (if required) when using isotopic spiking; (2) standard deviation when using the analyte spiking procedure; (3) estimated variance of validated test method when using the comparison procedure; and (4) standard deviation of differences and t-statistic when using the analyte spiking or comparison procedures.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This proposed action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This proposed action does not impose an information collection burden under the PRA. The revisions being proposed in this action to Method 301 do not add information collection requirements, but make corrections and updates to existing testing methodology.

C. Regulatory Flexibility Act (RFA)

I certify that this proposed action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. The proposed revisions to Method 301 do not impose any requirements on regulated entities beyond those specified in the current regulations, nor do they change any emission standard. We have therefore concluded that this proposed action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This proposed action does not contain any unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538. The proposed action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This proposed action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and

responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed action does not have tribal implications, as specified in Executive Order 13175. This proposed action would correct and update the existing procedures specified in Method 301. Thus, Executive Order 13175 does not apply to this proposed action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This proposed action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This proposed action involves technical standards. The agency previously identified ASTM D4855–97 (Standard Practice for Comparing Test Methods) as being potentially applicable in previous revisions of Method 301, but determined that the use of ASTM D4855–97 was impractical (Section V in 76 FR 28664).

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This action would make corrections and updates to an existing protocol for assessing the precision and accuracy of alternative test methods to ensure they are comparable to the methods otherwise required; thus, it does not modify or affect the impacts to human health or the environment of any standards for which it may be used.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Alternative test method, EPA Method 301, Field validation, Hazardous air pollutants.

Dated: November 8, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, the EPA proposes to amend title 40, chapter I of the Code of the Federal Regulations as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

■ 2. Appendix A to part 63 is amended by revising Method 301 to read as follows:

Appendix A to Part 63—Test Methods Pollutant Measurement Methods From Various Waste Media

Method 301—Field Validation of Pollutant Measurement Methods From Various Waste Media

Sec.

Using Method 301

1.0 What is the purpose of Method 301?
2.0 When must I use Method 301?
3.0 What does Method 301 include?
4.0 How do I perform Method 301?

Reference Materials

5.0 What reference materials must I use?

Sampling Procedures

6.0 What sampling procedures must I use?
7.0 How do I ensure sample stability?

Bias and Precision

8.0 What are the requirements for bias?
9.0 What are the requirements for precision?
10.0 What calculations must I perform for isotopic spiking?
11.0 What calculations must I perform for comparison with a validated method if I am using quadruplicate replicate sampling systems?
12.0 What calculations must I perform for analyte spiking?
13.0 How do I conduct tests at similar sources?

Optional Requirements

14.0 How do I use and conduct ruggedness testing?
15.0 How do I determine the Limit of Detection for the candidate test method?

Other Requirements and Information

16.0 How do I apply for approval to use a candidate test method?
17.0 How do I request a waiver?
18.0 Where can I find additional information?

Using Method 301

1.0 What is the purpose of Method 301?

Method 301 provides a set of procedures for the owner or operator of an affected source, to validate a candidate test method as an alternative to a required test method based on established precision and bias criteria. These validation procedures are applicable under 40 CFR part 63 or 65 when a test method is proposed as an alternative test method to meet an applicable requirement or in the absence of a validated method. Additionally, the validation procedures of Method 301 are appropriate for demonstration of the suitability of alternative test methods under 40 CFR parts 59, 60, and 61. If, under 40 CFR part 63 or 60, you choose to propose a validation method other than Method 301, you must submit and obtain the Administrator's approval for the candidate validation method.

2.0 What approval must I have to use Method 301?

If you want to use a candidate test method to meet requirements in a subpart of 40 CFR part 59, 60, 61, 63, or 65, you must also request approval to use the candidate test method according to the procedures in Section 16 of this method and the appropriate section of the part (§ 59.104, § 59.406, § 60.8(b), § 61.13(h)(ii), § 63.7(f), or § 65.158(a)(2)(iii)). You must receive the Administrator's written approval to use the candidate test method before you use the candidate test method to meet the applicable federal requirements. In some cases, the Administrator may decide to waive the requirement to use Method 301 for a candidate test method to be used to meet a requirement under 40 CFR part 59, 60, 61, 63, or 65 in absence of a validated test method. Section 17 of this method describes the requirements for obtaining a waiver.

3.0 What does Method 301 include?

3.1 *Procedures.* Method 301 includes minimum procedures to determine and document systematic error (bias) and random error (precision) of measured concentrations from exhaust gases, wastewater, sludge, and other media. Bias is established by comparing the results of sampling and analysis against a reference value. Bias may be adjusted on a source-specific basis using a correction factor and data obtained during the validation test. Precision may be determined using a paired sampling system or quadruplicate sampling system for isotopic spiking. A quadruplicate sampling system is required when establishing precision for analyte spiking or when comparing a candidate test method to a validated method. If such procedures have not been established and verified for the candidate test method, Method 301 contains procedures for ensuring sample stability by developing sample storage procedures and limitations and then testing them. Method 301 also includes procedures for ruggedness testing and determining detection limits. The procedures for ruggedness testing and determining detection limits are required for candidate test methods that are to be applied to multiple sources and optional for

candidate test methods that are to be applied at a single source.

3.2 *Definitions.*

Affected source means an affected source as defined in the relevant part and subpart under title 40 (*e.g.,* 40 CFR parts 59, 60, 61, 63, and 65).

Candidate test method means the sampling and analytical methodology selected for field validation using the procedures described in Method 301. The candidate test method may be an alternative test method under 40 CFR part 59, 60, 61, 63, or 65.

Paired sampling system means a sampling system capable of obtaining two replicate samples that are collected as closely as possible in sampling time and sampling location (collocated).

Quadruplicate sampling system means a sampling system capable of obtaining four replicate samples (*e.g.,* two pairs of measured data, one pair from each method when comparing a candidate test method against a validated test method, or analyte spiking with two spiked and two unspiked samples) that are collected as close as possible in sampling time and sampling location.

Surrogate compound means a compound that serves as a model for the target compound(s) being measured (*i.e.,* similar chemical structure, properties, behavior). The surrogate compound can be distinguished by the candidate test method from the compounds being analyzed.

4.0 How do I perform Method 301?

First, you use a known concentration of an analyte or compare the candidate test method against a validated test method to determine the bias of the candidate test method. Then, you collect multiple, collocated simultaneous samples to determine the precision of the candidate test method. Additional procedures, including validation testing over a broad range of concentrations over an extended time period are used to expand the applicability of a candidate test method to multiple sources. Sections 5.0 through 17.0 of this method describe the procedures in detail.

Reference Materials

5.0 What reference materials must I use?

You must use reference materials (a material or substance with one or more properties that are sufficiently homogenous to the analyte) that are traceable to a national standards body (*e.g.,* National Institute of Standards and Technology (NIST)) at the level of the applicable emission limitation or standard that the subpart in 40 CFR part 59, 60, 61, 63, or 65 requires. If you want to expand the applicable range of the candidate test method, you must conduct additional test runs using analyte concentrations higher and lower than the applicable emission limitation or the anticipated level of the target analyte. You must obtain information about your analyte according to the procedures in Sections 5.1 through 5.4 of this method.

5.1 *Exhaust Gas Test Concentration.* You must obtain a known concentration of each analyte from an independent source such as a specialty gas manufacturer, specialty chemical company, or chemical laboratory. You must also obtain the manufacturer's certification of traceability, uncertainty, and stability for the analyte concentration.

5.2 *Tests for Other Waste Media.* You must obtain the pure liquid components of each analyte from an independent manufacturer. The manufacturer must certify the purity, traceability, uncertainty, and shelf life of the pure liquid components. You must dilute the pure liquid components in the same type medium or matrix as the waste from the affected source.

5.3 *Surrogate Analytes.* If you demonstrate to the Administrator's satisfaction that a surrogate compound behaves as the analyte does, then you may use surrogate compounds for highly toxic or reactive compounds. A surrogate may be an isotope or compound that contains a unique element (*e.g.,* chlorine) that is not present in the source or a derivation of the toxic or reactive compound if the derivative formation is part of the method's procedure. You may use laboratory experiments or literature data to show behavioral acceptability.

5.4 *Isotopically-Labeled Materials.* Isotope mixtures may contain the isotope and the natural analyte. The concentration of the isotopically-labeled analyte must be more than five times the concentration of the naturally-occurring analyte.

Sampling Procedures

6.0 What sampling procedures must I use?

You must determine bias and precision by comparison against a validated test method, using isotopic spiking, or using analyte spiking (or the equivalent). Isotopic spiking can only be used with candidate test methods capable of measuring multiple isotopes simultaneously such as test methods using mass spectrometry or radiological procedures. You must collect samples according to the requirements specified in Table 301–1 of this method. You must perform the sampling according to the procedures in Sections 6.1 through 6.4 of this method.

6.1 *Isotopic Spiking.* Spike all 12 samples with isotopically-labelled analyte at an analyte mass or concentration level equivalent to the emission limitation or standard specified in the applicable regulation. If there is no applicable emission limitation or standard, spike the analyte at the expected level of the samples. Follow the applicable spiking procedures in Section 6.3 of this method.

6.2 *Analyte Spiking.* In each quadruplicate set, spike half of the samples (two out of the four samples) with the analyte according to the applicable procedure in Section 6.3 of this method. You should spike at an analyte mass or concentration level equivalent to the emission limitation or standard specified in the applicable regulation. If there is no applicable emission limitation or standard, spike the analyte at the expected level of the samples. Follow the applicable spiking procedures in Section 6.3 of this method.

6.3 *Spiking Procedure.*

6.3.1 *Gaseous Analyte With Sorbent or Impinger Sampling Train.* Sample the analyte being spiked (in the laboratory or preferably in the field) at a mass or concentration that is approximately equivalent to the applicable emission limitation or standard (or the expected sample concentration or mass where there is no standard) for the time required by the candidate test method, and then sample the stack gas stream for an equal amount of time. The time for sampling both the analyte and stack gas stream should be equal; however, you must adjust the sampling time to avoid sorbent breakthrough. You may sample the stack gas and the gaseous analyte at the same time. You must introduce the analyte as close to the tip of the sampling probe as possible.

6.3.2 *Gaseous Analyte With Sample Container (Bag or Canister).* Spike the sample containers after completion of each test run with an analyte mass or concentration to yield a concentration approximately equivalent to the applicable emission limitation or standard (or the expected sample concentration or mass where there is no standard). Thus, the final concentration of the analyte in the sample container would be approximately equal to the analyte concentration in the stack gas plus the equivalent of the applicable emission standard (corrected for spike volume). The volume amount of spiked gas must be less than 10 percent of the sample volume of the container.

6.3.3 *Liquid or Solid Analyte With Sorbent or Impinger Trains.* Spike the sampling trains with an amount approximately equivalent to the mass or concentration in the applicable emission limitation or standard (or the expected sample concentration or mass where there is no standard) before sampling the stack gas. If possible, do the spiking in the field. If it is not possible to do the spiking in the field, you must spike the sampling trains in the laboratory.

6.3.4 *Liquid and Solid Analyte With Sample Container (Bag or Canister).* Spike the containers at the completion of each test run with an analyte mass or concentration approximately equivalent to the applicable emission limitation or standard in the subpart (or the expected sample concentration or mass where there is no standard).

6.4 *Probe Placement and Arrangement for Stationary Source Stack or Duct Sampling.* To sample a stationary source, you must place the paired or quadruplicate probes according to the procedures in this subsection. You must place the probe tips in the same horizontal plane.

6.4.1 *Paired Sampling Probes.* For paired sampling probes, the first probe tip should be 2.5 centimeters (cm) from the outside edge of the second probe tip, with a pitot tube on the outside of each probe. Section 17.1 of Method 301 describes conditions for waivers. For example, the Administrator may approve a validation request where other paired arrangements for the pitot tubes (where required) are used.

6.4.2 *Quadruplicate Sampling Probes.* For quadruplicate sampling probes, the tips should be in a 6.0 cm x 6.0 cm square area measured from the center line of the opening of the probe tip with a single pitot tube, where required, in the center of the probe

tips or two pitot tubes, where required, with their location on either side of the probe tip configuration. Section 17.1 of Method 301 describes conditions for waivers. For example, you must propose an alternative arrangement whenever the cross-sectional area of the probe tip configuration is approximately five percent or more of the stack or duct cross-sectional area.

7.0 How do I ensure sample stability?

7.1 *Developing Sample Storage and Threshold Procedures.* If the candidate test method includes well-established procedures supported by experimental data for sample storage and the time within which the collected samples must be analyzed, you must store the samples according to the procedures in the candidate test method and you are not required to conduct the procedures specified in Section 7.2 or 7.3 of this method. If the candidate test method does not include such procedures, your candidate method must include procedures for storing and analyzing samples to ensure sample stability. At a minimum, your proposed procedures must meet the requirements in Section 7.2 or 7.3 of this method. The minimum time period between collection and storage must be as soon as possible, but no longer than 72 hours after collection of the sample. The maximum storage duration must not be longer than 2 weeks.

7.2 *Storage and Sampling Procedures for Stack Test Emissions.* You must store and analyze samples of stack test emissions according to Table 301–2 of this method. You may reanalyze the same sample at both the minimum and maximum storage durations for: (1) Samples collected in containers such as bags or canisters that are not subject to dilution or other preparation steps, or (2) impinger samples not subjected to preparation steps that would affect stability of the sample such as extraction or digestion. For candidate test method samples that do not meet either of these criteria, you must analyze one of a pair of replicate samples at the minimum storage duration and the other replicate at the proposed storage duration but no later than 2 weeks of the initial analysis to identify the effect of storage duration on analyte samples. If you are using the isotopic spiking procedure, then you must analyze each sample for the spiked analyte and the native analyte.

7.3 *Storage and Sampling Procedures for Testing Other Waste Media (e.g., Soil/Sediment, Solid Waste, Water/Liquid).* You must analyze one of each pair of replicate samples (half the total samples) at the minimum storage duration and the other replicate (other half of samples) at the maximum storage duration or within two weeks of the initial analysis to identify the effect of storage duration on analyte samples. The minimum time period between collection and storage should be as soon as possible, but no longer than 72 hours after collection of the sample.

7.4 *Sample Stability.* After you have conducted sampling and analysis according to Section 7.2 or 7.3 of this method, compare the results at the minimum and maximum storage durations. Calculate the difference in the results using Equation 301–1 of this method.

$$d_i = R_{mini} - R_{maxi} \qquad \text{(Eq. 301-1)}$$

Where:

d_i = Difference between the results of the ith replicate pair of samples.

R_{mini} = Results from the ith replicate sample pair at the minimum storage duration.

R_{maxi} = Results from the ith replicate sample pair at the maximum storage duration.

For single samples that can be reanalyzed for sample stability assessment (*e.g.,* bag or canister samples and impinger samples that do not require digestion or extraction), the values for R_{mini} and R_{maxi} will be obtained from the same sample rather than replicate samples.

7.4.1 *Standard Deviation.* Determine the standard deviation of the paired samples using Equation 301–2 of this method.

$$SD_d = \sqrt{\frac{\sum_i^n (d_i - d_m)^2}{n-1}} \qquad \text{(Eq. 301-2)}$$

Where:

SD_d = Standard deviation of the differences of the paired samples.

d_i = Difference between the results of the ith replicate pair of samples.

d_m = Mean of the paired sample differences.

n = Total number of paired samples.

7.4.2 *T Test.* Test the difference in the results for statistical significance by calculating the t-statistic and determining if the mean of the differences between the results at the minimum storage duration and the results after the maximum storage duration is significant at the 95 percent confidence level and n-1 degrees of freedom. Calculate the value of the t-statistic using Equation 301–3 of this method.

$$t = \frac{|d_m|}{\left(\frac{SD_d}{\sqrt{n}}\right)} \qquad \text{(Eq. 301-3)}$$

Where:

t = t-statistic.

d_m = The mean of the paired sample differences.

SD_d = Standard deviation of the differences of the paired samples.

n = Total number of paired samples.

Compare the calculated t-statistic with the critical value of the t-statistic from Table 301–3 of this method. If the calculated t-value is less than the critical value, the difference is not statistically significant. Therefore, the sampling, analysis, and sample storage procedures ensure stability, and you may submit a request for validation of the candidate test method. If the calculated t-value is greater than the critical value, the difference is statistically significant, and you must repeat the procedures in Section 7.2 or 7.3 of this method with new samples using a shorter proposed maximum storage duration or improved handling and storage procedures.

Bias and Precision

8.0 What are the requirements for bias?

You must determine bias by comparing the results of sampling and analysis using the candidate test method against a reference value. The bias must be no more than ±10 percent for the candidate test method to be considered for application to multiple sources. A candidate test method with a bias greater than ±10 percent and less than or equal to ±30 percent can only be applied on

a source-specific basis at the facility at which the validation testing was conducted. In this case, you must use a correction factor for all data collected in the future using the candidate test method. If the bias is more than ±30 percent, the candidate test method is unacceptable.

9.0 What are the requirements for precision?

You may use a paired sampling system or a quadruplicate sampling system to establish precision for isotopic spiking. You must use a quadruplicate sampling system to establish precision for analyte spiking or when comparing a candidate test method to a validated method. If you are using analyte spiking or isotopic spiking, the precision, expressed as the relative standard deviation (RSD) of the candidate test method, must be less than or equal to 20 percent. If you are comparing the candidate test method to a validated test method, the candidate test method must be at least as precise as the validated method as determined by an F test (see Section 11.2.2 of this method).

10.0 What calculations must I perform for isotopic spiking?

You must analyze the bias, RSD, precision, and data acceptance for isotopic spiking tests according to the provisions in Sections 10.1 through 10.4 of this method.

10.1 *Numerical Bias.* Calculate the numerical value of the bias using the results from the analysis of the isotopic spike in the field samples and the calculated value of the spike according to Equation 301–4 of this method.

$$B = S_m - CS \qquad \text{(Eq. 301-4)}$$

Where:

B = Bias at the spike level.

S_m = Mean of the measured values of the isotopically-labeled analyte in the samples.

CS = Calculated value of the isotopically-labeled spike level.

10.2 *Standard Deviation.* Calculate the standard deviation of the S_i values according to Equation 301–5 of this method.

$$SD = \sqrt{\frac{\sum_{i}^{n}(S_i - S_m)^2}{(n-1)}} \qquad \text{(Eq. 301-5)}$$

Where:

SD = Standard deviation of the candidate test method.

S_i = Measured value of the isotopically-labeled analyte in the ith field sample.

S_m = Mean of the measured values of the isotopically-labeled analyte in the samples.

n = Number of isotopically-spiked samples.

10.3 *T Test.* Test the bias for statistical significance by calculating the t-statistic using Equation 301–6 of this method. Use the standard deviation determined in Section 10.2 of this method and the numerical bias determined in Section 10.1 of this method.

$$t = \frac{|B|}{\left(\frac{SD}{\sqrt{n}}\right)} \qquad \text{(Eq. 301-6)}$$

Where:

t = Calculated t-statistic.

B = Bias at the spike level.

SD = Standard deviation of the candidate test method.

n = Number of isotopically spike samples.

Compare the calculated t-value with the critical value of the two-sided t-distribution at the 95 percent confidence level and n-1 degrees of freedom (see Table 301–3 of this method). When you conduct isotopic spiking according to the procedures specified in Sections 6.1 and 6.3 of this method as required, this critical value is 2.201 for 11 degrees of freedom. If the calculated t-value is less than or equal to the critical value, the bias is not statistically significant, and the bias of the candidate test method is acceptable. If the calculated t-value is greater than the critical value, the bias is statistically significant, and you must evaluate the relative magnitude of the bias using Equation 301–7 of this method.

$$B_R = \left|\frac{B}{CS}\right| x100\% \qquad \text{(Eq. 301-7)}$$

Where:

B_R = Relative bias.

B = Bias at the spike level.

CS = Calculated value of the spike level.

If the relative bias is less than or equal to 10 percent, the bias of the candidate test method is acceptable for use at multiple sources. If the relative bias is greater than 10 percent but less than or equal to 30 percent, and if you correct all data collected with the candidate test method in the future for bias using the source-specific correction factor determined in Equation 301–8 of this method, the candidate test method is acceptable only for application to the source at which the validation testing was conducted and may not be applied to any other sites. If either of the preceding two cases applies, you may continue to evaluate the candidate test method by calculating its precision. If not, the candidate test method does not meet the requirements of Method 301.

$$CF = \left(\frac{1}{1 + \frac{B}{CS}} \right) \qquad \text{(Eq. 301-8)}$$

Where:

CF = Source-specific bias correction factor.
B = Bias at the spike level.
CS = Calculated value of the spike level.

If the CF is outside the range of 0.70 to 1.30, the data and method are considered unacceptable.

10.4 *Precision.* Calculate the RSD according to Equation 301–9 of this method.

$$RSD = \left(\frac{SD}{S_m} \right) x\ 100 \qquad \text{(Eq. 301-9)}$$

Where:

RSD = Relative standard deviation of the candidate test method.
SD = Standard deviation of the candidate test method calculated in Equation 301–5 of this method.
S_m = Mean of the measured values of the spike samples.

The data and candidate test method are unacceptable if the RSD is greater than 20 percent.

11.0 What calculations must I perform for comparison with a validated method if I am using quadruplicate replicate sampling systems?

If you are comparing a candidate test method to a validated method, then you must analyze the data according to the provisions in this section. If the data from the candidate test method fail either the bias or precision test, the data and the candidate test method are unacceptable. If the Administrator determines that the affected source has highly variable emission rates, the Administrator may require additional precision checks.

11.1 *Bias Analysis.* Test the bias for statistical significance at the 95 percent confidence level by calculating the t-statistic.

11.1.1 *Bias.* Determine the bias, which is defined as the mean of the differences between the candidate test method and the validated method (d_m). Calculate d_i according to Equation 301–10 of this method.

$$d_i = \frac{(V_{1i} + V_{2i})}{2} - \frac{(P_{1i} + P_{2i})}{2} \qquad \text{(Eq. 301-10)}$$

Where:

d_i = Difference in measured value between the candidate test method and the validated method for each quadruplicate sampling train.
V_{1i} = First measured value with the validated method in the ith quadruplicate sampling train.
V_{2i} = Second measured value with the validated method in the ith quadruplicate sampling train.
P_{1i} = First measured value with the candidate test method in the ith quadruplicate sampling train.
P_{2i} = Second measured value with the candidate test method in the ith quadruplicate sampling train.

Calculate the numerical value of the bias using Equation 301–11 of this method.

$$B = \frac{\sum_{i}^{n} d_i}{n} \qquad \text{(Eq. 301-11)}$$

Where:

B = Numerical bias.
d_i = Difference between the candidate test method and the validated method for the ith quadruplicate sampling train.
n = Number of quadruplicate sampling trains.

11.1.2 *Standard Deviation of the Differences.* Calculate the standard deviation of the differences, SD_d, using Equation 301–12 of this method.

$$SD_d = \sqrt{\frac{\sum_{i}^{n} (d_i - d_m)^2}{(n-1)}} \qquad \text{(Eq. 301-12)}$$

Where:

SD_d = Standard deviation of the differences between the candidate test method and the validated method.
d_i = Difference in measured value between the candidate test method and the validated method for each quadruplicate sampling train.
d_m = Mean of the differences, d_i, between the candidate test method and the validated method.
n = Number of quadruplicate sampling trains.

11.1.3 *T Test.* Calculate the t-statistic using Equation 301–13 of this method.

$$t = \frac{|d_m|}{\left(\frac{SD}{\sqrt{n}}\right)} \qquad \text{(Eq. 301-13)}$$

Where:

t = Calculated t-statistic.

d_m = The mean of the differences, d_i, between the candidate test method and the validated method.

SD_d = Standard deviation of the differences between the candidate test method and the validated method.

n = Number of quadruplicate sampling trains.

For the procedure comparing a candidate test method to a validated test method listed in Table 301–1 of this method, n equals six. Compare the calculated t-statistic with the critical value of the t-statistic, and determine if the bias is significant at the 95 percent confidence level (see Table 301–3 of this method). When six runs are conducted, as specified in Table 301–1 of this method, the critical value of the t-statistic is 2.571 for five degrees of freedom. If the calculated t-value is less than or equal to the critical value, the bias is not statistically significant and the data are acceptable. If the calculated t-value is greater than the critical value, the bias is statistically significant, and you must evaluate the magnitude of the relative bias using Equation 301–14 of this method.

$$B_R = \left|\frac{B}{VS}\right| x\ 100\% \qquad \text{(Eq. 301-14)}$$

Where:

B_R = Relative bias.

B = Bias as calculated in Equation 301–11 of this method.

VS = Mean of measured values from the validated method.

If the relative bias is less than or equal to 10 percent, the bias of the candidate test method is acceptable. On a source-specific basis, if the relative bias is greater than 10 percent but less than or equal to 30 percent, and if you correct all data collected in the future with the candidate test method for the bias using the correction factor, CF, determined in Equation 301–8 of this method (using VS for CS), the bias of the candidate test method is acceptable for application to the source at which the validation testing was conducted. If either of the preceding two cases applies, you may continue to evaluate the candidate test method by calculating its precision. If not, the candidate test method does not meet the requirements of Method 301.

11.2 *Precision.* Compare the estimated variance (or standard deviation) of the candidate test method to that of the validated test method according to Sections 11.2.1 and 11.2.2 of this method. If a significant difference is determined using the F test, the candidate test method and the results are rejected. If the F test does not show a significant difference, then the candidate test method has acceptable precision.

11.2.1 *Candidate Test Method Variance.* Calculate the estimated variance of the candidate test method according to Equation 301–15 of this method.

$$S_p^2 = \frac{\sum_i^n d_i^2}{2n} \qquad \text{(Eq. 301-15)}$$

Where:

S_p^2 = Estimated variance of the candidate test method.

d_i = The difference between the ith pair of samples collected with the candidate test method in a single quadruplicate train.

n = Total number of paired samples (quadruplicate trains).

Calculate the estimated variance of the validated test method according to Equation 301–16 of this method.

$$S_v^2 = \frac{\sum_i^n d_i^2}{2n} \qquad \text{(Eq. 301-16)}$$

Where:

S_v^2 = Estimated variance of the validated test method.

d_i = The difference between the ith pair of samples collected with the validated test method in a single quadruplicate train.

n = Total number of paired samples (quadruplicate trains).

11.2.2 *The F test.* Determine if the estimated variance of the candidate test method is greater than that of the validated method by calculating the F-value using Equation 301–17 of this method.

$$F = \frac{S_p^2}{S_v^2} \qquad \text{(Eq. 301-17)}$$

Where:

F = Calculated F value.

S_p^2 = The estimated variance of the candidate test method.

S_v^2 = The estimated variance of the validated method.

Compare the calculated F value with the one-sided confidence level for F from Table 301–4 of this method. The upper one-sided confidence level of 95 percent for $F_{(6,6)}$ is 4.28 when the procedure specified in Table 301–1 of this method for quadruplicate

sampling trains is followed. If the calculated F value is greater than the critical F value, the difference in precision is significant, and the data and the candidate test method are unacceptable.

12.0 What calculations must I perform for analyte spiking?

You must analyze the data for analyte spike testing according to this section.

12.1 *Bias Analysis.* Test the bias for statistical significance at the 95 percent confidence level by calculating the t-statistic.

12.1.1 *Bias.* Determine the bias, which is defined as the mean of the differences between the spiked samples and the unspiked samples in each quadruplicate sampling train minus the spiked amount, using Equation 301–18 of this method.

$$d_i = \frac{(S_{1i} + S_{2i})}{2} - \frac{(M_{1i} + M_{2i})}{2} - CS \qquad \text{(Eq. 301-18)}$$

Where:

d_i = Difference between the spiked samples and unspiked samples in each quadruplicate sampling train minus the spiked amount.

S_{1i} = Measured value of the first spiked sample in the ith quadruplicate sampling train.

S_{2i} = Measured value of the second spiked sample in the ith quadruplicate sampling train.

M_{1i} = Measured value of the first unspiked sample in the ith quadruplicate sampling train.

M_{2i} = Measured value of the second unspiked sample in the ith quadruplicate sampling train.

CS = Calculated value of the spike level.

Calculate the numerical value of the bias using Equation 301–19 of this method.

$$B = \frac{\sum_{i}^{n} d_i}{n} \qquad \text{(Eq. 301-19)}$$

Where:

B = Numerical value of the bias.

d_i = Difference between the spiked samples and unspiked samples in each quadruplicate sampling train minus the spiked amount.

n = Number of quadruplicate sampling trains.

12.1.2 *Standard Deviation of the Differences.* Calculate the standard deviation of the differences using Equation 301–20 of this method.

$$SD_d = \sqrt{\frac{\sum_{i}^{n}(d_i - d_m)^2}{n-1}} \qquad \text{(Eq. 301-20)}$$

Where:

SD_d = Standard deviation of the differences of paired samples.

d_i = Difference between the spiked samples and unspiked samples in each quadruplicate sampling train minus the spiked amount.

d_m = The mean of the differences, d_i, between the spiked samples and unspiked samples.

n = Total number of quadruplicate sampling trains.

12.1.3 *T Test.* Calculate the t-statistic using Equation 301–21 of this method, where n is the total number of test sample differences (d_i). For the quadruplicate sampling system procedure in Table 301–1 of this method, n equals six.

$$t = \frac{|d_m|}{\left(\frac{SD_d}{\sqrt{n}}\right)} \qquad \text{(Eq. 301-21)}$$

Where:

t = Calculated t-statistic.

d_m = Mean of the difference, d_i, between the spiked samples and unspiked samples.

SD_d = Standard deviation of the differences of paired samples.

n = Number of quadruplicate sampling trains.

Compare the calculated t-statistic with the critical value of the t-statistic, and determine if the bias is significant at the 95 percent confidence level. When six quadruplicate runs are conducted, as specified in Table 301–1 of this method, the 2-sided confidence level critical value is 2.571 for the five degrees of freedom. If the calculated t-value is less than the critical value, the bias is not statistically significant and the data are acceptable. If the calculated t-value is greater than the critical value, the bias is statistically significant and you must evaluate the magnitude of the relative bias using Equation 301–22 of this method.

$$B_R = \left|\frac{B}{CS}\right| x\,100\% \qquad \text{(Eq. 301-22)}$$

Where:

B_R = Relative bias.

B = Bias at the spike level from Equation 301–19 of this method.

CS = Calculated value at the spike level.

If the relative bias is less than or equal to 10 percent, the bias of the candidate test method is acceptable. On a source-specific basis, if the relative bias is greater than 10 percent but less than or equal to 30 percent, and if you correct all data collected with the candidate test method in the future for the magnitude of the bias using Equation 301–8, the bias of the candidate test method is acceptable for application to the tested source at which the validation testing was conducted. Proceed to evaluate precision of the candidate test method.

12.2 *Precision.* Calculate the standard deviation using Equation 301–23 of this method.

$$SD = \sqrt{\frac{\sum_{i}^{n}(S_i - S_m)^2}{(n-1)}} \qquad \text{(Eq. 301-23)}$$

Where:

SD = Standard deviation of the candidate test method.

S_i = Measured value of the analyte in the ith spiked sample.

S_m = Mean of the measured values of the analyte in all the spiked samples.

n = Number of spiked samples.

Calculate the RSD of the candidate test method using Equation 301–9 of this method, where SD and S_m are the values from Equation 301–23 of this method. The data and candidate test method are unacceptable if the RSD is greater than 20 percent.

13.0 How do I conduct tests at similar sources?

If the Administrator has approved the use of an alternative test method to a test method required in 40 CFR part 59, 60, 61, 63, or 65 for an affected source, and you would like to apply the alternative test method to a similar source, then you must petition the Administrator as described in Section 17.1.1 of this method.

Optional Requirements

14.0 How do I use and conduct ruggedness testing?

Ruggedness testing is an optional requirement for validation of a candidate test method that is intended for the source where the validation testing was conducted. Ruggedness testing is required for validation of a candidate test method intended to be used at multiple sources. If you want to use a validated test method at a concentration that is different from the concentration in the applicable emission limitation under 40 CFR part 59, 60, 61, 63, or 65, or for a source category that is different from the source category that the test method specifies, then you must conduct ruggedness testing according to the procedures in Reference 18.16 of Section 18.0 of this method and submit a request for a waiver for conducting Method 301 at that different source category according to Section 17.1.1 of this method.

Ruggedness testing is a study that can be conducted in the laboratory or the field to determine the sensitivity of a method to parameters such as analyte concentration, sample collection rate, interferent concentration, collection medium temperature, and sample recovery temperature. You conduct ruggedness testing by changing several variables simultaneously instead of changing one variable at a time. For example, you can determine the effect of seven variables in only eight experiments. (W.J. Youden, Statistical Manual of the Association of Official Analytical Chemists, Association of Official Analytical Chemists, Washington, DC, 1975, pp. 33–36).

15.0 How do I determine the Limit of Detection for the candidate test method?

Determination of the Limit of Detection (LOD) as specified in Sections 15.1 and 15.2 of this method is required for source-specific method validation and validation of a candidate test method intended to be used for multiple sources.

15.1 *Limit of Detection.* The LOD is the minimum concentration of a substance that can be measured and reported with 99 percent confidence that the analyte concentration is greater than zero. For this protocol, the LOD is defined as three times the standard deviation, S_o, at the blank level.

15.2 *Purpose.* The LOD establishes the lower detection limit of the candidate test method. You must calculate the LOD using the applicable procedures found in Table 301–5 of this method. For candidate test methods that collect the analyte in a sample matrix prior to an analytical measurement, you must determine the LOD using Procedure I in Table 301–5 of this method by calculating a method detection limit (MDL) as described in proposed 40 CFR part 136, appendix B. For the purposes of this section, the LOD is equivalent to the calculated MDL. For radiochemical methods, use the Multi-Agency Radiological Laboratory Analytical Protocols (MARLAP) Manual (*i.e.,* use the minimum detectable concentration (MDC) and not the LOD) available at *http://www2.epa.gov/radiation/marlap-manual-and-supporting-documents.*

Other Requirements and Information

16.0 How do I apply for approval to use a candidate test method?

16.1 *Submitting Requests.* You must request to use a candidate test method according to the procedures in § 63.7(f) or similar sections of 40 CFR parts 59, 60, 61, and 65 (§ 59.104, § 59.406, § 60.8(b), § 61.13(h)(ii), or § 65.158(a)(2)(iii)). You cannot use a candidate test method to meet any requirement under these parts until the Administrator has approved your request. The request must include a field validation report containing the information in Section 16.2 of this method. You must submit the request to the Group Leader, Measurement Technology Group, U.S. Environmental Protection Agency, E143–02, Research Triangle Park, NC 27711.

16.2 *Field Validation Report.* The field validation report must contain the information in Sections 16.2.1 through 16.2.8 of this method.

16.2.1 *Regulatory Objectives for the Testing, Including a Description of the Reasons for the Test, Applicable Emission Limits, and a Description of the Source.*

16.2.2 *Summary of the Results and Calculations Shown in Sections 6.0 Through 16.0 of This Method, as Applicable.*

16.2.3 *Reference Material Certification and Value(s).*

16.2.4 *Discussion of Laboratory Evaluations.*

16.2.5 *Discussion of Field Sampling.*

16.2.6 *Discussion of Sample Preparation and Analysis.*

16.2.7 *Storage Times of Samples (and Extracts, if Applicable).*

16.2.8 *Reasons for Eliminating Any Results.*

17.0 How do I request a waiver?

17.1 *Conditions for Waivers.* If you meet one of the criteria in Section 17.1.1 or 17.1.2 of this method, the Administrator may waive the requirement to use the procedures in this method to validate an alternative or other candidate test method. In addition, if the EPA currently recognizes an appropriate test method or considers the candidate test method to be satisfactory for a particular source, the Administrator may waive the use of this protocol or may specify a less rigorous validation procedure.

17.1.1 *Similar Sources.* If the alternative or other candidate test method that you want to use was validated for source-specific application at another source and you can demonstrate to the Administrator's satisfaction that your affected source is similar to that validated source, then the Administrator may waive the requirement for you to validate the alternative or other candidate test method. One procedure you may use to demonstrate the applicability of the method to your affected source is to conduct a ruggedness test as described in Section 14.0 of this method.

17.1.2 *Documented Methods.* If the bias and precision of the alternative or other candidate test method that you are proposing have been demonstrated through laboratory tests or protocols different from this method, and you can demonstrate to the Administrator's satisfaction that the bias and

precision apply to your application, then the Administrator may waive the requirement to use this method or to use part of this method.

17.2 *Submitting Applications for Waivers.* You must sign and submit each request for a waiver from the requirements in this method in writing. The request must be submitted to the Group Leader, Measurement Technology Group, U.S. Environmental Protection Agency, E143–02, Research Triangle Park, NC 27711.

17.3 *Information Application for Waiver.* The request for a waiver must contain a thorough description of the candidate test method, the intended application, and results of any validation or other supporting documents. The request for a waiver must contain, at a minimum, the information in Sections 17.3.1 through 17.3.4 of this method. The Administrator may request additional information if necessary to determine whether this method can be waived for a particular application.

17.3.1 *A Clearly Written Test Method.* The candidate test method should be written preferably in the format of 40 CFR part 60, appendix A, Test Methods. Additionally, the candidate test must include an applicability statement, concentration range, precision, bias (accuracy), and minimum and maximum storage durations in which samples must be analyzed.

17.3.2 *Summaries of Previous Validation Tests or Other Supporting Documents.* If you use a different procedure from that described in this method, you must submit documents substantiating the bias and precision values to the Administrator's satisfaction.

17.3.3 *Ruggedness Testing Results.* You must submit results of ruggedness testing conducted according to Section 14.0 of this method, sample stability conducted according to Section 7.0 of this method, and detection limits conducted according to Section 15.0 of this method, as applicable. For example, you would not need to submit ruggedness testing results if you will be using the method at the same affected source and level at which it was validated.

17.3.4 *Applicability Statement and Basis for Waiver Approval.* Discussion of the applicability statement and basis for approval of the waiver. This discussion should address as applicable the following: Applicable regulation, emission standards, effluent characteristics, and process operations.

18.0 Where can I find additional information?

You can find additional information in the references in Sections 18.1 through 18.17 of this method.

18.1 Albritton, J.R., G.B. Howe, S.B. Tompkins, R.K.M. Jayanty, and C.E. Decker. 1989. Stability of Parts-Per-Million Organic Cylinder Gases and Results of Source Test Analysis Audits, Status Report No. 11. Environmental Protection Agency Contract 68–02–4125. Research Triangle Institute, Research Triangle Park, NC. September.

18.2 ASTM Standard E 1169–89 (current version), ''Standard Guide for Conducting Ruggedness Tests,'' available from ASTM, 100 Barr Harbor Drive, West Conshohoken, PA 19428.

18.3 DeWees, W.G., P.M. Grohse, K.K. Luk, and F.E. Butler. 1989. Laboratory and Field Evaluation of a Methodology for Speciating Nickel Emissions from Stationary Sources. EPA Contract 68–02–4442. Prepared for Atmospheric Research and Environmental Assessment Laboratory, Office of Research and Development, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711. January.

18.4 International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceuticals for Human Use, ICH–Q2A, ''Text on Validation of Analytical Procedures,'' 60 FR 11260 (March 1995).

18.5 International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceuticals for Human Use, ICH–Q2b, ''Validation of Analytical Procedures: Methodology,'' 62 FR 27464 (May 1997).

18.6 Keith, L.H., W. Crummer, J. Deegan Jr., R.A. Libby, J.K. Taylor, and G. Wentler. 1983. Principles of Environmental Analysis. American Chemical Society, Washington, DC.

18.7 Maxwell, E.A. 1974. Estimating variances from one or two measurements on each sample. Amer. Statistician 28:96–97.

18.8 Midgett, M.R. 1977. How EPA Validates NSPS Methodology. Environ. Sci. & Technol. 11(7):655–659.

18.9 Mitchell, W.J., and M.R. Midgett. 1976. Means to evaluate performance of stationary source test methods. Environ. Sci. & Technol. 10:85–88.

18.10 Plackett, R.L., and J.P. Burman. 1946. The design of optimum multifactorial experiments. Biometrika, 33:305.

18.11 Taylor, J.K. 1987. Quality Assurance of Chemical Measurements. Lewis Publishers, Inc., pp. 79–81.

18.12 U.S. Environmental Protection Agency. 1978. Quality Assurance Handbook for Air Pollution Measurement Systems: Volume III. Stationary Source Specific Methods. Publication No. EPA–600/4–77–027b. Office of Research and Development Publications, 26 West St. Clair St., Cincinnati, OH 45268.

18.13 U.S. Environmental Protection Agency. 1981. A Procedure for Establishing Traceability of Gas Mixtures to Certain National Bureau of Standards Standard Reference Materials. Publication No. EPA–600/7–81–010. Available from the U.S. EPA, Quality Assurance Division (MD–77), Research Triangle Park, NC 27711.

18.14 U.S. Environmental Protection Agency. 1991. Protocol for The Field Validation of Emission Concentrations from Stationary Sources. Publication No. 450/4–90–015. Available from the U.S. EPA, Emission Measurement Technical Information Center, Technical Support Division (MD–14), Research Triangle Park, NC 27711.

18.15 Wernimont, G.T., ''Use of Statistics to Develop and Evaluate Analytical Methods,'' AOAC, 1111 North 19th Street, Suite 210, Arlington, VA 22209. USA, 78–82 (1987).

18.16 Youden, W.J. Statistical techniques for collaborative tests. In: Statistical Manual of the Association of Official Analytical Chemists, Association of Official Analytical Chemists, Washington, DC, 1975, pp. 33–36.

18.17 NIST/SEMATECH (current version), ''e-Handbook of Statistical Methods,'' available from NIST, *http://www.itl.nist.gov/div898/handbook/.*

TABLE 301–1—SAMPLING PROCEDURES

If you are . . .	You must collect . . .
Comparing the candidate test method against a validated method	A total of 24 samples using a quadruplicate sampling system (a total of six sets of replicate samples). In each quadruplicate sample set, you must use the validated test method to collect and analyze half of the samples.
Using isotopic spiking (can only be used with methods capable of measurement of multiple isotopes simultaneously).	A total of 12 samples, all of which are spiked with isotopically-labeled analyte. You may collect the samples either by obtaining six sets of paired samples or three sets of quadruplicate samples.
Using analyte spiking	A total of 24 samples using the quadruplicate sampling system (a total of six sets of replicate samples—two spiked and two unspiked).

TABLE 301–2—STORAGE AND SAMPLING PROCEDURES FOR STACK TEST EMISSIONS

If you are . . .	With . . .	Then you must . . .
Using isotopic or analyte spiking procedures.	Sample container (bag or canister) or impinger sampling systems that are not subject to dilution or other preparation steps.	Analyze six of the samples within 7 days and then analyze the same six samples at the proposed maximum storage duration or 2 weeks after the initial analysis.
	Sorbent and impinger sampling systems that require extraction or digestion.	Extract or digest six of the samples within 7 days and extract or digest six other samples at the proposed maximum storage duration or 2 weeks after the first extraction or digestion. Analyze an aliquot of the first six extracts (digestates) within 7 days and proposed maximum storage duration or 2 weeks after the initial analysis. This will allow analysis of extract storage impacts.
	Sorbent sampling systems that require thermal desorption.	Analyze six samples within 7 days. Analyze another set of six samples at the proposed maximum storage time or within 2 weeks of the initial analysis.
Comparing a candidate test method against a validated test method.	Sample container (bag or canister) or impinger sampling systems that are not subject to dilution or other preparation steps.	Analyze at least six of the candidate test method samples within 7 days and then analyze the same six samples at the proposed maximum storage duration or within 2 weeks of the initial analysis.
	Sorbent and impinger sampling systems that require extraction or digestion.	Extract or digest six of the candidate test method samples within 7 days and extract or digest six other samples at the proposed maximum storage duration or within 2 weeks of the first extraction or digestion. Analyze an aliquot of the first six extracts (digestates) within 7 days and an aliquot at the proposed maximum storage durations or within 2 weeks of the initial analysis. This will allow analysis of extract storage impacts.
	Sorbent systems that require thermal desorption.	Analyze six samples within 7 days. Analyze another set of six samples at the proposed maximum storage duration or within 2 weeks of the initial analysis.

TABLE 301–3—CRITICAL VALUES OF t FOR THE TWO-TAILED 95 PERCENT CONFIDENCE LIMIT

Degrees of freedom	t_{95}
1	12.706
2	4.303
3	3.182
4	2.777
5	2.571
6	2.447
7	2.365
8	2.306
9	2.262
10	2.228
11	2.201

TABLE 301–4—UPPER CRITICAL VALUES OF THE F DISTRIBUTION FOR THE 95 PERCENT CONFIDENCE LIMIT

Numerator (k_1) and denominator (k_2) degrees of freedom	$F\{F>F_{.05}(k_1,k_2)\}$
1,1	161.4
2,2	19.0
3,3	9.3
4,4	6.39
5,5	5.05
6,6	4.28
7,7	3.79
8,8	3.44
9,9	3.18

TABLE 301–4—UPPER CRITICAL VALUES OF THE F DISTRIBUTION FOR THE 95 PERCENT CONFIDENCE LIMIT—Continued

Numerator (k_1) and denominator (k_2) degrees of freedom	$F\{F>F_{.05}(k_1,k_2)\}$
10,10	2.98

TABLE 301–5—PROCEDURES FOR ESTIMATING S_o

If the estimated LOD (LOD_1, expected approximate LOD concentration level) is no more than twice the calculated LOD or an analyte in a sample matrix was collected prior to an analytical measurement, use Procedure I as follows..	If the estimated LOD (LOD_1, expected approximate LOD concentration level) is greater than twice the calculated LOD, use Procedure II as follows
Procedure I	*Procedure II*
Determine the LOD by calculating a method detection limit (MDL) as described in proposed 40 CFR part 136, appendix B.	Prepare two additional standards (LOD_2 and LOD_3) at concentration levels lower than the standard used in Procedure I (LOD_1).
	Sample and analyze each of these standards (LOD_2 and LOD_3) at least seven times.
	Calculate the standard deviation (S_2 and S_3) for each concentration level.
	Plot the standard deviations of the three test standards (S_1, S_2 and S_3) as a function of concentration.
	Draw a best-fit straight line through the data points and extrapolate to zero concentration. The standard deviation at zero concentration is S_o.
	Calculate the LOD_0 (referred to as the calculated LOD) as 3 times S_o.

[FR Doc. 2016–27544 Filed 12–1–16; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 81, No. 232

Friday, December 2, 2016

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

Council for Native American Farming and Ranching: Public Meeting

AGENCY: Office of Tribal Relations, USDA.

ACTION: Notice of public meeting; correction.

SUMMARY: This notice announces a forthcoming meeting of The Council for Native American Farming and Ranching (CNAFR), a public advisory committee of the Office of Tribal Relations (OTR). Notice of the meetings are provided in accordance with section 10(a)(2) of the Federal Advisory Committee Act, as amended. This will be the first meeting held during fiscal year 2017 and will consist of, but not be limited to: Hearing public comments, update of USDA programs and activities, and discussion of committee priorities. This meeting will be open to the public.

DATES: The meeting will be held on December 8, 2016, 10:00 a.m. to 6:00 p.m., and December 9, 2016, 8:30 a.m. to 6:00 p.m. The meeting will be open to the public on both days. Note that a period for public comment will be held on December 8, 2016, from 2:00 p.m. to 4:00 p.m.

ADDRESSES: The meeting will be held at the Flamingo Hotel, 3555 S. Las Vegas Boulevard, Las Vegas, Nevada 89109, in the El Dorado Room.

Written Comments: Written comments may be submitted to: The CNAFR Contact Person, Josiah Griffin, Acting Designated Federal Officer, USDA/Office of Tribal Relations, 1400 Independence Ave. SW., Whitten Bldg., 501–A; Stop 0160; Washington, DC 20250; by Fax: (202) 720–1058; or by email: *Josiah.Griffin@osec.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Josiah Griffin, Acting Designated Federal Officer; USDA/Office of Tribal Relations, 1400 Independence Ave. SW., Whitten Bldg., 501–A; Stop 0160; Washington, DC 20250; by Fax: (202) 720–1058 or email: *Josiah.Griffin@osec.usda.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App. 2), USDA established an advisory council for Native American farmers and ranchers. The CNAFR is a discretionary advisory committee established under the authority of the Secretary of Agriculture.

The CNAFR will operate under the provisions of the FACA and report to the Secretary of Agriculture. The purpose of the CNAFR is (1) to advise the Secretary of Agriculture on issues related to the participation of Native American farmers and ranchers in USDA programs; (2) to transmit recommendations concerning any changes to USDA regulations or internal guidance or other measures that would eliminate barriers to program participation for Native American farmers and ranchers; (3) to examine methods of maximizing the number of new farming and ranching opportunities created by USDA programs through enhanced extension and financial literacy services; (4) to examine methods of encouraging intergovernmental cooperation to mitigate the effects of land tenure and probate issues on the delivery of USDA programs; (5) to evaluate other methods of creating new farming or ranching opportunities for Native American producers; and (6) to address other related issues as deemed appropriate.

The Secretary of Agriculture selected a diverse group of members representing a broad spectrum of persons interested in providing solutions to the challenges of the aforementioned purposes. Equal opportunity practices were considered in all appointments to the CNAFR in accordance with USDA policies. The Secretary selected the members in November 2016.

Interested persons may present views, orally or in writing, on issues relating to agenda topics before the CNAFR. Written submissions may be submitted to the contact person on or before November 30, 2016. Oral presentations from the public will be heard from 2:00 p.m. to 4:00 p.m. on December 8, 2016. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the issue they wish to present and the names and addresses of proposed participants by November 30, 2016. All oral presentations will be given three (3) to five (5) minutes depending on the number of participants.

The OTR will also make the agenda available to the public via the OTR Web site *http://www.usda.gov/tribalrelations* no later than 10 business days before the meeting and at the meeting. The minutes from the meeting will be posted on the OTR Web site. OTR welcomes the attendance of the public at the CNAFR meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please notify the Contact Person, at least 10 business days in advance of the meeting.

Josiah Griffin,

Acting Designated Federal Officer, Council for Native American & Ranching.

[FR Doc. 2016–28492 Filed 12–1–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 29, 2016.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and

Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, Washington, DC; New Executive Office Building, 725 17th Street NW., Washington, DC 20503. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602.

Comments regarding these information collections are best assured of having their full effect if received by January 3, 2017. Copies of the submission(s) may be obtained by calling (202) 720–8681.

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.

Agricultural Marketing Service

Title: Generic Fruit Crops, Marketing Order and Agreement Division.

OMB Control Number: 0581–0189.

Summary of Collection: Industries enter into a marketing order program under the Agricultural Marketing Agreement Act (AMAA) of 1937, as amended by U.S.C. 601–674. Marketing Order programs provide an opportunity for producers of fresh fruits, vegetables and specialty crops in specified production areas, to work together to solve marketing problems that cannot be solved individually. Order regulations help ensure adequate supplies of high quality product and adequate returns to producers. Under the market orders, producers and handlers are nominated by their respective peers and serve as representatives on their respective committees/boards.

Need and Use of the Information: The information collected is essential to provide the respondents the type of service they request. The committees and boards have developed forms as a means for persons to file required information relating to supplies, shipments, and dispositions of their respective commodities. The information is used only by the authorized committees employees and representatives of USDA including AMS, Specialty Crops Programs' regional and headquarters' staff to administer the marketing order programs.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; Farms.

Number of Respondents: 13,300.

Frequency of Responses: Recordkeeping; Reporting; on Occasion, Quarterly; Biennially; Weekly; Semi-annually; Monthly; Annually.

Total Burden Hours: 8,294.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–28963 Filed 12–1–16; 8:45 am]

BILLING CODE 3410–02–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Nevada State Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of Public Meeting.

DATES: Thursday, December 8, 2016.

Time: 1:00 p.m.–2:00 p.m. (PST).

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a meeting of the Nevada Advisory Committee (Committee) to the Commission will be held at 1:00 p.m. (Pacific Time) Thursday, December 8, 2016, for the purpose discussing a project proposal on the civil rights issues regarding municipal fees and policing practices in Nevada.

Date: The meeting will be held on Thursday, December 8, 2016, at 1:00 p.m. PST.

Public Call Information:

Dial: 888–503–8177.

Conference ID: 8691781.

FOR FURTHER INFORMATION CONTACT: Angelica Trevino at *atrevino@usccr.gov* or (213) 894–3437.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the following toll-free call-in number: 888–503–8177, conference ID number: 8691781. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 55 W. Monroe St., Suite 410, Chicago, IL 60603. They may be faxed to the Commission at (312) 353–8324, or emailed to David Mussatt, Regional Programs Unit at *dmussatt@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *http://facadatabase.gov/committee/meetings.aspx?cid=261.* Please click on the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's Web site, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Introductions—Wendell Blaylock, Chair of the Nevada Advisory Committee
II. Discussion of Project Proposal: Civil Rights Issues Regarding Municipal Fees and Police Practices in Nevada—Member of the Nevada Advisory Committee
III. Public Comment
IV. Adjournment

Exceptional Circumstance: Pursuant to the Federal Advisory Committee Management Regulations (41 CFR 102–3.150), the notice for this meeting cancelation is given less than 15 calendar days prior to the meeting due to exceptional circumstance of the Committee project supporting the Commission's 2017 statutory enforcement report.

Dated: November 29, 2016.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2016–28987 Filed 12–1–16; 8:45 am]

BILLING CODE–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–427–428]

Certain Carbon and Alloy Steel Cut-to-Length Plate From France: Amended Preliminary Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On November 14, 2016, the Department of Commerce (the Department) published in the **Federal Register** the *Preliminary Determination* of the antidumping duty investigation of certain carbon and alloy steel cut-to-length plate (CTL plate) from France. The Department is amending the *Preliminary Determination* of the investigation to correct two significant ministerial errors.

DATES: Effective December 2, 2016.

FOR FURTHER INFORMATION CONTACT: Brandon Custard or Terre Keaton Stefanova, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1823 or (202) 482–1280, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 14, 2016, the Department published in the **Federal Register** the *Preliminary Determination* of CTL plate from France.[1] On November 14, 2016, Dillinger France S.A., (Dillinger France) a respondent in this investigation, alleged that the Department made a significant ministerial error in the *Preliminary Determination*.[2]

Scope of the Investigation

The product covered by this investigation is CTL plate from France. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation,'' in Appendix I of this notice.

Significant Ministerial Error

A ministerial error is defined in 19 CFR 351.224(f) as ''an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.'' Further, 19 CFR 351.224(e) provides that the Department ''will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination.'' A significant ministerial error is defined as a ministerial error, the correction of which, singly or in combination with other errors, would result in: (1) A change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin calculated in the original (erroneous) preliminary determination; or (2) a difference between a weighted-average dumping margin of zero or *de minimis* and a weighted-average dumping margin of greater than *de minimis* or vice versa.[3]

Ministerial Error Allegation

Dillinger France alleges that the Department erred in its preliminary determination by not excluding Dillinger France's intra-company sales from its U.S. sales database, which resulted in the double-counting of these sales in the margin calculation. No other party commented on this issue. After comparing the ministerial error allegation against the U.S. sales databases, we agree with the respondent that we inadvertently double-counted its intra-company U.S. sales. Additionally, we identified a further error in the preliminary determination margin calculation. Specifically, we inadvertently failed to cap certain reported freight revenue and to offset the movement expenses by this additional capped freight revenue amount.

Pursuant to 19 CFR 351.224(g)(2), these errors are significant because their correction results in a change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin calculated in the original preliminary determination (*i.e.,* change from a weighted-average dumping margin of 12.97 percent to 6.43 percent). Therefore, we are correcting these errors and amending our preliminary determination accordingly.[4]

Amended Preliminary Determination

We are amending the preliminary determination of sales at less than fair value for CTL plate from France to reflect the correction of significant ministerial errors made in the margin calculation of that determination for Dillinger France in accordance with 19 CFR 351.224(e). The ''All-Others'' Rate was based on the simple average of the margins calculated for Dillinger France and Industeel France S.A. (Industeel), the other mandatory respondent in this investigation. Thus, we are also amending the ''All-Others'' rate to account for the change in Dillinger France's margin. We are amending the calculation of the all-others rate to base it on the weighted average of the margins calculated for Dillinger France and Industeel using publicly-ranged data. Because we cannot apply our normal methodology of calculating a weighted-average margin due to requests to protect business-proprietary information, we find this rate to be the best proxy of the actual weighted-average margin determined for these respondents.[5] As a result of the correction of the ministerial error, the revised weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average dumping margin (percent)
Dillinger France S.A	6.43
Industeel France S.A	4.26
All Others	6.33

Amended Cash Deposits and Suspension of Liquidation

The collection of cash deposits and suspension of liquidation will be revised according to the rates established in this amended preliminary determination, in accordance with section 733(d) of the Tariff Act of 1930, as amended (the Act). Because these amended rates result in reduced cash deposit rates, they will be effective retroactively to November 14, 2016, the date of publication of the *Preliminary Determination*.

International Trade Commission Notification

In accordance with section 733(f) of the Act, we notified the International

[1] *See Certain Carbon and Alloy Steel Cut-to-Length Plate From France: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 81 FR 79437 (November 14, 2016) (*Preliminary Determination*).

[2] *See* letter from Dillinger France regarding, ''Certain Carbon and Alloy Steel Cut-To-Length Plate from France; Ministerial Error Allegation,'' dated November 14, 2016 (Ministerial Error Allegation Letter).

[3] *See* 19 CFR 351.224(g)(1) and (2).

[4] *See* Memorandum to the File entitled ''Amended Preliminary Determination Margin Calculation for Dillinger France S.A.'' (Amended Preliminary Determination Memorandum), for further discussion of our calculations for this amended preliminary determination.

[5] *See, e.g., Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value,* 80 FR 61362, 61363 (October 13, 2015). For further discussion of the amended calculation of the all-others rate, *see* Amended Preliminary Determination Memorandum.

Trade Commission of our amended preliminary determination.

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days after public announcement of the amended preliminary determination, in accordance with 19 CFR 351.224.

This amended preliminary determination is issued and published in accordance with sections 733(f) and 777(i) of the Act and 19 CFR 351.224(e).

Dated: November 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products covered by this investigation are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) Universal mill plates (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.,* products which have been ''worked after rolling'' (*e.g.,* products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) Except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above; and

(2) where the width and thickness vary for a specific product (*e.g.,* the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this investigation are products in which: (1) Iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of this investigation unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this investigation:

(1) Products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL–A–12560,
- MIL–DTL–12560H,
- MIL–DTL–12560J,
- MIL–DTL–12560K,
- MIL–DTL–32332,
- MIL–A–46100D,
- MIL–DTL–46100–E,
- MIL–46177C,
- MIL–S–16216K Grade HY80,
- MIL–S–16216K Grade HY100,
- MIL–S–24645A HSLA–80;
- MIL–S–24645A HSLA–100,
- T9074–BD–GIB–010/0300 Grade HY80,
- T9074–BD–GIB–010/0300 Grade HY100,
- T9074–BD–GIB–010/0300 Grade HSLA80,
- T9074–BD–GIB–010/0300 Grade HSLA100, and
- T9074–BD–GIB–010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of this order;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A–829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0–2.5,
- Molybdenum 0.35–0.80,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

(i) 270–300 HBW,

(ii) 290–320 HBW, or

(iii) 320–350HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at −75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at −40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm.

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: A Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at −40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

The products subject to the investigation are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the investigation may also enter under the following HTSUS item numbers: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the investigation is dispositive.

[FR Doc. 2016–28983 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–805]

Notice of Final Results of Antidumping Duty Changed Circumstances Review: Stainless Steel Bar From Spain

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On October 26, 2016, the Department of Commerce (the ''Department'') published the notice of initiation and preliminary results of the changed circumstances review of the antidumping duty (''AD'') order on stainless steel bar (''SSB'') from Spain. The Department preliminarily determined that Sidenor Aceros Especiales S.L. (''Sidenor'') is the successor-in-interest to Gerdau Aceros Especiales Europa S.L. (''Gerdau'') for purposes of the AD order and, as such, is entitled to Gerdau's cash deposit rate with respect to entries of subject merchandise. We invited interested parties to comment on the *Preliminary Results.* As no parties submitted comments, and there is no additional information or evidence on the record, the Department is making no changes to the *Preliminary Results.*

DATES: Effective December 2, 2016.

FOR FURTHER INFORMATION CONTACT: Ryan Mullen, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5260.

SUPPLEMENTARY INFORMATION:

Background

On September 6, 2016, Sidenor informed the Department that, effective May 20, 2016, the following occurred: (1) Gerdau S.A., the Brazilian owner of Gerdau Holdings Europa S.A.U., including its Spanish subsidiary company Gerdau, sold its European holdings to Clerbil S.L.; and (2) Clerbil S.L. renamed Gerdau Holdings Europa S.A.U. to be Sidenor Holdings Europa S.A.U.; and Gerdau, to be Sidenor, while leaving its operations mostly unchanged.[1] Citing section 751(b) of the of the Tariff Act of 1930, as amended (''the Act'') and 19 CFR 351.216, Sidenor requested that the Department initiate a changed circumstances review and determine that Sidenor is the successor-in-interest to Gerdau. On October 26, 2016, the Department initiated this changed circumstances review and published the notice of preliminary results, determining that Sidenor is the successor-in-interest to Gerdau.[2]

Scope of the Order

The merchandise subject to the order is SSB. The term SSB with respect to the order means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process. Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (*i.e.,* cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (*i.e.,* cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections. The SSB subject to the order is currently classifiable under subheadings 7222.10.00, 7222.11.00, 7222.19.00, 7222.20.00, 7222.30.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.[3]

Final Results of Changed Circumstances Review

Because no party submitted a case brief in response to the Department's *Preliminary Results,* and because the record contains no other information or evidence that calls into question the *Preliminary Results,* the Department

[1] *See* Letter to the Secretary of Commerce from Sidenor, ''Stainless Steel Bar from Spain: Sidenor request for changed-circumstances review'' (September 22, 2016) at 3–6.

[2] *See Stainless Steel Bar From Spain: Initiation and Preliminary Results of Changed Circumstances Review,* 81 FR 74401 (October 26, 2016) (*Preliminary Results*).

[3] The HTSUS numbers provided in the scope have changed since the publication of the order. *See Amended Final Determination and Antidumping Duty Order: Stainless Steel Bar From Spain,* 60 FR 11656 (March 2, 1995).

continues to find that Sidenor is the successor-in-interest to Gerdau, and is entitled to Gerdau's cash deposit rate with respect to entries of merchandise subject to the AD order on SSB from Spain.[4]

Instructions to U.S. Customs and Border Protection

Based on these final results, we will instruct U.S. Customs and Border Protection to collect estimated antidumping duties for all shipments of subject merchandise exported by Sidenor and entered, or withdrawn from warehouse, for consumption on or after the publication of this notice in the **Federal Register** at the current AD cash deposit rate for Gerdau (*i.e.,* 0 percent). This case deposit requirement shall remain in effect until further notice.

Notification to Interested Parties

This notice serves as a final reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this final results notice in accordance with sections 751(b) and 777(i) of the Act, and 19 CFR 351.216.

Dated: November 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–28982 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–DS–P

[4] For a complete discussion of the Department's findings, which remain unchanged in these final results and which are herein incorporated by reference and adopted by this notice, *see generally Preliminary Results.*

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF015

Fishing Capacity Reduction Program for the Bering Sea and Aleutian Islands (BSAI) King and Tanner Crab Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of loan repayment.

SUMMARY: NMFS issues this notice to inform interested parties that the Aleutian Island Golden (Brown) King crab (a/k/a WAG and EAG) sub-loan in the fishing capacity reduction program for the Bering Sea and Aleutian Islands (BSAI) King and Tanner Crab Fisheries has been repaid. Therefore, buyback fee collections on Aleutian Island Golden (Brown) King crab will cease for all landings after October 31, 2016.

DATES: Comments must be submitted on or before 5 p.m. EST December 19, 2016.

ADDRESSES: Send comments about this notice to Paul Marx, Chief, Financial Services Division, NMFS, Attn: Aleutian Island Golden (Brown) King crab Buyback, 1315 East-West Highway, Silver Spring, MD 20910 (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Michael A. Sturtevant at (301) 427–8799 or *Michael.A.Sturtevant@noaa.gov.*

SUPPLEMENTARY INFORMATION: On July 28, 2005, NMFS published a **Federal Register** document (69 FR 67100) proposing regulations to implement an industry fee system for repaying the reduction loan. The final rule was published September 16, 2005 (70 FR 54652) and fee collection began on October 17, 2005. Interested persons should review these for further program details.

The Aleutian Island Golden (Brown) King crab sub-loan of the Bering Sea and Aleutian Islands (BSAI) King and Tanner Crab Capacity Reduction (Buyback) loan in the amount of $6,380,837.19 will be repaid in full upon receipt of buyback fees on landings through October 31, 2016. NMFS has received $10,004,785.86 to repay the principal and interest on this sub-loan since fee collection began October 17, 2005. Based on buyback fees received to date, landings after October 31, 2016, will not be subject to the buyback fee. Therefore, buyback loan fees will no longer be collected in the Aleutian Island Golden (Brown) King crab fishery on future landings.

Buyback fees not yet forwarded to NMFS for Aleutian Island Golden (Brown) King crab landings through October 31, 2016, should be forwarded to NMFS immediately. Any overpayment of buyback fees submitted to NMFS will be refunded on a pro-rata basis to the fish buyers/processors based upon best available fish ticket landings data. The fish buyers/processors should return excess buyback fees collected to the harvesters, including buyback fees collected but not yet remitted to NMFS for landings after October 31, 2016. Any discrepancies in fees owed and fees paid must be resolved immediately. After the sub-loan is closed, no further adjustments to fees paid and fees received can be made.

Dated: November 28, 2016.

Brian Pawlak,

Director, Office of Management and Budget, National Marine Fisheries Service.

[FR Doc. 2016–28900 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF060

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will host a webinar meeting of the Area 2A Pacific halibut governmental management entities, which will be open to the public.

DATES: The Area 2A manager's webinar will be held on Wednesday, December 14, 2016, from 8:30 a.m. until 10:30 a.m., or until business for the day is complete.

ADDRESSES: To attend the webinar (1) join the meeting by visiting this link *http://www.joinwebinar.com;* (2) enter the Webinar ID: 811–687–419, and (3) enter your name and email address (required). After logging in to the webinar, please (1) dial this TOLL number +1 (914) 614–3221 (not a toll-free number); (2) enter the attendee phone audio access code 867–903–330; and (3) then enter your audio phone pin (shown after joining the webinar). Participants are required to use their telephone, as this is the best practice to avoid technical issues and excessive feedback. Technical Information and System Requirements: PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (See the GoToMeeting WebinarApps). You may send an email to *Kris.Kleinschmidt@noaa.gov* or contact him at (503) 820–2280, extension 425 for technical assistance. A public listening station will also be available at the Pacific Council office.

Council address: Pacific Council, 7700 NE. Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Ms. Kelly Ames, Pacific Council; telephone: (503) 820–2426.

SUPPLEMENTARY INFORMATION: The primary purpose of the Area 2A Pacific halibut manager's meeting is to prepare and develop recommendations for the January 23–27, 2017 International Pacific Halibut Commission's (IPHC) annual meeting in Victoria, British Columbia, Canada. Recommendations generated from the meeting would be communicated to the IPHC by the Pacific Council's representative, Mr. Phil Anderson. Attendees may also address other assignments relating to Pacific halibut management. No management actions will be decided by the attendees. The meeting will be open to the public, and the agenda, which will be available one week before the meeting, will provide for a public comment period.

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-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The public listening station is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2425 at least 10 business days prior to the meeting date.

Dated: November 28, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–28918 Filed 12–1–16; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation

AGENCY: U.S. Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The U.S. Consumer Product Safety Commission (CPSC or the Commission) is publishing this Litigation Guidance to provide recommendations for best practices to all parties in relevant litigation related to providing an exemption in protective orders and settlement agreements for reporting information to the CPSC.

FOR FURTHER INFORMATION CONTACT: Todd A. Stevenson, Secretary, U.S. Consumer Product Safety Commission, Office of the Secretary, 4330 East-West Highway, Bethesda, MD 20814, Room 820, 301–504–7923; email *tstevenson@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background [1]

The CPSC is a public-health authority with a broad mandate to protect the public against unreasonable risks of injury associated with consumer products. *See* 15 U.S.C. 2051 (2014); *See also* Public Health Authority Notification, 79 FR 11769 (March 3, 2014). The Consumer Product Safety Act (CPSA) defines consumer products broadly, making the Commission responsible for ensuring the public's safety from thousands of different ever-evolving product lines. *See* 15 U.S.C. 2052 (2014). The timely collection of information regarding consumer product-related safety hazards is essential for carrying out the Commission's public health and safety mission.

Mandatory self-reporting of potential product hazards by manufacturers (including importers), retailers, and distributors (Industry Stakeholders) is a key element of CPSC's ability to identify potential substantial product hazards and subsequently take corrective action to protect the public. Such Industry Stakeholders are best situated to discover a potential product hazard and, thus, are statutorily required to report immediately to the CPSC when they obtain information that reasonably supports the conclusion that a product fails to comply with an applicable rule or standard, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death. 15 U.S.C. 2064(b) (2014).

Despite the mandatory reporting requirement, the Commission believes Industry Stakeholders do not always meet their reporting obligations. Industry Stakeholders may fail to report potential product hazards altogether, may fail to report them in a timely manner and/or may fail to report new incidents that occur after the initial hazard has been reported.[2]

If Industry Stakeholders fail to report, CPSC has limited alternative means of obtaining this critical safety information. It is therefore possible that a product hazard will never come to CPSC's attention. Information in private litigation could, thus, be a key resource for the CPSC when Industry Stakeholders have not satisfied their reporting obligations. However, in some instances, confidentiality provisions imposed or enforced by the courts or agreed upon by private litigants may have prevented parties that are not industry stakeholders from sharing with the CPSC important product safety information they have discovered. *See* S. REP. NO. 110–439, at 6–8 (2008); *see also* Footnote 2 *infra.*

The motions and hearings involved in obtaining protective orders in private litigation for specific documents may result in enormous associated costs both in terms of money and time. This often leads to the use of ''blanket'' or ''umbrella'' protective orders covering the entirety of pre-trial discovery. *See Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.,* 529 F. Supp. 866, 879 (E.D. Pa. 1981) (finding that without blanket protective orders, a judge becomes a ''veritable hostage'' required to spend years on motions for individual documents). Rather than requiring a series of individual rulings for a large number of documents, blanket protective orders may create a presumption against disclosure for all or certain groups of information that then may be challenged individually for lack of good cause. *See* MANUAL FOR COMPLEX LITIGATION § 11.432 (2004). Such umbrella protective orders have become fairly common. *See Zenith Radio Corp,* 529 F. Supp. 866, 889 (E.D. Pa. 1981) (''We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties); *see also Jepson, Inc.* v. *Makita Elec. Works, LTD.,* 30 F.3d 854, 858 (7th Cir. 1994) (''stipulated protective orders are relatively common.''). Additionally, if incriminating documents outside the

[1] The Commission voted (3–2) to publish this notice in the **Federal Register**. Chairman Elliot F. Kaye and Commissioners Robert S. Adler and Marietta S. Robinson voted to approve publication of the notice. Commissioner Ann Marie Buerkle and Joseph P. Mohorovic voted against publication of the notice.

[2] The CPSA recognizes that failures to report and delays in reporting may occur, and authorizes civil penalties up to $15,150,000 for any related series of violations for stakeholders who violate their reporting obligations. *See* 15 U.S.C. 2068–2069 (2014).

scope of a protective order are discovered before trial, defendants often demand blanket protective orders as a condition of settlement. *Pansy* v. *Borough of Stroudsburg,* 23 F.3d 772, 785–786 (3rd Cir. 1994). In order to facilitate settlements, courts are often willing to grant these blanket orders without significantly analyzing the public interests involved. *Id.*

The Commission believes that general acceptance of ''blanket'' or ''umbrella'' protective orders in private litigation increases the likelihood that such agreements will bar the reporting to the Commission by those who are not Industry Stakeholders of consumer product safety information that the CPSC needs to protect the public. Although a party could pursue a good-cause challenge to allow the reporting of such information, the practicalities involved create a significant disincentive—the party's attorneys must first recognize the information's relevance to the CPSC and then pursue a potentially costly series of motions and hearings that are unlikely to benefit their client directly. *See* Nick Saccone, Comment, *Somewhere Between Florida, Texas, and Federal Rule of Civil Procedure 26(c): A Balanced Approach to Protective Orders and Confidentiality Settlements,* 39 U. Tol. L. Rev. 729, 740 (2008) (''Satellite litigation concerning contested discovery requests often has little or no bearing on the ultimate result of the lawsuit, other than increasing the cost of litigation for both injured plaintiffs and defendants.''). Few parties will therefore even attempt to lift protective orders in order to inform the CPSC of relevant product safety information.

According to a report submitted by the United States Senate Committee on the Judiciary on the proposed Sunshine in Litigation Act of 2008, safety information related to dangerous playground equipment, collapsible cribs, and all-terrain vehicle design defects was kept from the CPSC by protective orders in private litigation. S. REP. NO. 110–439, at 6–8 (2008). A cursory review of other civil product liability cases reveals that protective orders are in place in cases involving additional consumer products that fall under the CPSC's jurisdiction.[3] These protective orders prohibit parties from reporting to the CPSC information they obtain in the course of litigation that concerns potentially hazardous consumer products, including incident reports.

The Commission believes the best way to protect public health and safety is to preemptively exclude or exempt the reporting of relevant consumer product safety information to the CPSC (and other government public health and safety agencies) from all confidentiality provisions.

II. The Model: NHTSA's Enforcement Guidance Bulletin

The Commission has reviewed the National Highway Transportation Safety Administration's (NHTSA) guidance on this issue. NHTSA is situated similarly to the CPSC with a public health and safety mission to reduce traffic accidents and the deaths and injuries resulting from them. *See* 49 U.S.C. 30101 (2014). NHTSA's ''ability to identify and define safety-related motor vehicle defects relies in large part on manufacturers' self-reporting.'' *NHTSA Enforcement Guidance Bulletin 2015–01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation,* 81 FR 13026, 13026 (March 11, 2016) (hereinafter NHTSA Enforcement Guidance Bulletin). NHTSA found that it does not always receive such information from their industry stakeholders. *Id.* NHTSA recently issued an Enforcement Guidance Bulletin in an attempt to address the use of ''protective orders, settlement agreements, or other confidentiality provisions'' barring reporting to the agency. *Id.*

The NHTSA Enforcement Guidance Bulletin laid out a detailed, comprehensive and compelling legal analysis supporting the disclosure to public health authorities, notwithstanding confidentiality provisions in protective orders, settlements, and similar agreements. CPSC agrees with NHTSA that Rule 26 of the Federal Rules of Civil Procedure and various related state laws, as well as case law on public policy and contract law, all support the conclusion that government agencies with public health and safety missions should be excluded or exempted from the various relevant protective orders that are ubiquitous in private litigation today. NHTSA's legal analysis of this issue is available at: *https://www.federalregister.gov/documents/2016/03/11/2016-05522/nhtsa-enforcement-guidance-bulletin-2015-01-recommended-best-practices-for-protective-orders-and.*

CPSC further agrees with NHTSA that nondisclosure provisions may be appropriately used by courts and litigants to ''promote full and complete disclosure, to prevent abuses of the discovery process, and to protect legitimate privacy and proprietary interests.'' 81 FR 13029. However, when such orders and agreements shield relevant and actionable safety information behind nondisclosure provisions, they violate the good-cause requirement of Rule 26 of the Federal Rules of Civil Procedure, its state corollaries, and the well-established public policy favoring protecting public health and safety.

III. Recommendation for Best Practices

CPSC recommends, following the example set by NHTSA, that ''all parties seek to include a provision in any private protective order or settlement agreement that—despite whatever restrictions on confidentiality are imposed, and whether entered into by consent or judicial fiat—specifically allows for disclosure of relevant [consumer product] safety information to [the CPSC] and other applicable authorities.'' 81 FR 13029–13030. CPSC's proposed Litigation Guidance does not impose any new or additional requirements, but sets forth CPSC's recommendations for best practices when parties are considering confidentiality provisions in litigation related to consumer products within the CPSC's jurisdiction.

Parties in the process of establishing or already subject to confidentiality provisions may use this Litigation Guidance and CPSC's standing as a public-health authority to support a reporting exception to these provisions. *See* 79 FR 11769. For example, the exception could explicitly state ''nothing herein shall be construed to prohibit any party from disclosing relevant consumer product safety information to the Consumer Product Safety Commission.'' Alternatively, a

[3] For example, the following is a select (and by no means exhaustive) list of protective orders that have been entered into in ongoing litigation or settlements related to consumer products within the CPSC's jurisdiction. Any relevant information discovered in these cases is covered by the protective orders and plaintiffs would be prohibited from sharing such information with the CPSC. *Hampton* v. *Crescent Cleaners, Inc., et al.,* USDC Western District of Tennessee, Case 2:08–cv–02696–SHM–cgc, Document 89, Filed 08/17/2009 (infrared liquid propane wall-mounted heater); *Miah* v. *Ames True Temper, Inc., et al.,* St Ct of DeKalb County, GA, Civ Action File No. 03A05859–7, Protective Order, 7/22/2013 (wheelbarrow); *Tamayo* v. *Dollar Tree Stores., Inc., et al.,* USDC Eastern District of PA, Case 2:13 cv–02062–GP, Document 41, Stipulated Protective Order, (Document 41), Filed 12/05/13 (markers); *Williams* v. *Ideal Industries, Inc., et al.,* USDC Northern District of Georgia, Case 1:14–cv–02883–LMM, First Amended Protective Order (Document 46), Filed 02/17/15 (multimeter device); *Broughton* v. *Paoli, LLC, et al.,* NC Carteret County Sup Ct, 15 CVS 471, Stipulated Protected Order, 12/21/2015 (office chair); and *Gomez* v. *Harbor Freight Tools USA, Inc.,* Sup Ct of CA Los Angeles County, Case no. BC616712, Stipulation and Protective Order—Confidential Designations, Filed 8/17/2016 (gas cans).

clause might more generally state that ''nothing herein shall be construed to prohibit any party from disclosing relevant safety information to a regulatory agency or government entity that has an interest in the subject matter of the underlying suit.'' The CPSC, however, is not endorsing any particular language since the parties themselves are in the best position to determine how that may be accomplished.

IV. Conclusion

The CPSC is publishing this Litigation Guidance to provide recommendations for best practices when drafting protective orders, confidentiality agreements, and settlement agreements. The Litigation Guidance should be reviewed by judges, plaintiffs, and defendants, as well as those parties wishing to submit *amicus* briefs relating to protective orders and confidentiality agreements in ongoing litigation.

The Commission believes this Litigation Guidance is simple. Protective orders, confidentiality agreements and settlements (as well as other similar documents), should include language that allows any party to report consumer product safety information, incidents, injuries and deaths to the CPSC.[4]

The Commission notes that this Litigation Guidance is not a binding or enforceable rule and would not change any person's rights, duties or obligations under the CPSIA or any other Act administered by the Commission.

Dated: November 29, 2016.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2016–29004 Filed 12–1–16; 8:45 am]

BILLING CODE 6355–01–P

[4] The public is always encouraged to report relevant consumer product safety information to the CPSC via the CPSC's hotline [(800) 638–CPSC (2772)]; the CPSC's online reporting tool: *www.saferproducts.gov*; and by contacting the CPSC's Office of Compliance and Field Operations directly [(301) 504-7547].

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, December 7, 2016; 9:30 a.m.–12 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

Matter To Be Considered: Compliance Matters: The Commission staff will brief the Commission on the status of various compliance matters.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: November 29, 2016.

Todd A. Stevenson,

Secretary.

[FR Doc. 2016–29061 Filed 11–30–16; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Programmatic Environmental Assessment for Construction and Operation of Solar Photovoltaic Renewable Energy Projects on Army Installations

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army has completed a Programmatic Environmental Assessment (PEA) for construction, operation, and maintenance of solar photovoltaic (PV) renewable energy projects on Army installations and is making the PEA and a draft Finding of No Significant Impact (FNSI) available for public comment. The draft FNSI incorporates the PEA, which does not identify any significant environmental impacts from the proposed action or any of the alternatives. The draft FNSI concludes that preparation of an environmental impact statement (EIS) is not required, and therefore will not be prepared.

The PEA is programmatic and nationwide in scope. For years, the Army has analyzed and implemented solar PV projects at Army installations across the country. In the PEA, the Army leveraged this experience with the goal of streamlining the National Environmental Policy Act process for future solar PV proposals, as appropriate, in a manner consistent with Council on Environmental Quality and Department of the Army regulations.

DATES: The public comment period will end 30 days after publication of the Notice of Availability in the **Federal Register** by the Department of the Army.

ADDRESSES: Written comments should be sent to: U.S. Army Environmental Command, Attn: Solar PV PEA Public Comments, 2450 Connell Road (Building 2264), JBSA—Fort Sam Houston, TX 78234–7664; email: *usarmy.jbsa.aec.nepa@mail.mil.*

FOR FURTHER INFORMATION CONTACT: Please contact the U.S. Army Environmental Command Public Affairs Office, (210) 466–1590 or toll-free 855–846–3940, or email at *usarmy.jbsa.aec.nepa@mail.mil.*

SUPPLEMENTARY INFORMATION: The proposed action is to construct, operate, and maintain solar PV arrays and/or ancillary power systems on Army installations, to include U.S. Army Reserve facilities, Army National Guard sites, and joint bases managed by the Department of the Army (with all henceforth referred to only as ''Army installations'' or ''installations''). The proposed action includes, for those solar PV projects where the existing infrastructure is insufficient, constructing (or upgrading) and maintaining the associated infrastructure required for the transmission and management of the generated electricity to the electric grid. Associated infrastructure includes but is not limited to electricity transformers, transmission and distribution lines, and sub or switching stations; as well as ancillary power control systems such as energy storage systems, micro-grid components, and back-up power generators. The proposed action may include real estate actions on Army lands where the projects could be funded and constructed by the Army, funded through a third party Power Purchase Agreement utilizing a lease of Army or Joint Base land to an independent power producer or the local regulated utility company, or funded via some other relationship with a private or public entity.

The projects being evaluated and analyzed would generally range from approximately 10 megawatt (MW) to 100 MW per site; however, the projects outside of this MW range (*e.g.,* less than 10 MW) are inclusive in this proposed action. On average, seven acres of land are currently required to produce one MW of power. As this technology has evolved, the acreage requirement for one MW generating capacity has decreased; therefore, it is possible that future solar PV technologies may require even less acreage per MW; currently, approximately 70 acres of land would be required for a 10 MW site and 700 acres of land for a 100 MW site. PV systems on rooftops would generally expect to have capacity measured in watts or kilowatts (kW), not MW, and be of a much smaller size and scope.

After construction, equipment monitoring, routine maintenance (including vegetation control, snow removal, solar module washing, and periodic module/other equipment

replacement), and as-needed repairs by the system operator would follow to ensure proper operation of the solar PV system.

The alternatives considered and analyzed in the PEA are the No Action alternative and three action alternatives, which are to implement the proposed action on greenfield sites (Alternative 1), on previously developed sites (Alternative 2), and on or over structures or impervious surfaces, such as buildings and carports (Alternative 3). Installations may choose any or all of the action alternative approaches to solar PV.

The goal of this programmatic approach is to streamline the NEPA process for the construction, operation, and maintenance of solar PV renewable energy projects by providing installations with sufficient detail about environmental impacts on resources to enable them to tier off of the PEA, as appropriate. Tiering from this PEA would avoid or reduce the costs of repetitive, similar analyses, and allow the Army to focus resources on only those site-specific environmental issues that merit a deeper analysis. Installations tiering from the PEA would use the checklist contained in the PEA to identify site-specific NEPA requirements. Where further analysis would be required to meet site-specific NEPA requirements, the PEA may still be used for tiering, allowing the installation to focus on those resources which require site-specific analysis.

Members of the public, federally-recognized Native American Tribes, Alaska Native Tribes, Native Hawaiian Organizations, and federal, state, and local agencies are invited to submit written comments on the PEA and/or draft FNSI.

The PEA and draft FNSI may be accessed at: *http://www.aec.army.mil/Services/Support/NEPA/Documents.aspx*.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2016–28842 Filed 12–1–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0136]

Agency Information Collection Activities; Comment Request; William D. Ford Federal Direct Loan Program—150% Limitation

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 31, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0136. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education 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: William D. Ford Federal Direct Loan Program—150% Limitation.

OMB Control Number: 1845–0116.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Individuals or Households; Private Sector.

Total Estimated Number of Annual Responses: 7,770,494.

Total Estimated Number of Annual Burden Hours: 282,713.

Abstract: These data will allow the Department to calculate the borrowers maximum eligibility period, subsidized usage period, and remaining eligibility period as described in 685.200(f)(1)(ii)–(f)(1)(iv), determine whether the borrower is eligible to receive an additional Direct Subsidized Loan, and ensure that borrowers do not receive Direct Subsidized Loans if they are no longer eligible to receive a Direct Subsidized Loan under 685.200(f)(2).

The Department will determine whether the borrower is responsible for accruing interest on their previously received Direct Subsidized Loans. To ensure that the Department has the information to necessary to make that determination, institutions will be required to report additional information to NSLDS. For example, institutions will be required to report: The CIP code and the credential level for the program in which a borrower is enrolled; the length of the program in academic years, weeks, or months (consistent with current institutional reporting in the COD System); and a more detailed enrollment status of the borrower (*e.g.,* full-time, three-quarter-time, half-time, or less-than-half-time).

These data will allow the Department to determine whether a borrower who is not eligible for additional Direct Subsidized Loans is responsible for accruing interest on his or her previously received Direct Subsidized Loans.

The regulations implement a new statutory requirement that significantly limits a borrowers eligibility for Direct Subsidized Loans and potentially results in the borrower becoming responsible for accruing interest on existing Direct Subsidized Loans. Under section 485(l) of the HEA, which requires that borrowers be provided with entrance and exit counseling on the provisions governing federal student aid, institutions will be required to revise the entrance and exit counseling provided to borrowers.

For entrance counseling, the added counseling requirements under 685.304 will require institutions to explain the new provisions to borrowers.

Dated: November 29, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–29003 Filed 12–1–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0105]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Student Assistance General Provisions—Subpart J—Approval of Independently Administered Tests

AGENCY: Department of Education (ED), Federal Student Aid (FSA).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 3, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0105. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Student Assistance General Provisions—Subpart J—Approval of Independently Administered Tests.

OMB Control Number: 1845–0049.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Individuals or Households; Private Sector.

Total Estimated Number of Annual Responses: 48,779.

Total Estimated Number of Annual Burden Hours: 6,340.

Abstract: This request is for revision of the approval of the reporting and record-keeping requirements that are contained in the information collection 1845–0049 for Student Assistance General Provision regulations Subpart J—Approval of Independently Administered Tests; Specification of Passing Score; Approval of State Process. These regulations govern the application for and approval by the Secretary of assessments by a private test publisher or State that are used to measure a student's skills and abilities. The administration of approved ability to benefit (ATB) tests may be used to determine a student's eligibility for assistance for the Title IV student financial assistance programs authorized under the Higher Education Act of 1965, as amended (HEA) when, among other conditions, the student does not have a high school diploma or its recognized equivalent. The language of the current regulations has not changed.

Dated: November 29, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–29002 Filed 12–1–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. DW–012]

Notice of Petition for Waiver of Miele Incorporated From the Department of Energy Dishwashers Test Procedures and Grant of Interim Waiver

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

ACTION: Notice of petition for waiver and grant of interim waiver, and request for public comment.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from Miele Incorporated (Miele) seeking an exemption from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of dishwashers that operate at 208 volts under Title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendix C1. Section 2.2 of appendix C1 has provisions for testing at 115 and 240 volts only. Consequently, Miele submitted to DOE an alternate test procedure that allows for testing of one specified basic model at 208 volts. This notice also announces that DOE has granted Miele an interim waiver from the DOE dishwasher test procedure for the specified dishwasher basic model, subject to use of the alternative test procedure as set forth in this notice. DOE solicits comments, data, and information concerning Miele's petition and its suggested alternate test procedure.

DATES: DOE will accept comments, data, and information with regard to the Miele petition until January 3, 2017.

ADDRESSES: You may submit comments, identified by Case Number DW–012, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov* Include the case number [Case No. DW–012] in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft

Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

• *Postal Mail:* Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, Petition for Waiver Case No. DW–012, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

• *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586–6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

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

FOR FURTHER INFORMATION CONTACT:

Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program that includes the dishwashers that are the focus of this notice.[2] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, or estimated operating costs during a representative average-use cycle, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for dishwashers is contained in Title 10 of the CFR part 430, subpart B, appendix C1, *Uniform Test Method for Measuring the Energy Consumption of Dishwashers.*

DOE's regulations set forth at 10 CFR 430.27 contain provisions that allow a person to seek a waiver from the test procedure requirements for a particular basic model of a type of covered consumer product when: (1) The petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). A petitioner must include in its petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii).

DOE may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2). As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. 10 CFR 430.27(l).

The waiver process also allows DOE to grant an interim waiver if it appears likely that the petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(e)(2). Within one year of issuance of an interim waiver, DOE will either: (i) Publish in the **Federal Register** a determination on the petition for waiver; or (ii) publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver. 10 CFR 430.27(h)(1). When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 430.27(h)(2).

II. Petition for Waiver of Test Procedure and Application for Interim Waiver

On July 13, 2016, Miele filed a petition for waiver and application for interim waiver from the test procedure applicable to dishwashers set forth in 10 CFR part 430, subpart B, appendix C1. Miele has designed a dishwasher that runs on an electrical supply voltage of 208 volts. The existing test procedure under section 2.2 of 10 CFR part 430, subpart B, appendix C1 has provisions for testing at 115 and 240 volts only. In its petition for waiver, Miele submitted to DOE an alternate test procedure that allows for testing of one specified basic model at 208 volts.

DOE granted a petition for waiver submitted for the previous design generation of Miele dishwasher rated for 208 volts (Case No. DW–006) on December 27, 2011 as a waiver from the applicable residential dishwasher test procedure in 10 CFR part 430, subpart B, appendix C for certain basic models of dishwashers with a 208 volt supply voltage, provided that Miele tests and rates such products using the alternate test procedure described in the petition. 76 FR 80920.

As previously noted, an interim waiver may be granted if it appears likely that the petition for waiver will be granted, and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. See 10 CFR 430.27(e)(2).

DOE understands that absent an interim waiver, the basic model identified by Miele in its petition cannot be tested and rated for energy consumption on a basis representative of their true energy consumption characteristics. DOE has reviewed the alternate procedure suggested by Miele and concludes that it will allow for the accurate measurement of the energy use of these products, while alleviating the testing problems associated with Miele's implementation of dishwasher testing. Consequently, DOE has determined that Miele's petition for waiver will likely be granted and has decided that it is desirable for public policy reasons to grant Miele immediate relief pending a determination on the petition for waiver. Miele requests to use an alternate test procedure that would follow the test procedure for dishwashers prescribed by DOE at 10 CFR part 430, subpart B, appendix C1 with a modification of section 2.2 for dishwashers that operate with an electrical supply of 208 volts.

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

[2] All references to EPCA in this document refer to the statute as amended through the Energy Efficiency Improvement Act of 2015 (EEIA), Public Law 114–11 (April 30, 2015).

III. Summary of Grant of Interim Waiver

For the reasons stated above, DOE has granted Miele's application for interim waiver from testing for its specified dishwasher basic model. The substance of the interim waiver is summarized below.

Miele is required to test and rate Miele dishwasher basic model PG8056–208V according to the alternate test procedure as set forth in section IV, ''Alternate Test Procedure.''

Miele is permitted to make representations about the energy use of this basic model for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions set forth in the alternate test procedure and such representations fairly disclose the results of such testing in accordance with 10 CFR 429.19.

DOE makes decisions on waivers and interim waivers for only those basic models specifically set out in the petition, not future models that may be manufactured by the petitioner. Miele may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition consistent with 10 CFR 430.27(g). In addition, DOE notes that granting of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429. See also 10 CFR 430.27(a) and (i).

The interim waiver shall remain in effect consistent with 10 CFR 430.27(h). Furthermore, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may rescind or modify a waiver or interim waiver at any time upon a determination that the factual basis underlying the petition for waiver or interim waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic model's true energy consumption characteristics. See 10 CFR 430.27(k).

IV. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures when making representations about the energy consumption and energy consumption costs of products and equipment covered by the statute. (42 U.S.C. 6293(c); 6314(d)) Consistent representations about the energy efficiency of covered products and equipment are important for consumers evaluating products when making purchasing decisions and for manufacturers to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 430.27, and after considering public comments on the petition, DOE will announce its decision as to an alternate test procedure for Miele in a subsequent Decision and Order.

During the period of the interim waiver granted in this notice, Miele shall test the basic model listed in section III according to the test procedure for dishwashers prescribed by DOE at 10 CFR part 430, subpart B, appendix C1, except that Miele must use section 2.2 of appendix C1 with the modification set forth below:

Dishwashers that operate with an electrical supply of 208 volts. Maintain the electrical supply to the dishwasher at 208 volts ±2 percent and within 1 percent of its nameplate frequency as specified by the manufacturer. Maintain a continuous electrical supply to the unit throughout testing, including the preconditioning cycles, specified in section 2.9 of this appendix, and in between all test cycles.

V. Summary and Request for Comments

Through this notice, DOE announces receipt of Miele's petition for waiver from the DOE test procedure for certain basic models of Miele dishwasher, and announces DOE's decision to grant Miele an interim waiver from the test procedure for its dishwasher. DOE is publishing Miele's petition for waiver in its entirety, pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information. The petition includes a suggested alternate test procedure to determine the energy consumption of its dishwasher. DOE will consider public comments on the petition in issuing its Decision and Order.

DOE solicits comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation methodology. Pursuant to 10 CFR 430.27(d), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is Steve Polinski, Senior Manager Regulatory Affairs, Miele Incorporated, 9 Independence Way, Princeton, New Jersey 08540. All comment submissions must include the agency name and Case Number DW–012 for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: One copy of the document marked ''confidential'' with all of the information believed to be confidential included, and one copy of the document marked ''non-confidential'' with all of the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on November 22, 2016.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Miele
July 13, 2016
Via Email:
AS_Waiver_Requests@ee.doe.gov
Assistant Secretary for Conservation and Renewable Energy
U.S. Department of Energy Building Technologies Program, Test Procedure Waiver
1000 Independence Avenue SW.
Washington, DC 20585
John.Cymbalski@ee.doe.gov

Re: Application for Interim Waiver and Petition for Waiver, 10 C.F.R. 430 Subpart B, Appendix C1—Uniform Test Method For Measuring Energy Consumption of Dishwashers

Miele Inc. is submitting this Application for Interim Waiver and Petition for Waiver of the Department of Energy's test procedure pursuant to 10 CFR 430.27, to the Department of Energy concerning the test procedure found in 10 CFR 430, Subpart B, Appendix C1 for measuring energy consumption of dishwashers specifically the Miele PG8056–208V.

The request for this waiver is focused on the testing voltages specified in the existing test procedure found in Section 2.2.

2.2.1 *Dishwashers that operate with an electrical supply of 115 volts.* Maintain the electrical supply to the dishwasher at 115 Volts ±2 percent and within 1 percent of the nameplate frequency as specified by the manufacturer.

2.2.2 *Dishwashers that operate with an electrical supply of 240 Volts.* Maintain the electrical supply to the dishwasher at 240 volts ±2 percent and within 1 percent of its nameplate frequency as specified by the manufacturer.

Currently there is no provision to test dishwashers using 208 Volts. There are many instances where only 208 Volts are provided to the consumer. Dishwashers rated at 240 Volts would not allow the proper operation of a dishwasher when connected to a 208 Volt supply. To achieve the data plate rating, appropriate voltage components are used in the design of the 208 Volt dishwashers.

The proposed test procedure would allow for a variation in electrical supply voltage to 208 Volts based on the electrical safety test data plate rating. In the case of the PG8056–208V, a rating of 208 Volts ±2 percent and within 1 percent of its nameplate frequency as specified by the manufacturer would be used to perform the energy test.

Miele requests immediate relief by grant of the proposed interim waiver, justified by the following reasons:

Economic Hardship. Since the Miele PG8056–208V dishwasher is intended to be sold in applications where 240 volts power supply is not available to the consumer, denial of this Application for Interim Waiver and Petition for Waiver would eliminate the possibility of high performance dishwasher sales where a compatible voltage is not present. This will also greatly affect sales of all other Miele product categories where consumers most frequently choose one brand of appliance for their home.

Acceptance of Predicate Model A Petition for Waiver submitted for the previous design generation of Miele dishwasher rated for 208 volts, (Case No. DW–006) was granted by the DOE on December 27, 2011 as a waiver from the applicable residential dishwasher test procedure in 10 CFR part 430, subpart B, appendix C for certain basic models of dishwashers with a 208 volt supply voltage, provided that Miele tests and rates such products using the alternate test procedure described in the petition.

Public Policy Merits. The public policy benefits of encouraging business success and fostering innovation in high performance dishwasher design are additional reasons for prompt approval of the requested interim waiver.

We hereby certify that all dishwasher manufacturers of domestically-marketed units known to Miele Inc. have been notified by letter of this application, copies of which are attached.

Thank you for your timely attention to this Application for Interim Waiver and Petition for Waiver.

Best regards,
Steve Polinski
Senior Manager Regulatory Affairs
Miele Incorporated
9 Independence Way
Princeton, New Jersey 08540
SPolinski@MieleUSA.com
Phone: 609 419 9898

richard.bollard@fp.co.nz;
EARL.JONES@GE.COM
John.taylor@lge.com
AHAMORGANIZATION@AHAM.ORG
jcleary@AHAM.org
Bernt.Svensson@asko.se
wayne_p_klug@whirlpool.com
manfred.staebler@bshg.com
dennis.a.poyner@electrolux.com
jmiller@vikingrange.com
richard_j_koenes@whirlpool.com
marco.darsie@indesit.com;
brian.wylie@subzero.com
szbugay@arcelik.com
mtroisi@haieramerica.com

[FR Doc. 2016–28984 Filed 12–1–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CW–027]

Notice of Petition for Waiver of Samsung Electronics America, Inc. From the Department of Energy Clothes Washer Test Procedure, and Grant of Interim Waiver

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

ACTION: Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

SUMMARY: This notice announces receipt of a petition for waiver from Samsung Electronics America, Inc. (Samsung) seeking an exemption from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of residential clothes washers. Samsung seeks to use an alternate test procedure to address certain issues involved in testing one clothes washer basic model, as identified in its petition, with a container volume between 6.0 cubic feet and 8.0 cubic feet. Samsung contends the basic model cannot be accurately tested using the currently applicable DOE test procedure. DOE solicits comments, data, and information concerning Samsung's petition and its suggested alternate test procedure. This notice also grants Samsung an interim waiver from the residential clothes washer test procedure for the specified basic model, subject to use of the alternative test procedure set forth in this notice.

DATES: DOE will accept comments, data, and information with respect to the Samsung petition until January 3, 2017.

ADDRESSES: You may submit comments, identified by Case Number CW–027, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov.* Include ''Case No. CW–027'' in the subject line of the message.
- *Mail:* Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, Petition for Waiver Case No. CW–027, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
- *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586–6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

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

FOR FURTHER INFORMATION CONTACT:

Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–5B, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–33, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program that includes the clothes washers that are the focus of this notice.[2] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency,

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

[2] All references to EPCA in this document refer to the statute as amended through the Energy Efficiency Improvement Act of 2015 (EEIA), Public Law 114–11 (April 30, 2015).

energy use, or estimated operating costs during a representative average-use cycle, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for automatic and semi-automatic clothes washers (both residential and commercial) is contained in 10 CFR part 430, subpart B, appendix J2, *Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-automatic Clothes Washers.*

DOE's regulations set forth at 10 CFR 430.27 contain provisions that allow a person to seek a waiver from the test procedure requirements for a particular basic model of a type of covered consumer product when: (1) The petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). A petitioner must include in its petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii).

DOE may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2). As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. 10 CFR 430.27(l).

The waiver process also allows DOE to grant an interim waiver if it appears likely that the petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(e)(2). Within one year of issuance of an interim waiver, DOE will either: (i) Publish in the **Federal Register** a determination on the petition for waiver; or (ii) publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver. 10 CFR 430.27(h)(1). When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 430.27(h)(2).

II. Petition for Waiver of Test Procedure and Application for Interim Waiver

On August 24, 2016, Samsung submitted a petition for waiver from the DOE test procedure applicable to automatic and semi-automatic clothes washers set forth in 10 CFR part 430, subpart B, appendix J2. Samsung requested the waiver because the mass of the test load used in the procedure, which is based on the basket volume of the test unit, is currently not defined for basket sizes greater than 6.0 cubic feet. In its petition, Samsung seeks a waiver for a specified basic model with a capacity greater than 6.0 cubic feet. Table 5.1 of Appendix J2 defines the test load sizes used in the test procedure as linear functions of the basket volume. Samsung requests that DOE grant a waiver for testing and rating based on a revised Table 5.1.

Samsung also requests an interim waiver from the existing DOE test procedure. An interim waiver may be granted if it appears likely that the petition for waiver will be granted, and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. See 10 CFR 430.27(e)(2).

DOE understands that absent an interim waiver, Samsung's products cannot be tested and rated for energy consumption on a basis representative of their true energy consumption characteristics. DOE has reviewed the alternate procedure suggested by Samsung and concludes that, generally, it will allow for the accurate measurement of the energy use of these products, while alleviating the testing problems associated with Samsung's implementation of clothes washer containers larger than 6.0 cubic feet. Consequently, DOE has determined that Samsung's petition for waiver will likely be granted. Furthermore, as explained below, DOE has granted similar waivers to Samsung and other manufacturers, and has determined that it is desirable for public policy reasons to grant Samsung immediate relief pending a determination of the petition for waiver.

DOE recently granted a waiver to Whirlpool under Decision and Order (81 FR 26251, May 2, 2016) to allow for the testing of certain basic models of clothes washers with container volumes between 6.0 cubic feet and 8.0 cubic feet. DOE also granted a waiver to Samsung for a similar request under Decision and Order Samsung (76 FR 13169, Mar. 10, 2011; 76 FR 50207, Aug. 12, 2011) to allow for the testing of certain basic models of clothes washers with container volumes between 3.8 cubic feet and 6.0 cubic feet. In addition, DOE granted waivers to LG (CW–016 (76 FR 11233, Mar. 1, 2011), CW–018 (76 FR 21879, Apr. 19, 2011), and CW–021 (76 FR 64330, Oct. 18, 2011); General Electric (75 FR 76968, Dec. 10, 2010), Whirlpool (75 FR 69653, Nov. 15, 2010), and Electrolux (76 FR 11440, Mar. 2, 2011) to allow for the testing of certain basic models of clothes washers with container volumes between 3.8 cubic feet and 6.0 cubic feet.

The current DOE test procedure specifies test load sizes only for machines with capacities up to 6.0 cubic feet. (77 FR 13888, Mar. 7, 2012; the ''March 2012 Final Rule'') For the reasons set forth in DOE's March 2012 Final Rule, DOE concludes that extending the linear relationship between test load size and container capacity to larger capacities is valid. In addition, testing a basic model with a capacity larger than 6.0 cubic feet using the current procedure could evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data.

Based on these considerations, and the waivers granted to LG, GE, Electrolux and Whirlpool, as well as the previous waivers granted to Samsung for similar requests, it appears likely that the petition for waiver will be granted. As a result, DOE grants an interim waiver to Samsung for the basic models of clothes washers with container volumes greater than 6.0 cubic feet specified in its petition for waiver. DOE also provides for the use of an alternative test procedure extending the linear relationship between test load size and container capacity, as described below.

III. Summary of Grant of Interim Waiver

For the reasons stated above, DOE has granted Samsung's application for interim waiver from testing for its specified clothes washer basic models. The substance of DOE's Interim Waiver Order is summarized below.

Samsung is required to test and rate the clothes washer basic model Samsung WA63M97**A* according to the alternate test procedure as set forth in section IV, ''Alternate Test Procedure.''

Samsung is permitted to make representations about the energy use of this basic model for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions set forth in the alternate test procedure

and such representations fairly disclose the results of such testing in accordance with 10 CFR 429.20.

DOE makes decisions on waivers and interim waivers for only those basic models specifically set out in the petition, not future models that may be manufactured by the petitioner. Samsung may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition consistent with 10 CFR 430.27(g). In addition, DOE notes that granting of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429. See also 10 CFR 430.27(a) and (i).

The interim waiver shall remain in effect consistent with the provisions of 10 CFR 430.27(h). Furthermore, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may rescind or modify a waiver or interim waiver at any time upon a determination that the factual basis underlying the petition for waiver or interim waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic model's true energy consumption characteristics. See 10 CFR 430.27(k).

IV. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures when making representations about the energy consumption and energy consumption costs of products and equipment covered by the statute. (42 U.S.C. 6293(c); 6314(d)) Consistent representations about the energy efficiency of covered products and equipment are important for consumers evaluating products when making purchasing decisions and for manufacturers to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 430.27 and after considering public comments on the petition, DOE will announce its decision as to an alternate test procedure for Samsung in a subsequent Decision and Order.

The alternate procedure approved today is intended to allow Samsung to make valid representations regarding Samsung clothes washer basic model WA63M97**A*.

In the alternate test procedure described below, DOE has corrected an error in the proposed Samsung load size table:

- For the 6.80–6.90, the average load size was not calculated correctly. The average load size should be the numerical average of the minimum and maximum load sizes. It should have been 7.05 kg instead of 7.04 kg.

During the period of the interim waiver granted in this notice, Samsung must test clothes washer basic model WA63M97**A* according to the provisions of 10 CFR part 430 subpart B, appendix J2, except that Samsung shall substitute the expanded Table 5.1 below for Table 5.1 of appendix J2.

TABLE 5.1—TEST LOAD SIZES

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	Kg
0–0.80	0–22.7	3.00	1.36	3.00	1.36	3.00	1.36
0.80–0.90	22.7–25.5	3.00	1.36	3.50	1.59	3.25	1.47
0.90–1.00	25.5–28.3	3.00	1.36	3.90	1.77	3.45	1.56
1.00–1.10	28.3–31.1	3.00	1.36	4.30	1.95	3.65	1.66
1.10–1.20	31.1–34.0	3.00	1.36	4.70	2.13	3.85	1.75
1.20–1.30	34.0–36.8	3.00	1.36	5.10	2.31	4.05	1.84
1.30–1.40	36.8–39.6	3.00	1.36	5.50	2.49	4.25	1.93
1.40–1.50	39.6–42.5	3.00	1.36	5.90	2.68	4.45	2.02
1.50–1.60	42.5–45.3	3.00	1.36	6.40	2.90	4.70	2.13
1.60–1.70	45.3–48.1	3.00	1.36	6.80	3.08	4.90	2.22
1.70–1.80	48.1–51.0	3.00	1.36	7.20	3.27	5.10	2.31
1.80–1.90	51.0–53.8	3.00	1.36	7.60	3.45	5.30	2.40
1.90–2.00	53.8–56.6	3.00	1.36	8.00	3.63	5.50	2.49
2.00–2.10	56.6–59.5	3.00	1.36	8.40	3.81	5.70	2.59
2.10–2.20	59.5–62.3	3.00	1.36	8.80	3.99	5.90	2.68
2.20–2.30	62.3–65.1	3.00	1.36	9.20	4.17	6.10	2.77
2.30–2.40	65.1–68.0	3.00	1.36	9.60	4.35	6.30	2.86
2.40–2.50	68.0–70.8	3.00	1.36	10.00	4.54	6.50	2.95
2.50–2.60	70.8–73.6	3.00	1.36	10.50	4.76	6.75	3.06
2.60–2.70	73.6–76.5	3.00	1.36	10.90	4.94	6.95	3.15
2.70–2.80	76.5–79.3	3.00	1.36	11.30	5.13	7.15	3.24
2.80–2.90	79.3–82.1	3.00	1.36	11.70	5.31	7.35	3.33
2.90–3.00	82.1–85.0	3.00	1.36	12.10	5.49	7.55	3.42
3.00–3.10	85.0–87.8	3.00	1.36	12.50	5.67	7.75	3.52
3.10–3.20	87.8–90.6	3.00	1.36	12.90	5.85	7.95	3.61
3.20–3.30	90.6–93.4	3.00	1.36	13.30	6.03	8.15	3.70
3.30–3.40	93.4–96.3	3.00	1.36	13.70	6.21	8.35	3.79
3.40–3.50	96.3–99.1	3.00	1.36	14.10	6.40	8.55	3.88
3.50–3.60	99.1–101.9	3.00	1.36	14.60	6.62	8.80	3.99
3.60–3.70	101.9–104.8	3.00	1.36	15.00	6.80	9.00	4.08
3.70–3.80	104.8–107.6	3.00	1.36	15.40	6.99	9.20	4.17
3.80–3.90	107.6–110.4	3.00	1.36	15.80	7.16	9.40	4.26
3.90–4.00	110.4–113.3	3.00	1.36	16.20	7.34	9.60	4.35
4.00–4.10	113.3–116.1	3.00	1.36	16.60	7.53	9.80	4.45
4.10–4.20	116.1–118.9	3.00	1.36	17.00	7.72	10.00	4.54
4.20–4.30	118.9–121.8	3.00	1.36	17.40	7.90	10.20	4.63
4.30–4.40	121.8–124.6	3.00	1.36	17.80	8.09	10.40	4.72

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	Kg
4.40–4.50	124.6–127.4	3.00	1.36	18.20	8.27	10.60	4.82
4.50–4.60	127.4–130.3	3.00	1.36	18.70	8.46	10.85	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.05	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.25	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.45	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.65	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.85	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.05	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.25	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.45	5.65
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.65	5.75
5.50–5.60	155.7–158.6	3.00	1.36	22.80	10.32	12.90	5.84
5.60–5.70	158.6–161.4	3.00	1.36	23.20	10.51	13.10	5.93
5.70–5.80	161.4–164.2	3.00	1.36	23.60	10.69	13.30	6.03
5.80–5.90	164.2–167.1	3.00	1.36	24.00	10.88	13.50	6.12
5.90–6.00	167.1–169.9	3.00	1.36	24.40	11.06	13.70	6.21
6.00–6.10	169.9–172.7	3.00	1.36	24.80	11.25	13.90	6.30
6.10–6.20	172.7–175.6	3.00	1.36	25.20	11.43	14.10	6.40
6.20–6.30	175.6–178.4	3.00	1.36	25.60	11.61	14.30	6.49
6.30–6.40	178.4–181.2	3.00	1.36	26.00	11.79	14.50	6.58
6.40–6.50	181.2–184.1	3.00	1.36	26.40	11.97	14.70	6.67
6.50–6.60	184.1–186.9	3.00	1.36	26.90	12.20	14.95	6.78
6.60–6.70	186.9–189.7	3.00	1.36	27.30	12.38	15.15	6.87
6.70–6.80	189.7–192.6	3.00	1.36	27.70	12.56	15.35	6.96
6.80–6.90	192.6–195.4	3.00	1.36	28.10	12.75	15.55	7.05
6.90–7.00	195.4–198.2	3.00	1.36	28.50	12.93	15.75	7.14
7.00–7.10	198.2–201.0	3.00	1.36	28.90	13.11	15.95	7.23
7.10–7.20	201.0–203.9	3.00	1.36	29.30	13.29	16.15	7.33
7.20–7.30	203.9–206.7	3.00	1.36	29.70	13.47	16.35	7.42
7.30–7.40	206.7–209.5	3.00	1.36	30.10	13.65	16.55	7.51
7.40–7.50	209.5–212.4	3.00	1.36	30.60	13.88	16.80	7.62
7.50–7.60	212.4–215.2	3.00	1.36	31.00	14.06	17.00	7.71
7.60–7.70	215.2–218.0	3.00	1.36	31.40	14.24	17.20	7.80
7.70–7.80	218.0–220.9	3.00	1.36	31.80	14.42	17.40	7.89
7.80–7.90	220.9–223.7	3.00	1.36	32.20	14.61	17.60	7.98
7.90–8.00	223.7–226.5	3.00	1.36	32.60	14.79	17.80	8.07

V. Summary and Request for Comments

Through this notice, DOE grants Samsung an interim waiver from the specified portions of the test procedure applicable to clothes washer basic model WA63M97**A*. and announces receipt of Samsung's petition for waiver from those same portions of the test procedure. DOE is publishing Samsung's petition for waiver pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information. The petition includes a suggested alternate test procedure to determine the energy consumption of clothes washer basic model WA63M97**A*. DOE is considering including the corrected alternate procedure in its subsequent Decision and Order.

DOE solicits comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation methodology. Pursuant to 10 CFR 430.27(d), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is Jenni Chun, Regulatory & Environmental Affairs Manager, Samsung Electronics America, Inc., QA Lab America. 19 Chapin Rd. Building D, Pine Brook, NJ 07058. All comment submissions to DOE must include the Case Number CW–027 for this proceeding. Submit electronic comments in Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Issued in Washington, DC, on November 22, 2016.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Samsung Electronics America, Inc.
QA Lab America
19 Chapin Rd. Building D
Pine Brook, NJ 07058

August 24, 2016

The Honorable David Friedman
Assistant Secretary, Energy Efficiency and Renewable Energy
United States Department of Energy
Forrestal Building (Mail Station EE–1)
1000 Independence Avenue SW.,
Washington, DC 20585

Dear Assistant Secretary Friedman:

Samsung Electronics America, Inc. (''Samsung'') respectfully submits the Application for Petition for Waiver and Application for Interim Waiver to the Department of Energy (''DOE'' or ''the Department'') regards to Samsung's residential clothes washers with a capacity over 6.0 cubic feet.

Reasoning

The 10 CFR 431.401(a)(1) allows a person to submit a petition to waive for a particular basic model any requirements of § 430.23 upon the grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy

consumption characteristics as to provide materially inaccurate comparative data. Additionally, 10 CFR part 430.27(b)(2) allows an applicant to request an Interim Waiver if economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the Application for Interim Waiver.

The current test procedure, Appendix J2 to Subpart B of Part 430 (''Appendix J2'') Table 5.1, does not contain load sizes for capacities greater than 6.0 cubic feet, preventing Samsung from appropriately testing the clothes washer models with capacity greater than 6.0 cubic feet. The Department previously granted a similar waiver to Whirlpool (75 FR 69653, Nov. 15, 2010 and 81 FR 26251, May 2, 2016).

Samsung also proposes an alternative procedure by extending the linear relationship between test load sizes and container volume in Table 5.1, as the following load size table for clothes washer with capacity between 6.0 cubic feet and 8.0 cubic feet:

TABLE 5.0—TEST LOAD SIZES—SUPPLEMENT

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	kg
6.00–6.10	169.9–172.7	3.00	1.36	24.80	11.25	13.90	6.30
6.10–6.20	172.7–175.6	3.00	1.36	25.20	11.43	14.10	6.40
6.20–6.30	175.6–178.4	3.00	1.36	25.60	11.61	14.30	6.49
6.30–6.40	178.4–181.2	3.00	1.36	26.00	11.79	14.50	6.58
6.40–6.50	181.2–184.1	3.00	1.36	26.40	11.97	14.70	6.67
6.50–6.60	184.1–186.9	3.00	1.36	26.90	12.20	14.95	6.78
6.60–6.70	186.9–189.7	3.00	1.36	27.30	12.38	15.15	6.87
6.70–6.80	189.7–192.6	3.00	1.36	27.70	12.56	15.35	6.96
6.80–6.90	192.6–195.4	3.00	1.36	28.10	12.75	15.55	7.04
6.90–7.00	195.4–198.2	3.00	1.36	28.50	12.93	15.75	7.14
7.00–7.10	198.2–201.0	3.00	1.36	28.90	13.11	15.95	7.23
7.10–7.20	201.0–203.9	3.00	1.36	29.30	13.29	16.15	7.33
7.20–7.30	203.9–206.7	3.00	1.36	29.70	13.47	16.35	7.42
7.30–7.40	206.7–209.5	3.00	1.36	30.10	13.65	16.55	7.51
7.40–7.50	209.5–212.4	3.00	1.36	30.60	13.88	16.80	7.62
7.50–7.60	212.4–215.2	3.00	1.36	31.00	14.06	17.00	7.71
7.60–7.70	215.2–218.0	3.00	1.36	31.40	14.24	17.20	7.80
7.70–7.80	218.0–220.9	3.00	1.36	31.80	14.42	17.40	7.89
7.80–7.90	220.9–223.7	3.00	1.36	32.20	14.61	17.60	7.98
7.90–8.00	223.7–226.5	3.00	1.36	32.60	14.79	17.80	8.07

Conclusion

In summary, Samsung respectfully requests to grant Samsung a Waiver and Interim Waiver to use the alternate expanded Table 5.1 of Appendix J2 that appears in DOE's clothes washer test procedure NOPR (79 FR 23061, April 25, 2014). Samsung is seeking the Department to grant a Waiver and Interim waiver for Samsung clothes washer basic model **WA63M97**A***:

Brand	Model name	Capacity load	Type	Reason
Samsung	WA63M97**A*	6.3 cu. ft	Top Load	Over 6.0 cu. ft.

Please feel free to contact me if you have any questions regarding this Petition for Waiver and Application for Interim Waiver. I will be happy to discuss should any questions arise.

Sincerely,

Jenni Chun,

Regulatory & Environmental Affairs Manager.

[FR Doc. 2016–28980 Filed 12–1–16; 8:45 am]

BILLING CODE 6450–01–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: EC17–39–000.

Applicants: Agera Energy LLC, energy.me midwest llc, Aequitas Energy, Inc.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act and Request for Confidential Treatment and Request for Expedited Review of Agera Energy LLC.

Filed Date: 11/23/16.

Accession Number: 20161123–5197.

Comments Due: 5 p.m. ET 12/14/16.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG17–33–000.

Applicants: Footprint Power Salem Harbor Development LP.

Description: Footprint Power Salem Harbor Development LP submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 11/28/16.

Accession Number: 20161128–5119.

Comments Due: 5 p.m. ET 12/19/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2331–060; ER10–2319–051; ER10–2317–051; ER13–1351–033; ER10–2330–058.

Applicants: J.P. Morgan Ventures Energy Corporation, BE CA LLC, BE Alabama LLC, Florida Power Development LLC, Utility Contract Funding, L.L.C.

Description: Notice of Non-Material Change in Status of the J.P. Morgan Sellers.

Filed Date: 11/25/16.

Accession Number: 20161125–5044.

Comments Due: 5 p.m. ET 12/16./16.

Docket Numbers: ER14–649–005.

Applicants: Midcontinent Independent System Operator, Inc., Entergy Services, Inc.

Description: Compliance filing: 2016–11–28_Compliance filing to address 9/28/2016 Order on Entergy Settlement to be effective 12/19/2013.

Filed Date: 11/28/16.

Accession Number: 20161128–5194.

Comments Due: 5 p.m. ET 12/19/16.

Docket Numbers: ER16–1956–001.

Applicants: Western Antelope Dry Ranch LLC.

Description: Compliance filing: Western Antelope Dry Ranch LLC MBR Tariff to be effective 6/18/2016.

Filed Date: 11/28/16.

Accession Number: 20161128–5102.

Comments Due: 5 p.m. ET 12/19/16.

Docket Numbers: ER17–418–000.

Applicants: Seward Generation, LLC.

Description: Compliance filing: Reactive Rate Schedule eTariff Compliance Filing to be effective 11/29/2016.

Filed Date: 11/28/16.

Accession Number: 20161128–5207.

Comments Due: 5 p.m. ET 12/19/16.

Docket Numbers: ER17–419–000.

Applicants: American Electric Power Service Corporate, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Transource PA and MD submit revisions to OATT to add Attachments H–29 and H–30 to be effective 2/1/2017.

Filed Date: 11/28/16.

Accession Number: 20161128–5221.

Comments Due: 5 p.m. ET 12/19/16.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF17–318–000.

Applicants: Fresh Air Energy II, LLC.

Description: Form 556 of Fresh Air Energy II, LLC [Shoshoni PV1].

Filed Date: 11/28/16.

Accession Number: 20161128–5065.

Comments Due: 5 p.m. ET 11/28/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) 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.

Dated: November 28, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–28938 Filed 12–1–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Proposed 2018 Olmsted Power Marketing Plan

AGENCY: Western Area Power Administration, Department of Energy (DOE).

ACTION: Notice of Proposed Olmsted Power Marketing Plan and announcement of public information and comment forum.

SUMMARY: Western Area Power Administration (WAPA), a Federal power marketing agency of the Department of Energy, is seeking comments about this Proposed Olmsted Power Marketing Plan. WAPA has responsibility for the marketing of energy from the Colorado River Storage Project (CRSP), among other projects, and operates the transmission infrastructure associated with these Federal projects.

DATES: The public comment period on the Proposed Olmsted Power Marketing Plan begins December 2, 2016 and ends March 2, 2017. To be assured of consideration, WAPA must receive all written comments by the end of the comment period. WAPA reserves the right not to consider any comments received after the prescribed date and time.

WAPA will hold a public information forum about this proposed marketing plan on Friday, January 13, 2017, from 10 a.m. to 12 p.m. MST at the Bureau of Reclamation, 125 South State Street, Salt Lake City, Utah. The public comment forum is scheduled for the afternoon of the same day Friday, January 13, 2017, from 1 p.m. to 3 p.m. MST at the Bureau of Reclamation, 125 South State Street, Salt Lake City, Utah.

ADDRESSES: Submit written comments about this proposed marketing plan to: Ms. Lynn C. Jeka, CRSP Manager, CRSP Management Center, Western Area Power Administration, 150 East Social Hall Avenue, Suite 300, Salt Lake City, UT 84111–1580. Comments may also be emailed to *jeka@wapa.gov* or be faxed to (801) 524–5017. All documentation developed or retained by WAPA for the purpose of developing the proposed marketing plan will be available for inspection and copying at the CRSP Management Center office, 150 East Social Hall Avenue, Suite 300, Salt Lake City, Utah.

FOR FURTHER INFORMATION CONTACT: Mr. Brent Osiek, CRSP Power Marketing Manager, *osiek@wapa.gov,* (801) 524–5495; or Mr. Steve Mullen, CRSP Public Utilities Specialist, *smullen@wapa.gov,* (801) 524–6383. Written requests for information should be mailed to CRSP Management Center, Western Area Power Administration, 150 East Social Hall Avenue, Suite 300, Salt Lake City, UT 84111–1580, or faxed to (801) 524–5017.

SUPPLEMENTARY INFORMATION: The Olmsted Powerplant, located in northern Utah, was acquired in condemnation proceedings by the United States in 1990 in order to secure water rights associated with the Olmsted Powerplant deemed essential to the Central Utah Project (CUP). The CUP is a participating project of the CRSP. As part of the condemnation proceedings, PacifiCorp continued Olmsted operations until 2015, after which time the operation of the facility became the responsibility of the Department of the Interior, Bureau of Reclamation.

The existing Olmsted Powerplant is over 100 years old and has greatly exceeded its operational life. A replacement facility is being constructed for the generation of power and the preservation of associated non-consumptive water rights necessary for the CUP. On February 4, 2015, an Implementation Agreement (Agreement) for the Olmsted Powerplant Replacement Project (Project) was signed by Central Utah Water Conservancy District (District); Department of the Interior, Bureau of Reclamation; and Department of Energy, WAPA (Participants). The Agreement sets forth the responsibilities of the Participants and how the Project will be funded. The District will construct, operate, maintain, and replace the Olmsted facilities in connection with its CUP operations, including power generation.

The Olmsted facilities are a feature of the CUP, which is a participating project of CRSP. WAPA markets the hydropower generated from the CRSP facilities as well as the participating projects of CRSP. In accordance with Acts of Congress approved April 11, 1956 (70 Stat. 105); August 4, 1977 (91 Stat. 565); October 30, 1992 (106 Stat. 46050); and Acts amendatory or supplementary to the foregoing Acts, WAPA will be responsible for marketing the energy from the Olmsted Powerplant. WAPA plans to begin marketing energy from the Olmsted

Powerplant in the summer of 2018. Only energy, without capacity, will be available for marketing (power production will be non-dispatchable and incidental to the delivery of water). It is expected that annual energy production from the replacement Olmsted Powerplant will average approximately 27,000,000 kWh per year.

Proposed 2018 Olmsted Power Marketing Plan

WAPA proposes to apply the following criteria to applicants seeking an allocation of energy under the proposed 2018 Olmsted Power Marketing Plan:

1. *Contract Term:* Due to the lack of actual generating data, the term of the contract will be limited. Service is expected to begin on July 1, 2018, or as soon as the Project is declared commercially operable; and the contract term will be effective through September 30, 2024.

2. *Marketing Area:* Due to the relatively small size of the resource and its operating characteristics, eligible applicants must be preference entities, in accordance with section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)), located within the following counties in Utah: Davis, Morgan, Salt Lake, Summit, Utah, Weber, and Wasatch.

3. *Delivery Point:* 12.47-kV bus at PacifiCorp's Hale Substation or another substation that may be identified that can be electrically interconnected to the Project.

4. *Transmission:* Any associated transformation/transmission beyond PacifiCorp's 12.47-kV bus at the Hale Substation, or other identified substation if delivery is not made at the Hale Substation, is the sole responsibility of the applicant. Applicants must have the necessary arrangements for transmission and/or distribution service in place by April 1, 2018.

5. *Eligible Applicants:* WAPA will provide allocations only to preference entities in the marketing area. WAPA, through the public process, will determine the amount of energy, if any, to allocate in accordance with the marketing criteria and administrative discretion under Reclamation Law. Priority will be given to the District as the operator of the Olmsted Powerplant.

6. *Resource Pool:* WAPA will take into consideration all existing Federal hydropower allocations an applicant is currently receiving when determining each allocation. Allocations of Olmsted energy will be determined solely by WAPA. Applicants who receive an allocation will be allocated a percentage of the annual energy output of the Powerplant.

7. *Preference Entities:* Preference will be given to entities in accordance with section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), as amended and supplemented, including Municipalities, Rural Cooperatives, and political subdivisions including irrigation or other districts, municipalities, and other governmental organizations that have electric utility status by April 1, 2018; and, Federally recognized Native American tribes as defined in the Indian Self Determination Act of 1975, 25 U.S.C. 5304 as amended. ''Electric utility status'' means that the entity has responsibility to meet load growth, has a distribution system, and is ready, willing, and able to purchase Federal power from WAPA on a wholesale basis.

8. *Ready, Willing, and Able:* Eligible applicants must be ready, willing, and able to receive and distribute or use energy from WAPA. Ready, willing, and able means the applicant has the facilities needed for the receipt of power or has made the necessary arrangements for transmission and/or distribution service, and its power supply contracts with third parties permit the delivery of WAPA's power.

9. *Rates and Payment:* Each applicant who receives an allocation will pay its proportional share of the annual expenses of the Project based on its proportional share of the energy produced. WAPA, through a separate public process, will establish a rate methodology for the Project. Rather than pay a stated rate per kWh for energy, applicants who receive allocations will pay their proportional shares of the Project's total annual OM&R expenses in return for their proportional shares of total marketable energy production.

Availability of Information

Documents developed or retained by WAPA during this public process will be available, by appointment, for inspection and copying at the CRSP Management Center, located at 150 East Social Hall Avenue, Suite 300, Salt Lake City, Utah. Written comments received as part of the Olmsted Marketing Plan formal public process will be available for viewing on WAPA's Web site after the close of the comment period.

Procedural Requirements

Environmental Compliance

WAPA Olmsted Power Marketing Plan will comply with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4347), the Council on Environmental Quality Regulations (40 CFR parts 1500–1508), and DOE NEPA Regulations (10 CFR 1021).

Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA; 5 U.S.C. 601, *et seq.*) requires a Federal agency to perform a regulatory flexibility analysis whenever the agency is required by law to publish a general notice of proposed rulemaking for any proposed rule, unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. In defining the term ''rule,'' the RFA specifies that a ''rule'' does not include ''a rule of particular applicability relating to rates [and] services . . . or to valuations, costs or accounting, or practices relating to such rates [and] services . . .'' (5 U.S.C. 601). WAPA has determined that this action relates to rates or services offered by WAPA and, therefore, is not a rule within the purview of the Regulatory Flexibility Act.

Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Dated: November 23, 2016.

Mark A. Gabriel,

Administrator.

[FR Doc. 2016–28976 Filed 12–1–16; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9030–5]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements

Filed 11/21/2016 Through 11/25/2016

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20160283, Final, NPS, FL, ADOPTION—Central Everglades Planning Program, Review Period

Ends: 01/03/2017, Contact: Robert Johnson 305–244–4235.

The U.S. Department of the Interior's National Park Service (NPS) is adopting the U.S. Army Corps of Engineers Final EIS #20140215, filed with EPA 07/31/2014. The NPS was not a cooperating agency for this project. Therefore, recirculation of the document is necessary under Section 1506.3(b) of Council on Environmental Quality Regulations.

EIS No. 20160284, Draft, TVA, TN, Multiple Reservoir Land Management Plans, Comment Period Ends: 01/31/2017, Contact: Matthew Higdon 865–632–8051.

Dated: November 29, 2016.

Dawn Roberts,

Management Analyst, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2016–29010 Filed 12–1–16; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

[Notice–WWICC–2016–05; Docket No. 2016–0006; Sequence No. 5]

World War One Centennial Commission; Notification of Upcoming Public Advisory Meeting

AGENCY: World War One Centennial Commission, GSA.

ACTION: Meeting notice.

SUMMARY: Notice of this meeting is being provided according to the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 10(a)(2). This notice provides the schedule and agenda for the December 15, 2016 meeting of the World War One Centennial Commission (the Commission). The meeting is open to the public.

DATES: *Meeting date:* The meeting will be held on Thursday, December 15, 2016 starting at 9:00 a.m. Eastern Standard Time (EST), and ending no later than 10:00 a.m., EST.

The meeting will be held at the Offices of the World War 1 Centennial Commission at 1800 G Street NW., Washington, DC 20006, Street Level. This location is handicapped accessible. The meeting will be open to the public. Persons attending in person are requested to refrain from using perfume, cologne, and other fragrances (see *http://www.access-board.gov/about/policies/fragrance.htm* for more information).

Written Comments may be submitted to the Commission and will be made part of the permanent record of the Commission. Comments must be received by 5:00 p.m., EST, December 9, 2016 and may be provided by email to *daniel.dayton@worldwar1centennial.gov*. Contact Daniel S. Dayton at *daniel.dayton@worldwar1centennial.org* to register to comment during the meeting's 30-minute public comment period. Registered speakers/organizations will be allowed 5 minutes and will need to provide written copies of their presentations. Requests to comment, together with presentations for the meeting must be received by 5:00 p.m., EST, Friday, December 9, 2016. Please contact Mr. Dayton at the email address above to obtain meeting materials.

FOR FURTHER INFORMATION CONTACT: Daniel S. Dayton, Designated Federal Officer, World War 1 Centennial Commission, 701 Pennsylvania Avenue NW., 123, Washington, DC 20004–2608; or telephone 202–380–0725 (note: this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The World War One Centennial Commission was established by Public Law 112–272 (as amended), as a commission to ensure a suitable observance of the centennial of World War I, to provide for the designation of memorials to the service of members of the United States Armed Forces in World War I, and for other purposes. Under this authority, the Committee will plan, develop, and execute programs, projects, and activities to commemorate the centennial of World War I, encourage private organizations and State and local governments to organize and participate in activities commemorating the centennial of World War I, facilitate and coordinate activities throughout the United States relating to the centennial of World War I, serve as a clearinghouse for the collection and dissemination of information about events and plans for the centennial of World War I, and develop recommendations for Congress and the President for commemorating the centennial of World War I. The Commission does not have an appropriation and operated solely on donated funds.

Agenda: Thursday, December 15, 2016

Old Business

- Acceptance of minutes of last meeting.
- Public Comment Period.

New Business

- Executive Director's Report—Mr. Dayton.
- Fundraising Report—Ambassador Sedgwick.
- Memorial Report—Mr. Fountain.
- Education Report—Dr. O'Connell.
- Endorsements—(RFS)—Dr. Seefried.
- International Report—Dr. Seefried.
- Report on April 6 Event—Dr. Seefried.

Other Business

- Chairman's Report.
- Set Next Meeting.
- Motion to Adjourn.

Dated: November 28, 2016.

Daniel S. Dayton,

Designated Federal Official, World War I Centennial Commission.

[FR Doc. 2016–28920 Filed 12–1–16; 8:45 am]

BILLING CODE 6820–95–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–17FB; Docket No. CDC–2016–0113]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection entitled ''Understanding Relationship Dynamics and Conflict Survey.'' CDC will use the information collected to ascertain which factors or groups of factors may influence violence perpetration that occurs within adult intimate partner relationships.

DATES: Written comments must be received on or before January 31, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0113 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office,

Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*Regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

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; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Understanding Relationship Dynamics and Conflict Survey—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Intimate partner violence (IPV) is a substantial public health problem in the United States. Over a third of women and over a quarter of men have experienced rape, physical violence, and/or stalking by an intimate partner. Recognition of the importance and prevalence of this issue has fueled research to examine the causes, correlates, and outcomes of IPV over the past several decades. However, studies across various IPV research domains (*e.g.,* etiology, prevention efficacy and intervention effectiveness) tend to view IPV as an isolated occurrence and rarely consider the contextual situation in which IPV occurs. For example, existing models may not distinguish between an act of physical violence perpetrated during an argument from an act of physical violence perpetrated as a constellation of physical, sexual, and psychological violence by one partner toward another for the purpose of dominating and controlling that partner.

To that end, we need more information about the factors or groups of factors that influence violence perpetration within adult intimate partner relationships. This project will take a critical first step by collecting information from adults in the United States about their attitudes, perceptions, beliefs and experiences with violence in intimate relationships. In the future, this information can help develop a standardized measurement scheme that will distinguish among different contextual forms of IPV perpetration so that effective violence prevention strategies can be targeted and implemented.

The respondent universe consists of 2,210 adults (18 years or older) from two populations: The general population who live in the United States and incarcerated individuals who live in Indiana. Half of the incarcerated group will have an IPV-related offense record and half will not. Data will be collected through an online survey of Mechanical Turk (MT) workers and an in-person survey of incarcerated individuals. Data analysis will include a combination of Factor Analysis and Latent Profile Analysis.

CDC will seek a two-year approval from the Office of for this new collection. There are no cost to respondents other than their time spent responding to the survey/screener.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Response burden (hours)	Total burden hours
Mechanical Turk Survey Respondents.	Screener	4,300	1	5/60	358
Mechanical Turk Survey Respondents.	Understanding Relationship Dynamics and. Conflict	1,000	1	1	1,000
Incarcerated Survey Respondents	Understanding Relationship Dynamics and Conflict.	105	1	75/60	131
Total					1,489

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–28899 Filed 12–1–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–26]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

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 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including any of the following subjects: The necessity and utility of the proposed information collection for the proper performance of the agency's functions; the accuracy of the estimated burden; ways to enhance the quality, utility, and clarity of the information to be collected; and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by January 31, 2017.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–R–26 Clinical Laboratory Improvement Amendments (CLIA) Regulations

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Clinical Laboratory Improvement Amendments (CLIA) Regulations; *Use:* The information is necessary to determine an entity's compliance with the Congressionally-mandated program with respect to the regulation of laboratory testing (CLIA). In addition, laboratories participating in the Medicare program must comply with CLIA requirements as required by section 6141 of OBRA 89. Medicaid, under the authority of section 1902(a)(9)(C) of the Social Security Act, pays for services furnished only by laboratories that meet Medicare (CLIA) requirements. *Form Number:* CMS–R–26 (OMB Control Number: 0938–0612); *Frequency:* Monthly, occasionally; *Affected Public:* Private sector—Business or other for-profits and Not-for-profit institutions, State, Local or Tribal Governments, and the Federal government; *Number of Respondents:* 70,861; *Total Annual Responses:* 1,979,300; *Total Annual Hours:* 14,975,785. (For policy questions regarding this collection contact Raelene Perfetto at 410–786–6876).

Dated: November 29, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–29011 Filed 12–1–16; 8:45 am]

BILLING CODE 4120–01– P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10340, CMS–10476, CMS–10525, and CMS–10630]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid 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 any of the following subjects: 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 January 3, 2017.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR*, Email: *OIRA_submission@omb.eop.gov*.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*
2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*
3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

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:* Collection of Encounter Data From: Medicare Advantage Organizations, Section 1876 Cost HMOS/CMPS, Section 1833 Health Care Prepayment Plans (HCPPS), and PACE Organizations; *Use:* We collect encounter data or data on each item or service delivered to enrollees of Medicare Advantage (MA) plans offered by MA organizations. The MA organizations currently obtain this data from providers. We collect this information using standard transaction forms and code sets. We will use the data for determining risk adjustment factors for payment, updating the risk adjustment model, calculating Medicare DSH percentages, Medicare coverage purposes, and quality review and improvement activities. The data is also used to verify the accuracy and validity of the costs claimed on cost reports. For PACE organizations, encounter data would serve the same purpose it does related to the MA program and would be submitted in a similar manner. *Form Number:* CMS–10340 (OMB control number: 0938–1152); *Frequency:* Weekly, bi-weekly, and monthly; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 691; *Total Annual Responses:* 18,854,605; *Total Annual Hours:* 54,054. (For policy questions regarding this collection contact Michael Massimini at 410–786–1566.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medical Loss Ratio (MLR) Report for Medicare Advantage (MA) Plans and Prescription Drug Plans (PDP); *Use:* We will use the data collection of annual reports provided by plan sponsors for each contract to ensure that beneficiaries are receiving value for their premium dollar by calculating each contract's medical loss ratio (MLR) and any remittances due for the respective MLR reporting year. The recordkeeping requirements will be used to determine plan sponsors' compliance with the MLR requirements, including compliance with how plan sponsors' experience is to be reported, and how their MLR and any remittances are calculated. *Form Number:* CMS–10476 (OMB control number: 0938–1232); *Frequency:* Yearly; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 616; *Total Annual Responses:* 616; *Total Annual Hours:* 130,004. (For policy questions regarding this collection contact Diane Spitalnic at 410–786–5745.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Program of all-Inclusive Care for the Elderly (PACE) Quality Data Entry in CMS Health Plan Monitoring System; *Use:* PACE organizations coordinate the care of each participant enrolled in the program based on his or her individual needs with the goal of enabling older individuals to remain in their community. To be eligible to enroll in PACE, an individual must: be 55 or older, live in the service area of a PACE organization (PO), need a nursing home-level of care (as certified by the state in which he or she lives), and be able to live safely in the community with assistance from PACE (42 CFR 460.150(b)).

The PACE program provides comprehensive care whereby an interdisciplinary team of health professionals provides individuals with coordinated care. The overall quality of care is analyzed by information collected and reported to CMS related to specific quality indicators that may cause potential or actual harm. CMS analyzes the quality data to identify opportunities to improve the quality of care, safety and PACE sustainability and growth.

Previously, quality reporting was identified as Level I or Level II reporting. Level I reporting requirements refer to those data elements that POs regularly report to CMS via the CMS Health Plan Management System (HPMS) PACE monitoring module. (Please see Appendix A for the list of data elements.) POs have been collecting, submitting and reporting data to CMS and State administering agencies (SAA) since 1999.

When analyzing the Level I data, findings may or may not trigger a Quality Improvement (QI) process of analysis (*e.g.,* Plan, Do, Study, Act known as PDSA). Findings may indicate the need for a change in policies, procedures, systems, clinical practice or training. Level II reporting requirements apply specifically to unusual incidents that result in serious adverse participant outcomes, or negative national or regional notoriety related to PACE.

In this PRA package, we are making title changes from Level I and Level II to PACE Quality Data. We are requesting to update and implement previously collected PACE data elements known as

Level I and Level II into PACE quality data. Additionally, we are establishing three PACE Quality measures adopted from the National Quality Forum (NQF) and modified for PACE use. These modified PACE quarterly measures are Falls, Falls with Injury, and Pressure Injury Prevalence/Prevention. Currently, the existing Level I and Level II elements have not been tested for reliability or feasibility. By adopting NQF defined reliable data collection process for these elements, certain existing Level I and Level II elements will then officially meet quality measures collection standards. These measures will be used to improve quality of care for participants in PACE. PACE Quality measures will be implemented via the existing HPMS. POs will be educated on data criteria, entry and will report quarterly. *Form Number:* CMS–10525 (OMB control number: 0938–1264); *Frequency:* Quarterly and occasionally; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 100; *Total Annual Responses:* 29,500; *Total Annual Hours:* 211,500. (For policy questions regarding this collection contact Tamika Gladney at 410–786–0648.)

4. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* The PACE Organization (PO) Monitoring and Audit Process in 42 CFR part 460; *Use:* Historically, the Programs of All-Inclusive Care for the Elderly (PACE) audit protocols have been included in the Medicare Advantage (MA) and Medicare Part D audit protocol's information collection request (CMS–10191, OMB 0938–1000). However, in examining previous submissions, we do not believe that including it with the MA and Part D audit protocols allowed for an accurate representation of the PACE burden. Due to PACE audits being substantially different from our MA and Part D audits, we have separated the PACE audit protocols from the MA and Part D protocols and created this information collection request which seeks OMB approval under a new control number.

POs are required to comply with all PACE program requirements. The growth of these PACE organizations forced CMS to develop an audit strategy to ensure we continue to obtain meaningful audit results. As a result, CMS' audit strategy reflected a move to a more targeted, data-driven and outcomes-based audit approach. We focused on high-risk areas that have the greatest potential for participant harm.

CMS has developed an audit protocol and will post it to the CMS Web site each year for use by POs to prepare for their audit. The data collected for audit is detailed in this protocol and the exact fields are located in the record layouts, at the end of the protocol. In addition, a questionnaire will be distributed as part of our audit. This questionnaire is also included in this package. *Form Number:* CMS–10630 (OMB control number: 0938—New); *Frequency:* Yearly; *Affected Public:* Private sector (Business or other for-profits and Not-for-profits institutions); *Number of Respondents:* 72; *Total Annual Responses:* 72; *Total Annual Hours:* 12,960. (For policy questions regarding this collection contact Caroline Zeman at 410–786–0116.)

Dated: November 29, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–29007 Filed 12–1–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2015–E–3158; FDA–2015–E–3159]

Determination of Regulatory Review Period for Purposes of Patent Extension; TRUMENBA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for TRUMENBA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 31, 2017. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 31, 2017. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments 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):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, 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 Nos. FDA–2015–E–3158 and FDA–2015–E–3159 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; TRUMENBA.'' 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 Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- 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 Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product TRUMENBA (Meningococcal Group B Vaccine). TRUMENBA is indicated for active immunization to prevent invasive disease caused by *Neisseria meningitidis* serogroup B. Meningococcal Group B Vaccine is approved for use in individuals 10 through 25 years of age. Subsequent to this approval, the USPTO received patent term restoration applications for TRUMENBA (U.S. Patent Nos. 8,101,194 and 8,563,007) from Wyeth Holdings LLC, and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated October 19, 2015, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of TRUMENBA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for TRUMENBA is 2,079 days. Of this time, 1,943 days occurred during the testing phase of the regulatory review period, while 136 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* February 20, 2009. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on February 20, 2009.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262*): June 16, 2014. FDA has verified the applicant's claim that the biologics license application (BLA) for TRUMENBA (BLA 125549/0) was initially submitted on June 16, 2014.

3. *The date the application was approved:* October 29, 2014. FDA has verified the applicant's claim that BLA 125549/0 was approved on October 29, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 255 days or 573 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–28916 Filed 12–1–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–3969]

Physiologically Based Pharmacokinetic Analyses—Format and Content; 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 guidance for industry entitled ''Physiologically Based Pharmacokinetic Analyses—Format and Content.'' This guidance recommends to drug sponsors the format and content for submitting physiologically based pharmacokinetic (PBPK) analyses to FDA to enable efficient and consistent review.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by January 31, 2017.

ADDRESSES: You may submit comments 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):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, 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–2016–D–3969 for ''Physiologically Based Pharmacokinetic Analyses—Format and Content; Draft Guidance for Industry; Availability.'' 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 Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• 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 Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm*.

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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Ping Zhao, Office of Clinical Pharmacology, Office of Translational Sciences, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3182, Silver Spring, MD 20993–0002, 301–796–3774.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Physiologically Based Pharmacokinetic Analyses—Format and Content.'' A PBPK analysis uses models and simulations that combine physiology, population, and drug characteristics to describe the pharmacokinetics and/or pharmacodynamics of that particular drug in humans. Throughout a drug's life cycle, PBPK analyses can be used to support decisions on whether, when, and how to conduct certain clinical pharmacology studies, inform dosing recommendations, and enable prescription drug labeling. Currently, the format and content of PBPK analyses that are submitted to FDA vary significantly across drug developers. Standardizing the content and format of the PBPK analyses can facilitate FDA's efficient assessment, consistent application, and timely decision making during regulatory review. This guidance recommends including the following five sections in a PBPK study report: (1) Executive Summary, (2) Materials and Methods, (3) Results, (4) Discussion, and (5) Appendices. This guidance does not address methodological considerations and best practices for the conduct of PBPK modeling and simulation, or the appropriateness of PBPK analyses for a particular drug.

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 the format and content of PBPK analyses. 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. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection of information in 21 CFR 314.50(d) has been approved under OMB control number 0910–0001.

Dated: November 29, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–28971 Filed 12–1–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–E–0616]

Determination of Regulatory Review Period for Purposes of Patent Extension; OPDIVO

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for OPDIVO and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 31, 2017. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 31, 2017. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments 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):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, 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–2016–E–0616 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; OPDIVO.'' 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 Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- 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 Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years

so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product OPDIVO (nivolumab). OPDIVO is indicated for the treatment of patients with unresectable or metastatic melanoma and disease progression following ipilimumab and, if BRAF V600 mutation positive, a BRAF inhibitor. Subsequent to this approval, the USPTO received a patent term restoration application for OPDIVO (U.S. Patent No. 8,008,449) from E.R. Squibb & Sons, LLC and Ono Pharmaceutical Co., Ltd., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated April 26, 2016, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of OPDIVO represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for OPDIVO is 3,071 days. Of this time, 2,925 days occurred during the testing phase of the regulatory review period, while 146 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* July 28, 2006. The applicants claim July 29, 2006, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was July 28, 2006, which was the first date after receipt of the IND that the investigational studies were allowed to proceed.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* July 30, 2014. FDA has verified the applicants' claim that the biologics license application (BLA) for OPDIVO (BLA 125554) was initially submitted on July 30, 2014.

3. *The date the application was approved:* December 22, 2014. FDA has verified the applicants' claim that BLA 125554 was approved on December 22, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In the application for patent extension, these applicants seek 552 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–28917 Filed 12–1–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–E–5107]

Determination of Regulatory Review Period for Purposes of Patent Extension; TRESIBA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for TRESIBA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 31, 2017 Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 31, 2017. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://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 *http://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):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, 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–2015–E–5107 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; TRESIBA.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *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 *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product TRESIBA (insulin degludec). TRESIBA is a long-acting human insulin analog indicated to improve glycemic control in adults with diabetes mellitus. Subsequent to this approval, the USPTO received a patent term restoration application for TRESIBA (U.S. Patent No. 7,615,532) from Novo Nordisk A/S, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated January 20, 2016, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of TRESIBA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for TRESIBA is 2,914 days. Of this time, 1,456 days occurred during the testing phase of the regulatory review period, while 1,458 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* October 5, 2007. The applicant claims September 5, 2007, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was October 5, 2007, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* September 29, 2011. FDA has verified the applicant's claim that the new drug application (NDA) for TRESIBA (NDA 203–314) was initially submitted on September 29, 2011.

3. *The date the application was approved:* September 25, 2015. FDA has verified the applicant's claim that the human drug application NDA 203–314 was approved on September 25, 2015.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,803 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested

person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *http://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 28, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–28939 Filed 12–1–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Review of an IGNTE Application.

Date: December 9, 2016.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Natalia Strunnikova, Ph.D., Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223, *Natalia.strunnikova@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: November 28, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–28902 Filed 12–1–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Time-Sensitive Obesity Applications.

Date: January 9, 2017.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Clinical Studies in Kidney Transplant and Hemodialysis.

Date: February 2, 2017.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma Begum, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7349, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; PAR–16–034: NIDDK Ancillary Studies (R01).

Date: February 6, 2017.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma Begum, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7349, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: November 28, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–28901 Filed 12–1–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITF) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November

25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); and on April 30, 2010 (75 FR 22809).

A notice listing all currently HHS-certified laboratories and IITFs is published in the **Federal Register** during the first week of each month. If any laboratory or IITF certification is suspended or revoked, the laboratory or IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory or IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://www.samhsa.gov/workplace.*

FOR FURTHER INFORMATION CONTACT: Giselle Hersh, Division of Workplace Programs, SAMHSA/CSAP, 5600 Fishers Lane, Room 16N03A, Rockville, Maryland 20857; 240–276–2600 (voice).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. The ''Mandatory Guidelines for Federal Workplace Drug Testing Programs,'' as amended in the revisions listed above, requires strict standards that laboratories and IITFs must meet in order to conduct drug and specimen validity tests on urine specimens for federal agencies.

To become certified, an applicant laboratory or IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory or IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and IITFs in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A HHS-certified laboratory or IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA), which attests that it has met minimum standards.

In accordance with the Mandatory Guidelines dated November 25, 2008 (73 FR 71858), the following HHS-certified laboratories and IITFs meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

HHS-Certified Instrumented Initial Testing Facilities

Dynacare, 6628 50th Street NW., Edmonton, AB Canada T6B 2N7, 780–784–1190, (Formerly: Gamma-Dynacare Medical Laboratories)

HHS-Certified Laboratories

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 844–486–9226

Aegis Analytical Laboratories, Inc., 345 Hill Ave., Nashville, TN 37210, 615–255–2400 (Formerly: Aegis Sciences Corporation, Aegis Analytical Laboratories, Inc., Aegis Analytical Laboratories)

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823 (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.)

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130 (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.)

Baptist Medical Center-Toxicology Laboratory, 11401 I–30, Little Rock, AR 72209–7056, 501–202–2783 (Formerly: Forensic Toxicology Laboratory Baptist Medical Center)

Clinical Reference Laboratory, Inc., 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917

DrugScan, Inc., 200 Precision Road, Suite 200, Horsham, PA 19044, 800–235–4890

Dynacare,* 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630 (Formerly: Gamma-Dynacare Medical Laboratories)

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609

Fortes Laboratories, Inc., 25749 SW Canyon Creek Road, Suite 600, Wilsonville, OR 97070, 503–486–1023

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984 (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845 (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.)

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088, Testing for Veterans Affairs (VA) Employees Only

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250/800–350–3515

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774 (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory)

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991/800–541–7891x7

Phamatech, Inc., 15175 Innovation Drive, San Diego, CA 92128, 888–635–5840

Quest Diagnostics Incorporated, 1777 Montreal Circle, Tucker, GA 30084,

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 30, 2010 (75 FR 22809). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

800–729–6432 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)
Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)
Quest Diagnostics Incorporated, 8401 Fallbrook Ave., West Hills, CA 91304, 818–737–6370 (Formerly: SmithKline Beecham Clinical Laboratories)
Redwood Toxicology Laboratory, 3700 Westwind Blvd., Santa Rosa, CA 95403, 800–255–2159
Southwest Laboratories, 4625 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040, 602–438–8507/800–279–0027
STERLING Reference Laboratories, 2617 East L Street, Tacoma, Washington 98421, 800–442–0438
US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085, Testing for Department of Defense (DoD) Employees Only

Charles LoDico,

Chemist.

[FR Doc. 2016–28940 Filed 12–1–16; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0019]

Agency Information Collection Activities: Vessel Entrance or Clearance Statement

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Vessel of Entrance or Clearance Statement (CBP Form 1300). CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before January 3, 2017 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Regulations and Rulings, Office of Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, or via email (*CBP_PRA@cbp.dhs.gov*). Please note contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs please contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP Web site at *https://www.cbp.gov/*. For additional help: *https://help.cbp.gov/app/home/search/1*.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** (81 FR 62517) on September 9, 2016, 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 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates 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, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: Vessel Entrance or Clearance Statement.

OMB Number: 1651–0019.

Form Number: CBP Form 1300.

Abstract: CBP Form 1300, *Vessel Entrance or Clearance Statement,* is used to collect essential commercial vessel data at time of formal entrance and clearance in U.S. ports. The form allows the master to attest to the truthfulness of all CBP forms associated with the manifest package, and collects information about the vessel, cargo, purpose of entrance, certificate numbers, and expiration for various certificates. It also serves as a record of fees and tonnage tax payments in order to prevent overpayments. CBP Form 1300 was developed through agreement by the United Nations Intergovernmental Maritime Consultative Organization (IMCO) in conjunction with the United States and various other countries. This form is authorized by 19 U.S.C. 1431, 1433, and 1434, and provided for by 19 CFR 4.7–4.9, and accessible at *http://www.cbp.gov/newsroom/publications/forms?title=1300*.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information being collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 12,000.

Estimated Number of Responses per Respondent: 22.

Estimated Total Annual Responses: 264,000.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 132,000.

Dated: November 28, 2016.

Seth Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2016–28923 Filed 12–1–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5907–N–49]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), call the toll-free Title V information line at 800–927–7588 or send an email to *title5@hud.gov* .

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to: Ms. Theresa M. Ritta, Chief Real Property Branch, the Department of Health and Human Services, Room 12–07, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–2265 (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 or send an email to *title5@hud.gov* for detailed instructions, or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*e.g.,* acreage, floor plan, condition of property, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following address(es): AGRICULTURE: Ms. Debra Kerr, Department of Agriculture, OPPM, Property Management Division, Agriculture South Building, 300 7th Street SW., Washington, DC 20024, (202) 720–8873; AIR FORCE: Mr. Robert E. Moriarty, P.E., AFCEC/CI, 2261 Hughes Avenue, Ste. 155, JBSA Lackland TX 78236–9853, (315) 225–7384; COE: Ms. Brenda Johnson-Turner, HQUSACE/CEMP–CR, 441 G Street NW., Washington, DC 20314, (202) 761–7238; COAST GUARD: Jeffrey R. Barlow, Real Property Specialist, Department of Homeland Security, HQ USCG, CG–437, (202) 475–5609; GSA: Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040 Washington, DC 20405, (202) 501–0084; NAVY: Ms. Nikki Hunt, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374; (202) 685–9426 (These are not toll-free numbers).

Dated: November 22, 2016.

Brian P. Fitzmaurice,

Director, Division of Community Assistance, Office of Special Needs Assistance Programs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 12/02/2016

Suitable/Available Properties

Building

Nebraska

Gremlin Park Shelter House
#30007 HARLAN–29039
70788 Corps Rd. A
Republican City NE 68971
Landholding Agency: COE
Property Number: 31201640015
Status: Excess
Comments: 1,620 sq. ft.; 66+ yrs. old; recreation for day use; fair conditions; contact COE for more details on conditions.

West Virginia

Parkersburg Federal Building
425 Juliana Street
Parkersburg WV 26101
Landholding Agency: GSA
Property Number: 54201640005
Status: Excess
GSA Number: 4–G–WV–0564
Comments: 104,870 total usable sf.; office and courthouse; 2+ yrs.-old vacant; asbestos present but contained; may be subject to historic preservation covenants; contact GSA for more details on property.

Unsuitable Properties

Building

California

Love Valley
2401 Love Valley Barn
Palomar Mountain CA
Landholding Agency: Agriculture
Property Number: 15201640014
Status: Unutilized
Comments: documented deficiencies: structurally unsound; wall fallen down; roof collapsing; clear threat to physical safety.
Reasons: Extensive deterioration

Florida

2 Buildings
Eglin AFB
Eglin FL 32542
Landholding Agency: Air Force

Property Number: 18201640034
Status: Unutilized
Directions: 9370; 9376
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Building 385
Naval Support Activity Panama City
Panama City FL 32407
Landholding Agency: Navy
Property Number: 77201640007
Status: Unutilized
Comments: public access denied & no alternative method to gain access without compromising national security.
Reasons: Secured Area

Kansas

5 Buildings
10419 Perry Park Drive
Perry KS 66073
Landholding Agency: COE
Property Number: 31201640012
Status: Unutilized
Directions: Perry-44493, Acct/Better# 56043; Perry-44475, Acct/Better# 56042; Perry-39678, Acct/Better# 56041; Perry-39677, Acct/Better #56040; Perry-39676, Acct/Better #56039
Comments: property located within floodway which has not been correct or contained.
Reasons: Floodway

8 Buildings
10419 Perry Park Drive
Perry KS 66073
Landholding Agency: COE
Property Number: 31201640013
Status: Unutilized
Directions: Perry-29552, Acct/Better#56017, Perry-29459, Acct/Better#56001; Perry-39668, Acct/Better#48025; Perry-29451, Acct/Better#48003; Perry-29433, Acct/Better#25008; Perry-29427, Acct/Better#25002; Perry-29554, Acct/Better#16009; Perry-29414, Acct/Better#16001
Comments: property located within floodway which has not been correct of contained.
Reasons: Floodway

Contractor Storage Shed
Venango Park #61014, KNPOLS–28154
105 Riverside Drive
Marquette KS 67464
Landholding Agency: COE
Property Number: 31201640014
Status: Unutilized
Comments: property located within floodway which has not been correct of contained.
Reasons: Floodway

Otoe Park Shower/Latrine
#L50018 WILSON–29263
4860 Outlet Blvd.
Sylvan Grove KS 67481
Landholding Agency: COE
Property Number: 31201640016
Status: Excess
Comments: property located within floodway which has not been correct of contained.
Reasons: Floodway

Kentucky

Markland Lock and Dam
Radio Shack at Lock & Dam Area
2760 US 42 West
Warsaw KY 41095
Landholding Agency: COE
Property Number: 31201640011
Status: Excess
Comments: public access denied & no alternative method to gain access with compromising national security; documented deficiencies: roof sagging; structurally unsound.
Reasons: Extensive deterioration; Secured Area

Mississippi

Facility No. F-Public Restroom
Naval Construction Battalion Center
Pascagoula MS 39581
Landholding Agency: Navy
Property Number: 77201640006
Status: Unutilized
Comments: public access denied & no alternative method to gain access without compromising National Security; documented deficiencies: portion of the roof deck has collapsed.
Reasons: Secured Area; Extensive deterioration

Pennsylvania

Organizational Storage Bldg.
3500 Grand Avenue
Pittsburgh PA 15225
Landholding Agency: COE
Property Number: 31201640018
Status: Underutilized
Directions: PEWARS–23749
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Virginia

Family Housing Unit (H049)
49 Millpoint Road
Hudgins VA 23079
Landholding Agency: Coast Guard
Property Number: 88201640001
Status: Excess
Directions: (67243) Single at Coast Guard Station Milford
Comments: Public access denied and no alternative method to gain access without compromising National Security.
Reasons: Secured Area

[FR Doc. 2016–28592 Filed 12–1–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22424; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Tongass National Forest, Craig Ranger District, Craig, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture, Forest Service (Forest Service) has completed an inventory of human remains and associated funerary objects in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Tongass National Forest, Craig Ranger District. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Tongass National Forest at the address in this notice by January 3, 2017.

ADDRESSES: Earl Stewart, Tongass National Forest Supervisor, 648 Mission Street Federal Building, Ketchikan, AK 99901–6591, telephone (907) 225–3101, email *estewart@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Forest Service, Tongass National Forest, Craig Ranger District. The human remains and associated funerary objects were removed from the Staney Creek area of Prince of Wales Island, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Forest Service professional staff using details provided from the Canadian Museum of History and in consultation with representatives of Craig Tribal Association (previously

listed as the Craig Community Association), Hydaburg Cooperative Association, Klawock Cooperative Association, and the Organized Village of Kasaan.

History and Description of the Remains

In 1973, human remains representing, at minimum, one individual were removed from the Staney Creek area on Prince of Wales Island, AK. The human remains were removed from Forest Service-managed lands by members of the United States Geological Survey, Department of the Interior. In 1974, the human remains were sent to the Canadian Museum of Civilization Corporation for analysis. The analysis indicated the human remains were from 185 to 385 years old. In September of 2014, the Forest Service took possession of the remains and funerary object from the museum and took them to the Craig Ranger District. No known individuals were identified. The one associated funerary object is a piece of wood that was found with the human remains.

Cultural affiliation of the human remains and associated funerary objects was based on multiple lines of evidence, including consultation with the Klawock Cooperative Association and a published source, *Haa Aani, Our Land: Tlingit and Haida Land Rights and Use* by Walter Goldschmidt and Theodore H. Haas, edited by Thomas F. Thornton, first issued in 1948, reprinted in 1988, by the Sealaska Heritage Association. The human remains were removed from an area defined in *Haa Aani* and by the tribe as culturally affiliated with the Klawock Cooperative Association.

Determinations Made by the Forest Service, Tongass National Forest

Officials of the Forest Service, Tongass National Forest have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the one object described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary object and the Klawock Cooperative Association.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Tongass National Forest Supervisor Earl Stewart, 648 Mission Street Federal Building, Ketchikan, AK 99901–6591, phone number (907) 225–3101, email *estewart@fs.fed.us,* by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to Klawock Cooperative Association may proceed.

The Forest Service is responsible for notifying the Craig Tribal Association (previously listed as the Craig Community Association), Klawock Cooperative Association, Hydaburg Cooperative Association, and the Organized Village of Kasaan that this notice has been published.

Melanie O'Brien,

Manager, National NAGPRA Program

[FR Doc. 2016–28958 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22456; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Indiana University, Bloomington, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Department of Anthropology at Indiana University has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Indiana University NAGPRA Office. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Indiana University NAGPRA Office at the address in this notice by January 3, 2017.

ADDRESSES: Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Avenue, Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu*.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Department of Anthropology at Indiana University, Bloomington, Indiana.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Indiana University professional staff in consultation with representatives of the Hopi Tribe of Arizona; Pueblo of Acoma, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe; Pueblo of San Ildefonso, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Tesuque, New Mexico; Ute Mountain Tribe of the Ute Mountain Reservation (Colorado, New Mexico, and Utah); Ysleta del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico. The following tribes were contacted but did not participate in consultations: Navajo Nation, Arizona, New Mexico, and Utah; Ohkay Owingeh (formerly the Pueblo of San Juan); Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of Santo Domingo, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Zia, New Mexico and

Southern Ute Indian Tribe of the Southern Ute Reservation.

History and Description of the Remains

The Cahone (Explorer's Camp) Site is a medium sized late Pueblo II site located on private land in Dolores County, CO. Excavations were directed by Samuel Tobin in 1946, by Alfred Guthe in 1947, and by George Neumann of Indiana University in 1948. Human remains, representing a minimum of 8 individuals, were recovered from this site. The 194 associated funerary objects are 4 ceramic sherds, 188 pebbles, 1 fused 2nd and 3rd deer tarsal, and 1 stone tool.

Evidence demonstrating cultural continuity between Ancestral Puebloan and modern day Puebloan tribes includes geographical, archeological, historical, architectural, and oral traditions. These descendants are members of the present day tribes of the Hopi Tribe of Arizona; Kewa Pueblo, New Mexico (previously listed as the Pueblo of Santo Domingo); Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Ysleta del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico.

Evidence demonstrating cultural continuity between the Cahone Ruin site and the Southern Ute Indian Tribe of the Southern Ute Reservation and the Ute Mountain Tribe of the Ute Mountain Reservation (Colorado, New Mexico, and Utah) tribes includes geographical, linguistic, and oral history evidence.

Determinations Made by the Indiana University

Officials of Indiana University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 8 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 194 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Hopi Tribe of Arizona; Kewa Pueblo, New Mexico (previously listed as the Pueblo of Santo Domingo); Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Southern Ute Indian Tribe of the Southern Ute Reservation; Ute Mountain Tribe of the Ute Mountain Reservation (Colorado, New Mexico, and Utah); Ysleta del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Avenue, Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu,* by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Hopi Tribe of Arizona; Kewa Pueblo, New Mexico (previously listed as the Pueblo of Santo Domingo); Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Southern Ute Indian Tribe of the Southern Ute Reservation; Ute Mountain Tribe of the Ute Mountain Reservation (Colorado, New Mexico, and Utah); Ysleta del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico.

Indiana University is responsible for notifying the Hopi Tribe of Arizona; Kewa Pueblo, New Mexico (previously listed as the Pueblo of Santo Domingo); Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; Southern Ute Indian Tribe of the Southern Ute Reservation; Ute Mountain Tribe of the Ute Mountain Reservation (Colorado, New Mexico, and Utah); Ysleta del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico.

Dated: November 18, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28955 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SERO–EVER–22108; PPSESERO03, PPMPSAS1Y.YP0000]

Recirculation and Adoption of the Central Everglades Planning Project Final Environmental Impact Statement

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability.

SUMMARY: The National Park Service (NPS), Everglades National Park (ENP), intends to adopt the Central Everglades Planning Project (CEPP) Final Environmental Impact Statement (Final EIS) issued by the U.S. Army Corps of Engineers (COE) in July 2014. Under applicable Council on Environmental Quality (CEQ) regulations, the NPS may adopt and recirculate the COE's Final EIS because the NPS proposed action is substantially the same as the action covered by the COE's Final EIS, and the NPS and partner agencies are ready to initiate detailed planning and

compliance for these components of the plan.

DATES: The NPS will execute the Record of Decision (ROD) no sooner than 30 days following publication by the Environmental Protection Agency of its Notice of Availability of the Final EIS in the **Federal Register**.

ADDRESSES: An electronic copy of the Central Everglades Planning Project Final EIS, including Appendix C (Environmental and Cultural Resources), is available for download on the Army Corps of Engineers Web site at: *http://www.saj.usace.army.mil/Missions/Environmental/Ecosystem-Restoration/Central-Everglades-Planning-Project/.*

A hard copy of the Final EIS can be viewed at Everglades National Park Headquarters, 40001 State Road 9336, Homestead, Florida 33034.

FOR FURTHER INFORMATION CONTACT: Pedro Ramos, Superintendent, Everglades National Park, *pedro_ramos@nps.gov,* 305–242–7712, or Ben West, Chief, Planning & Compliance, SE Regional Office, *ben_west@nps.gov,* 404–507–5700.

SUPPLEMENTARY INFORMATION: The NPS is adopting the CEPP Final EIS, prepared by the COE. The CEQ regulations allow Federal agencies to adopt an EIS prepared by another Federal agency that meets the standards for an adequate statement. When the proposed actions are ''substantially the same,'' the adopting agency only needs to recirculate it as a final EIS. CEQ's regulations implementing NEPA strongly encourage agencies to reduce paperwork and delay (40 CFR 1500.4, 1500.5.). One of the methods identified by CEQ to accomplish this goal is adopting the environmental documents prepared by other agencies in appropriate circumstances (40 CFR 1500.4(n), 1500.5(h), and 1506.3).

The CEPP combines several components of the Comprehensive Everglades Restoration Plan (CERP), and is designed to redirect water that is currently being discharged to the Atlantic Ocean and Gulf of Mexico to the Everglades and Florida Bay. The project optimizes the use of public lands to move additional water to the south. The CEPP will deliver approximately 210,000 acre-feet of water from Lake Okeechobee to the central Everglades every year. The recommended plan, Alternative 4R2, includes features to store, treat, and deliver water as sheetflow at the top of Water Conservation Area (WCA) 3A and calls for removal of barriers to sheetflow flow between WCA–3A, WCA 3B, and Everglades National Park.

These actions have been addressed in general or program-level terms and include guidelines for future coordination requirements and programmatic consultations as methods of ensuring the project is avoiding and minimizing impacts to resources to the extent practicable, and complying with all applicable environmental laws and regulations. Because of the complexity of the plan, detailed designs are likely to be developed and implemented in phases.

The NPS is adopting the Final EIS, and will refine its direction in more focused environmental reviews and provide site specific impact analysis prior to implementation of proposed actions. The NPS will prepare its own Record of Decision for the Selected Alternative (4R2) in accordance with 40 CFR 1505.2. 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.

Dated: November 10, 2016.

Stan Austin,

Regional Director, Southeast Region.

[FR Doc. 2016–28988 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22446; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Natural History, Yale University, New Haven, CT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Natural History has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Peabody Museum of Natural History. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Peabody Museum of Natural History at the address in this notice by January 3, 2017.

ADDRESSES: Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Peabody Museum of Natural History, Yale University, New Haven, CT. The human remains and associated funerary objects were removed from Site 16, Chandler Lake, Brooks Range, North Slope Borough, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Peabody Museum of Natural History professional staff in consultation with representatives of the Village of Anaktuvuk Pass.

History and Description of the Remains

In 1956, human remains representing one individual were removed from a Nunamiut burial site identified as Site 16, Chandler Lake, Brooks Range, North Slope Borough, AK and donated to the Peabody Museum of Natural History the same year. The human remains represent one individual identified as a probable male, aged approximately 30–

50 years. No known individuals were identified. The 21 associated funerary objects are 3 lots of glass beads, 1 lot of earthen beads, 1 jade pendant, 1 bone implement, 1 iron blade with bone handle, 1 rectangular iron blade, 1 iron implement, 1 metal scissors fragment, 2 iron bracelets, 1 iron wire fragment, 2 iron blades, 2 lots of iron fragments, 1 bone implement fragment, 1 lot of bone fragments, 1 lot of hide fragments, and 1 long bone shaft fragment.

Osteological data as well as the archaeological and geographic contexts identify these human remains as representing an individual of Native American ancestry. A portion of the funerary objects were identified by Campbell as typical of Nunamiut manufacture. The presence of historic trade objects confirms a post-contact date for this burial. The region of Anaktuvuk was, and is, occupied by the Nunamiut people who are today represented by the Village of Anaktuvuk Pass.

Determinations Made by the Peabody Museum of Natural History

Officials of the Peabody Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 21 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Village of Anaktuvuk Pass.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752, by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Village of Anaktuvuk Pass may proceed.

The Peabody Museum of Natural History is responsible for notifying the Village of Anaktuvuk Pass that this notice has been published.

Dated: November 17, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28951 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22421; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Peabody Museum of Natural History, Yale University, New Haven, CT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Natural History, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of unassociated funerary objects. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Peabody Museum of Natural History. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the Peabody Museum of Natural History at the address in this notice by January 3, 2017.

ADDRESSES: Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the Peabody Museum of Natural History, Yale University, New Haven, CT, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item(s)

In 1958, seven cultural items were removed from a Nunamiut burial site identified as the Ridge Burial, Anaktuvuk Pass, Brooks Range, North Slope Borough, AK, and donated to the Peabody Museum of Natural History the same year. The seven unassociated funerary objects are five faunal remains, one wood fragment, and one lot of rusted iron fragments.

The archeological context and the presence of trade materials confirms a post-contact date for this burial. The region of Anaktuvuk was, and is, occupied by the Nunamiut people who are today represented by the Village of Anaktuvuk Pass.

In an unknown year, 11 cultural items were removed by an unknown individual(s) from a Nunamiut burial site near Tuluak Lake, Anaktuvuk Pass, Brooks Range, North Slope Borough, AK. The cultural items were purchased from local Nunamiut persons in 1957 and 1958, and donated to the Peabody Museum of Natural History. The 11 unassociated funerary objects are one rifle, one brass ramrod fitting, one brass sling fitting, one lot of lead round ball bullets, one lot of lead fragments, one lot of metal springs, one lot of glass beads, one lot of spalls, one bone spatula, one antler pendant, and one biface fragment.

The archeological context and the presence of trade materials confirms a post-contact date for this burial. The region of Anaktuvuk was, and is, occupied by the Nunamiut people who are today represented by the Village of Anaktuvuk Pass.

Determinations Made by the Peabody Museum of Natural History

Officials of the Peabody Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the 18 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group

identity that can be reasonably traced between the unassociated funerary objects and the Village of Anaktuvuk Pass.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752, by January 3, 2017. After that date, if no additional claimants have come forward, transfer of control of the unassociated funerary objects to the Village of Anaktuvuk Pass may proceed.

The Peabody Museum of Natural History is responsible for notifying the Village of Anaktuvuk Pass that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28952 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22422; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Natural History, Yale University, New Haven, CT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Natural History has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Peabody Museum of Natural History. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Peabody Museum of Natural History at the address in this notice by January 3, 2017.

ADDRESSES: Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Peabody Museum of Natural History, Yale University, New Haven, CT. The human remains were removed from a burial ground within one mile of Holy Cross Village, Yukon-Koyukuk Borough, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Peabody Museum of Natural History professional staff in consultation with a representative of Holy Cross Village. Multiple attempts to contact Anvik Village and Shageluk Native Village were unsuccessful.

History and Description of the Remains

In 1913, human remains representing, at minimum, one individual were removed from a burial ground located within one mile of Holy Cross, Yukon-Koyukuk Borough, AK. In 1931, the remains were obtained by the Yale Peabody Museum Alaska Expedition. The human remains represent one individual identified as a female, aged approximately 16–20 years old. No known individuals were identified. No associated funerary objects are present.

Archeological evidence, historic documentation, and tribal knowledge suggest the lower Yukon River region, including the location of the modern site of Holy Cross Village, was occupied both prehistorically and historically by the Deg Hit'an. The proximity of the burial to the modern site of Holy Cross Village as well as the continuity of culture exhibited in the region supports a cultural affiliation between the individual human remains and the Deg Hit'an of Holy Cross Village. The locality of the burial as well as the osteological data support the finding that these remains represent an individual of Native American ancestry.

Determinations Made by the Peabody Museum of Natural History, Yale University

Officials of the Peabody Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and Holy Cross Village.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752, by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to Holy Cross Village may proceed.

The Peabody Museum of Natural History is responsible for notifying Holy Cross Village that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28953 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22254; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Bighorn National Forest, Sheridan, WY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture, Forest Service, Bighorn National Forest (BHNF), Sheridan, WY has completed an inventory of human

remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and associated funerary object and any present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary object should submit a written request to the BHNF. If no additional requestors come forward, transfer of control of the human remains and associated funerary object to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary object should submit a written request with information in support of the request to the BHNF at the address below by January 3, 2017.

ADDRESSES: Mr. William Bass, Forest Supervisor, Bighorn National Forest, 2013 Eastside Second Street, Sheridan, WY 82801, telephone (307) 674–2600.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and an associated funerary object under the control of the Bighorn National Forest, Sheridan, WY. The human remains and associated funerary object were removed from Big Horn County, WY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

On Thursday, July 28, 2016, at the Bighorn National Forest Supervisor's Office in Sheridan, WY a detailed assessment of the human remains and associated funerary object was made by BHNF professional staff in consultation with representatives of the Arapaho Tribe of the Wind River Reservation, Wyoming; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as the Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; the Crow Tribe of Montana; and the Eastern Shoshone Tribe of the Wind River Reservation, Wyoming (previously listed as the Shoshone Tribe of the Wind River Reservation, Wyoming), which BHNF had invited to consult, did not participate. The above Indian tribes are hereinafter referred to as ''The Invited and Consulted Tribes.''

History and Description of the Remains

In the 1920s, a rancher found and removed partially mummified human remains representing, at minimum, one individual from the Hudson Falls Creek area of Bighorn National Forest in Big Horn County, WY. In 1975, the rancher's family transferred the human remains to the University of Wyoming, for curation at the University of Wyoming Human Remains Repository (accession number HR049). In 1994, an osteologist from the Smithsonian Institution determined that the human remains represent a Native American child of indeterminate sex. No known individual was identified. The one associated funerary object is a brass wire shell earring.

Determinations Made by the Bighorn National Forest

Officials of the BHNF have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in the notice are Native American based on archeological evidence.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the one object described in this notice is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary object and any present-day Indian tribe.
- According to final judgments of the Indian Claims Commission, the lands from which the Native American human remains and associated funerary object were removed is the aboriginal land of the Arapaho Tribe of the Wind River Reservation, Wyoming; Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as the Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Crow Tribe of Montana; the Eastern Shoshone Tribe of the Wind River Reservation, Wyoming (previously listed as the Shoshone Tribe of the Wind River Reservation, Wyoming); the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota (hereinafter referred to as ''The Aboriginal Land Tribes'').
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary object may be to The Aboriginal Land Tribes.

Additional Requestors and Disposition

Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should contact Mr. William Bass, Forest Supervisor, Bighorn National Forest, 2013 Eastside Second Street, Sheridan, WY 82801, telephone 307–674–2600, before January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary object to The Aboriginal Land Tribes may proceed.

The BHNF is responsible for notifying The Invited and Consulted Tribes that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28957 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22425; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The United States Department of Interior, Bureau of Indian Affairs, and

the Arizona State Museum, University of Arizona, have completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and have determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Arizona State Museum, University of Arizona. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Arizona State Museum, University of Arizona at the address in this notice by January 3, 2017.

ADDRESSES: John McClelland, NAGPRA Coordinator, P.O. Box 210026, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626–2950.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ (ASM). The human remains were removed from locations within the boundaries of the Fort Apache Indian Reservation, Apache, Gila and Navajo Counties, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the ASM professional staff in consultation with representatives of the Hopi Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona; and the Zuni Tribe of the Zuni Reservation, New Mexico.

History and Description of the Remains

On an unknown date prior to 1979, human remains representing, at minimum, 1 individual were removed from the Salt River Draw region, (AZ P:14:—Salt River Draw) in Navajo County, AZ. The human remains were found with collections obtained by the University of Arizona Grasshopper Field School, but are marked with an incomplete site number. It is likely that the human remains were removed from the site of Grasshopper Pueblo, AZ P:14:1(ASM) or one of the nearby sites investigated by the field school during the years 1963–1979. No known individuals were identified. No associated funerary objects are present.

The Grasshopper Pueblo site is a large village site containing approximately 500 rooms in more than a dozen stone room blocks arranged around three main plazas. The site has been dated from A.D. 1275–1400, based on tree ring dates, architectural forms, building technology, and ceramic styles. These characteristics, the mortuary pattern and other items of material culture are consistent with the archeologically-described Upland Mogollon or prehistoric Western Pueblo tradition.

In 1978, human remains representing, at minimum, 1 individual were removed from site AZ V:1:60(ASM) in Gila County, AZ. Excavations were conducted by the Arizona State Museum under the direction of J. Jefferson Reid for the Arizona Public Service Cholla Project. No human remains were reported at the time of the excavations. Following project completion, the archeological collections were brought to ASM. In 2014, ASM staff found the fragmentary human remains in the repository collections. No known individuals were identified. No associated funerary objects are present.

AZ V:1:60(ASM) is described as a probable habitation site with a ceramic and lithic scatter. Ceramic typologies suggest a date range from about A.D. 1000 to 1200. These characteristics are consistent with the archeologically-described Upland Mogollon or prehistoric Western Pueblo tradition.

In 1979, human remains representing, at minimum, 1 individual were removed from an unrecorded site (AZ W:1:—Bean Pot Café) in Navajo County, AZ. The burial was inadvertently discovered in a bulldozed field and had been exposed by erosion from a drainage ditch. The human remains were recovered by ASM archeologist Alan Ferg at the request of the White Mountain Apache Tribe. At the conclusion of the excavation, the human remains were brought to ASM and were assigned an accession number. No known individuals were identified. The 9 associated funerary objects are 1 ceramic bowl, 6 ceramic sherds, 1 stone knife, and 1 stone core.

Based on ceramic typology, the burial likely took place about A.D. 1000–1200 and may be associated with the archeologically-described Upland Mogollon or prehistoric Western Pueblo tradition.

A detailed discussion of the basis for cultural affiliation of archeological sites in the region where the above sites are located may be found in ''Cultural Affiliation Assessment of White Mountain Apache Tribal Lands (Fort Apache Indian Reservation),'' by John R. Welch and T.J. Ferguson (2005). To summarize, archeologists have used the terms Upland Mogollon or prehistoric Western Pueblo to define the archeological complexes represented by the sites listed above. Material culture characteristics of these traditions include a temporal progression from earlier pit houses to later masonry pueblos, villages organized in room blocks of contiguous dwellings associated with plazas, rectangular kivas, polished and paint-decorated ceramics, unpainted corrugated ceramics, inhumation burials, cradleboard cranial deformation, grooved stone axes, and bone artifacts. The combination of the material culture attributes and a subsistence pattern that included hunting and gathering augmented by maize agriculture helps to identify an earlier group. Archeologists have also remarked that there are strong similarities between this earlier group and present-day tribes included in the Western Pueblo ethnographic group, especially the Hopi Tribe of Arizona and the Zuni Tribe of the Zuni Reservation, New Mexico. The similarities in ceramic traditions, burial practices, architectural forms, and settlement patterns have led archeologists to believe that the prehistoric inhabitants of the Mogollon Rim region migrated north and west to the Hopi mesas, and north and east to the Zuni River Valley. Certain objects found in Upland Mogollon archeological sites have been found to have strong resemblances with ritual

paraphernalia that are used in continuing religious practices by the Hopi and Zuni. Some petroglyphs on the Fort Apache Indian Reservation have also persuaded archeologists of continuities between the earlier identified group and current-day Western Pueblo people. Biological information from the site of Grasshopper Pueblo supports the view that the prehistoric occupants of the Upland Mogollon region had migrated from various locations to the north and west of the region.

Hopi and Zuni oral traditions parallel the archeological evidence for migration. Migration figures prominently in Hopi oral tradition, which refers to the ancient sites, pottery, stone tools, petroglyphs, and other artifacts left behind by the ancestors as ''Hopi Footprints.'' This migration history is complex and detailed, and includes traditions relating specific clans to the Mogollon region. Hopi cultural advisors have also identified medicinal and culinary plants at archeological sites in the region. Their knowledge about these plants was passed down to them from the ancestors who inhabited these ancient sites. Migration is also an important attribute of Zuni oral tradition and includes accounts of Zuni ancestors passing through the Upland Mogollon region. The ancient villages mark the routes of these migrations. Zuni cultural advisors remark that the ancient sites were not abandoned. People returned to these places from time to time, either to reoccupy them or for the purpose of religious pilgrimages—a practice that has continued to the present day. Archeologists have found ceramic evidence at shrines in the Upland Mogollon region that confirms these reports. Zuni cultural advisors have names for plants endemic to the Mogollon region that do not grow on the Zuni Reservation. They also have knowledge about traditional medicinal and ceremonial uses for these resources, which has been passed down to them from their ancestors. Furthermore, Hopi and Zuni cultural advisors have recognized that their ancestors may have been co-resident at some of the sites in this region during their ancestral migrations.

There are differing points of view regarding the possible presence of Apache people in the Upland Mogollon region during the time that Grasshopper Pueblo was occupied. Some Apache traditions describe interactions with Ancestral Pueblo people during this time, but according to these stories, Puebloan people and Apache people were regarded as having separate identities. The White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, does not claim cultural affiliation with the human remains and associated funerary objects from this site. As reported by Welch and Ferguson (2005), consultations between the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, and the Navajo Nation, Arizona, New Mexico & Utah; Pueblo of Acoma, New Mexico; and Pueblo of Laguna, New Mexico, have indicated that that none of these tribes wish to pursue claims of affiliation with sites on White Mountain Apache Tribal lands. Finally, the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona, supports the repatriation of human remains and associated funerary objects from this site and is ready to assist the Hopi Tribe of Arizona and Zuni Tribe of the Zuni Reservation, New Mexico, in their reburial.

Determinations Made by the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and the Arizona State Museum, University of Arizona, Tucson, AZ

Officials of the Bureau of Indian Affairs and Arizona State Museum have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 3 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 9 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Hopi Tribe of Arizona and the Zuni Tribe of the Zuni Reservation, New Mexico.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to John McClelland, NAGPRA Coordinator, P.O. Box 210026, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626–2950, by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Hopi Tribe of Arizona and the Zuni Tribe of the Zuni Reservation, New Mexico, may proceed.

The Arizona State Museum is responsible for notifying the Hopi Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona; and the Zuni Tribe of the Zuni Reservation, New Mexico, that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28961 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22419; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Natural History, Yale University, New Haven, CT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Natural History has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Peabody Museum of Natural History. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Peabody Museum of Natural History at the address in this notice by January 3, 2017.

ADDRESSES: Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Peabody Museum of Natural History, Yale University, New Haven, CT. The human remains were removed from the tundra surface near Barrow, North Slope Borough, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Peabody Museum of Natural History professional staff in consultation with representatives of the Native Village of Barrow Inupiat Traditional Government. Attempts to contact the Inupiat Community of the Arctic Slope went unanswered.

History and Description of the Remains

In 1957, human remains representing, at minimum, 14 individuals were removed from the tundra surface near Barrow in North Slope Borough, AK. The remains were collected and donated to the Peabody Museum of Natural History in 1957. The human remains represent four adult, probable male individuals, eight adult, probable female individuals, and two adult individuals of indeterminate sex. No known individuals were identified. No associated funerary objects are present.

The osteological data as well as the burial context support the identification of these individuals as Native Alaskan. The collector's description of the archaeological context supports an historic date for these burials. The city of Barrow and vicinity is documented as being inhabited by the Inupiat people during the historic era. The Inupiat people in this region are represented by the Native Village of Barrow Inupiat Traditional Government. During consultation, a representative of the Native Village of Barrow Inupiat Traditional Government confirmed the tribe's cultural affiliation to these human remains.

Determinations Made by the Peabody Museum of Natural History

Officials of the Peabody Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of fourteen individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Native Village of Barrow Inupiat Traditional Government.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752, by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Native Village of Barrow Inupiat Traditional Government may proceed.

The Peabody Museum of Natural History is responsible for notifying the Native Village of Barrow Inupiat Traditional Government that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28947 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22457; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Department of Anthropology at Indiana University, Bloomington, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Department of Anthropology at Indiana University has completed an inventory of human remains in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Indiana University NAGPRA Office. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Indiana University NAGPRA Office at the address in this notice by January 3, 2017.

ADDRESSES: Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Avenue, Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Department of Anthropology at Indiana University, Bloomington, IN.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Indiana University professional staff in consultation with representatives of the Caddo Nation, the Choctaw Nation of Oklahoma, the Jena Band of the Choctaw Indians, and the Mississippi Band of the Choctaw Indians.

History and Description of the Remains

On an unknown date, human remains representing, at minimum, 19 individuals were removed from the Woodward site in Rapides County, LA, and were subsequently delivered to the Department of Anthropology at Indiana University. The collection is listed as being possibly affiliated with the Choctaw and notes indicate it was possibly from the Woodward Forest Nursery area. During the late Historic period, a band of Choctaw individuals lived in Rapides Parish and left a cemetery near the Woodward Forest Nursery.

Woodward Place is also known as Rougeau Mounds. Material culture previously recovered from this site, specifically ceramics, has been attributed to the ancestral Caddo peoples. Additional reports have indicated that Rougeau is affiliated with the Caddo people.

Determinations Made by Indiana University

Officials of the Department of Anthropology at Indiana University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 19 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Caddo Nation, the Choctaw Nation of Oklahoma, the Jena Band of the Choctaw Indians, and the Mississippi Band of the Choctaw Indians.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Avenue, Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu,* by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Caddo Nation, the Choctaw Nation of Oklahoma, the Jena Band of the Choctaw Indians, and the Mississippi Band of the Choctaw Indians may proceed.

Indiana University is responsible for notifying the Caddo Nation, the Choctaw Nation of Oklahoma, the Jena Band of the Choctaw Indians, and the Mississippi Band of the Choctaw Indians that this notice has been published.

Dated: November 18, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28956 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22420; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Natural History, Yale University, New Haven, CT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Natural History has completed an inventory of human remains, in consultation with the appropriate Alaska Native Tribes, and has determined that there is a cultural affiliation between the human remains and present-day Alaska Native Tribes. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Peabody Museum of Natural History. If no additional requestors come forward, transfer of control of the human remains to the Alaska Native Tribes stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Peabody Museum of Natural History at the address in this notice by January 3, 2017.

ADDRESSES: Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Peabody Museum of Natural History, Yale University, New Haven, CT. The human remains were removed from Passage Island, Kenai Peninsula Borough, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Peabody Museum of Natural History professional staff in consultation with a representative of the Native Village of Chenega (aka Chanega), the Native Village of Eyak (Cordova), the Native Village of Nanwalek (aka English Bay), the Native Village of Port Graham, the Native Village of Tatitlek, and the Chugach Alaska Corporation.

History and Description of the Remains

In 1931, human remains representing one individual were removed from a burial on Passage Island in Kenai Peninsula Borough, AK. According to historical documentation, the burial was uncovered by a local fox farmer and was subsequently collected by the Yale Peabody Alaska Expedition. The human remains represent one individual identified as a probable female, aged approximately 20–25 years. No known individuals were identified. No associated funerary objects are present.

Osteological examination as well as contextual data identify these human remains as representing an individual of Native American ancestry. Archaeologist Frederica de Laguna identifies the Passage Island burial site as a local expression of the Third Period of the Kachemak Bay Tradition. Recent scholars have dated the Kachemak Bay Tradition from circa 1000 B.C. to A.D. 900. Additional scholars have identified the Kachemak Bay Tradition people as Pacific Eskimos. The Pacific Eskimo people are today represented by the Native Village of Chenega, the Native Village of Eyak, the Native Village of Nanwalek, the Native Village of Port Graham, and the Native Village of Tatitlek.

Determinations Made by the Peabody Museum of Natural History, Yale University

Officials of the Peabody Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and of the Native Village of Chenega (aka Chanega), the Native Village of Eyak (Cordova), the Native Village of Nanwalek (aka English Bay), the Native Village of Port Graham, and the Native Village of Tatitlek.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752, by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Chugach Alaska Corporation as an agent for the Native Village of Chenega (aka Chanega), the Native Village of Eyak (Cordova), the Native Village of Nanwalek (aka English Bay), the Native Village of Port Graham, and the Native Village of Tatitlek may proceed.

The Peabody Museum of Natural History is responsible for notifying the of the Native Village of Chenega (aka Chanega), the Native Village of Eyak (Cordova), the Native Village of Nanwalek (aka English Bay), the Native Village of Port Graham, the Native Village of Tatitlek, and the Chugach Alaska Corporation that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28948 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22418; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Natural History, Yale University, New Haven, CT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Natural History has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and any present-day Indian tribes or Native Hawaiian organizations. Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Peabody Museum of Natural History. If no additional requestors come forward, transfer of control of the human remains to the Indian tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Peabody Museum of Natural History at the address in this notice by January 3, 2017.

ADDRESSES: Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Peabody Museum of Natural History, Yale University, New Haven, CT. The human remains were removed from a mound near Fort Sisseton, Marshall County, SD.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Peabody Museum of Natural History professional staff in consultation with representatives of the Lower Sioux Indian Community, Minnesota and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota. During consultation it was determined there is insufficient evidence to make a determination of cultural affiliation.

History and Description of the Remains

Sometime prior to 1916, human remains representing, at minimum, five individuals were removed from a mound near Fort Sisseton in Marshall County, SD. The human remains were donated to the Peabody Museum of Natural History in 1916. No known individuals were identified. No associated funerary objects are present.

Determinations Made by the Peabody Museum of Natural History

Officials of the Peabody Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on the collection history as well as the biological/osteological markers.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of five individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains were removed is the aboriginal land of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota.
- Treaties, Acts of Congress, or Executive Orders, indicate that the land from which the Native American human remains were removed is the aboriginal land of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota.

Additional Requestors and Disposition

Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Professor David Skelly, Director, Yale Peabody Museum of Natural History, P.O. Box 208118, New Haven, CT 06520–8118, telephone (203) 432–3752, by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota may proceed.

The Peabody Museum of Natural History is responsible for notifying the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28946 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22426; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The United States Department of Interior, Bureau of Indian Affairs, and the Arizona State Museum, University of Arizona, have completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and any present-day Indian tribes or Native Hawaiian organizations. Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Arizona State Museum, University of Arizona. If no additional requestors come forward, transfer of control of the human remains to the Indian tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Arizona State Museum, University of Arizona at the address in this notice by January 3, 2017.

ADDRESSES: John McClelland, NAGPRA Coordinator, P.O. Box 210026, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626–2950.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ (ASM). The human remains were removed from locations within the boundaries of the Fort Apache Indian Reservation, Apache, Gila and Navajo Counties, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the ASM professional staff in consultation with representatives of the Hopi Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona; and the Zuni Tribe of the Zuni Reservation, New Mexico.

History and Description of the Remains

On an unknown date, human remains representing, at minimum, 1 individual were removed from an unknown location (AZ White Mountains) in Apache, Gila, or Navajo County, AZ. On an unknown date, the human remains were given by an unknown donor to Mrs. Minnie Guenther, then resident on the Fort Apache Indian Reservation. Although the exact location of the discovery is unknown, it is very likely that the human remains were obtained somewhere within the boundaries of the reservation. In the 1970s, the human remains were donated to the Arizona State Museum. No known individuals were identified. No associated funerary objects are present.

On an unknown date, fragmentary human remains representing, at minimum, 5 individuals were removed from a cave (AZ W:1:—East Fork) on the East Fork of the White River, several miles above Fort Apache, on the Fort Apache Indian Reservation in Navajo County, AZ. Although the circumstances of discovery and the date of removal are unknown, the human remains were found with a collection that was obtained during excavations conducted by the University of Arizona from 1931 to 1936 under the direction of Byron Cummings at Kinishba, AZ V:4:1(ASM). The collections were accessioned by the Arizona State Museum in 1936. No known individuals were identified. No associated funerary objects are present.

The cave is described as having both Ancestral Pueblo and Apache components. Since the archaeological context of the human remains is unknown, it is not possible to determine which cultural component they were associated with.

Determinations Made by the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and the Arizona State Museum, University of Arizona, Tucson, AZ

Officials of the Bureau of Indian Affairs and Arizona State Museum have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on the physical condition of the human remains and the reported archeological components represented at the cave.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 6 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian tribe.
- Pursuant to 25 U.S.C. 3001 (15), the land from which the Native American human remains were removed is the tribal land of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to John McClelland, NAGPRA Coordinator, P.O. Box 210026, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626–2950, by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona, may proceed.

The Arizona State Museum is responsible for notifying the Hopi Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona; and the Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28944 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22455; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Indiana University, Bloomington, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Department of Anthropology at Indiana University has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Indiana University NAGPRA Office. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Indiana University NAGPRA Office at the address in this notice by January 3, 2017.

ADDRESSES: Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Avenue, Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu*.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Department of Anthropology at Indiana University, Bloomington, IN.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Indiana University professional staff in consultation with representatives of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

History and Description of the Remains

In 1887, the Devil's Lake site in Ramsey County, ND, was excavated by Henry Montgomery. Human remains, representing a minimum of 24 individuals, were recovered from this site. No known individuals were identified. No associated funerary objects are present.

In 1948, G.W. Hewes excavated the Baldhill site in Barnes County, ND. Human remains, representing a minimum of 72 individuals, were recovered from this site. No known individuals were identified. The 67 associated funerary objects are 1 rodent skull, 1 radius from a rodent, 1 rib from a young deer, 1 tibia/fibula possibly from a rabbit, 9 cranial fragments and 1 part of a mandible of a large mammal, 8 cranial fragments and 1 part of a mandible of a large mammal, 1 piece of unidentified bone from a large mammal, 1 auditory bulla from a medium-sized mammal, 1 talus from a medium-sized mammal, 2 pieces of worked stone, 1 chert flake, 1 bifacial flake, 3 pieces of some kind of pigmented material, 1 phalange from an ungulate, possibly bison or elk, 1 single incisor, probably from an elk, 8 pieces of ribs from a large mammal, 5 caudal vertebrae—tail—from a dog-sized animal, 1 large molar, 2 tarsals from a large mammal, 2 vertebral fragments from a large mammal, 1 piece of unidentified bone from a large mammal, 1 piece of scapula, 1 metatarsal or metacarpal and 1 piece of a humerus from a dog-sized mammal, 4 amphibian bones, 3 bird bones, 1 half of a mandible from either skunk or a mink, 1 calcaneus from either a skunk or a mink, and 1 humerus from large dog or wolf.

On an unknown date, Alfred W. Bowers excavated the Greenshield site in Oliver County, ND. The collection was sent to Faye Cooper Cole at the University of Chicago in 1993. From 1950–1952, the collection was transferred to Indiana University. Human remains, representing a minimum of 34 individuals, were recovered. No known individuals were identified. The 2 associated funerary objects are rodent bones.

On an unknown date, Alfred W. Bowers excavated the Larson site in Oliver County, ND. The collection was sent to Faye Cooper Cole at the University of Chicago in 1993. From 1950–1952, the collection was transferred to Indiana University. Human remains, representing 7 individuals, were recovered. No known individuals were identified. There are no associated funerary objects.

On an unknown date, Alfred W. Bowers excavated the Motsiff site in Morton County, ND. The collection was sent to Faye Cooper Cole at the University of Chicago in 1993. From 1950–1952, the collection was transferred to Indiana University. Human remains, representing 2 individuals, were recovered. No known individuals were identified. There are no associated funerary objects.

On an unknown date, Alfred W. Bowers excavated the Sanger Mound site in Oliver County, ND. The collection was sent to Faye Cooper Cole at the University of Chicago in 1993. From 1950–1952, the collection was transferred to Indiana University. Human remains, representing 5 individuals, were recovered. No known individuals were identified. There are no associated funerary objects.

On an unknown date, Alfred W. Bowers excavated site Ar34 in an unknown County, ND. The collection was sent to Faye Cooper Cole at the University of Chicago in 1993. From 1950–1952, the collection was transferred to Indiana University. Human remains, representing 11 individuals, were recovered. No known individuals were identified. There are 16 associated funerary objects: 1 shell, 1 stone tool, 1 sherd, 1 piece of sandstone, and 12 pieces of chert.

Notes indicate that Sanger Mound, Greenshield, Larson, and Motsiff are culturally affiliated with the Mandan and Arikara tribes. Notes associated with site Ar34 indicate either Arikara or Mandan individuals, likely from Fort Abraham Lincoln. The Mandan had a large village located at the site of Fort Abraham Lincoln. The Baldhill and Devil's Lake sites are likely dated to the Extended Middle Missouri variant (1000–1500 AD). Archeological, geographical, and ethnographic evidence indicates that this period is

ancestral to the Mandan. Today, the Arikara, Hidatsa, and Mandan tribes are a part of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Determinations Made by the Indiana University

Officials of Indiana University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 155 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 85 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Avenue, Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu,* by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Indiana University is responsible for notifying the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Dated: November 18, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28954 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22454; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Glenn A. Black Laboratory of Archaeology at Indiana University, Bloomington, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Glenn A. Black Laboratory of Archaeology at Indiana University has completed an inventory of human remains and associated funerary objects in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Indiana University NAGPRA Office. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Indiana University NAGPRA Office at the address in this notice by January 3, 2017.

ADDRESSES: Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Ave., Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu*.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Glenn A. Black Laboratory of Archaeology at Indiana University, Bloomington, IN. The human remains and associated funerary objects were removed from Tipton County, TN.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Indiana University professional staff in consultation with representatives of the Quapaw Tribe of Oklahoma and the Chickasaw Nation. While the area where the human remains were removed is the aboriginal homeland of the Chickasaw Nation as documented by treaty cession area, the Quapaw Tribe of Oklahoma has claim to these remains based on cultural affinity, material culture, and physical occupation of the area.

History and Description of the Remains

In 1953, human remains representing, at minimum, one individual were recovered from the Bishop site in Tipton County, TN. The 52 associated funerary objects are pottery sherds. This material was received at the Glenn A. Black Laboratory of Archaeology as a gift from Mr. Wiley Wilcox.

The Bishop site has been assigned to the Nodena Phase, which is characterized by Mississippian Bell Plain pottery and has been culturally affiliated with the Quapaw. The majority of the pot sherds with this collection are Bell Plain variety. Archaeological material from the Bishop site has already previously been repatriated to the Quapaw Tribe of Oklahoma.

Oral traditions indicate that the Quapaw tribe originated in the Lower Ohio River Valley and eventually moved downstream to reside on both sides of the Mississippi River. The Quapaw maintained a presence in the Central Mississippi valley until their removal to northwest Louisiana in 1824 when their lands in the Territory of Arkansas were ceded to the United States.

Determinations Made by Indiana University

Officials of the Glenn A. Black Laboratory of Archaeology at Indiana University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 52 objects described in this notice are reasonably believed to have been placed with or near individual human

remains at the time of death or later as part of the death rite or ceremony.

• Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Quapaw Tribe of Oklahoma.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Dr. Jayne-Leigh Thomas, NAGPRA Director, Indiana University, NAGPRA Office, Student Building 318, 701 E. Kirkwood Ave., Bloomington, IN 47405, telephone (812) 856–5315, email *thomajay@indiana.edu,* by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Quapaw Tribe of Oklahoma may proceed.

Indiana University is responsible for notifying the Quapaw Tribe of Oklahoma that this notice has been published.

Dated: November 18, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28945 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22417; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent to Repatriate Cultural Items: U.S. Army Corps of Engineers, Huntington District, Huntington, WV

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers, Huntington District (Huntington District), in consultation with the appropriate Indian tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of unassociated funerary objects. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Huntington District. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the Huntington District at the address in this notice by January 3, 2017.

ADDRESSES: Mr. Rodney Parker, District Archaeologist, U.S. Army Corps of Engineers, Huntington District, 502 Eighth Street, Huntington, WV 25701, telephone (304) 399–5729, email *rodney.d.parker@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the U.S. Army Corps of Engineers, Huntington District, Huntington, WV, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item(s)

In 1963, ten cultural items were removed from 15PI11 (the Slone Site), Fishtrap Lake, Pike County, KY. The items were excavated during legally authorized excavations performed by Lee Hanson in 1963, a graduate student at the University of Kentucky. In 1964, Robert Dunnell, and undergraduate at the University, completed the excavation of the Fort Ancient component of the site. Burial 7 at the site was reported to have included the fragmentary skeletal remains of an infant; unmodified faunal remains and pottery sherds were collected with the burial fill. No human remains associated with Burial 7 have been located. The skeletal remains in Burial 12 had completely decayed, but the construction pattern of the grave was distinct enough to permit its identification as a grave without the actual presence of human remains. An engraved stone was collected from the burial pit of Burial 12. The items from these two burials have been housed at the University of Kentucky, Lexington, since their excavation. The ten unassociated funerary objects are one carved soapstone fragment, four ceramic sherds, and five fragments unmodified faunal remains.

The funerary objects were determined to be affiliated with the Shawnee based on the physical archeological evidence which indicated a Fort Ancient period occupation at this site from A.D. 1000 to 1700. The Shawnee are generally considered the 'southerners' or the southernmost of the Algonquian-speaking tribes, and oral tradition places their homeland along the central Ohio River Valley. The Shawnee are often associated with the Fort Ancient peoples who occupied the Ohio River Valley and have a long association with this territory in which they were first encountered by the Europeans by the mid seventeenth century including areas of southern Ohio, northern Kentucky, and western West Virginia. The location of Fort Ancient archaeological sites within the Huntington District indicates that a strong historical and ethnohistorical link showing the region was occupied by the Shawnees in the early historic period. Based on the geographic, anthropological, linguistic, anthropological, and historical evidence, and information gained during tribal consultation, Huntington District has determined that the unassociated funerary objects from site 15PI11 are culturally affiliated with the Shawnee. The three federally recognized tribes with standing under NAGPRA are the Absentee-Shawnee Tribe of Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Shawnee Tribe.

Determinations Made by the Huntington District

Officials of the Huntington District have determined that:

• Pursuant to 25 U.S.C. 3001(3)(B), the ten cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.

• Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Absentee-Shawnee Tribe of Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Shawnee Tribe.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Mr. Rodney Parker, District Archaeologist, U.S. Army Corps of Engineers, Huntington District, 502 Eighth Street, Huntington, WV 25701, telephone (304) 399–5729, email *rodney.d.parker@usace.army.mil,* by January 3, 2017. After that date, if no additional claimants have come forward, transfer of control of the unassociated funerary objects to the Absentee-Shawnee Tribe of Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Shawnee Tribe may proceed.

The Huntington District is responsible for notifying the Absentee Shawnee Tribe of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Cayuga Nation; Cherokee Nation; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as the Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Band of Cherokee Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Minnesota Chippewa Tribe, Minnesota (six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grant Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as the Huron Potawatomi, Inc.); Oneida Nation (previously listed as the Oneida Tribe of Indians of Wisconsin); Oneida Nation of New York; Onondaga Nation; Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as the Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Saint Regis Mohawk Tribe (previously listed as the St. Regis Band of Mohawk Indians of New York); Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as the Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Tonawanda Band of Seneca (previously listed as the Tonawanda Band of Seneca Indians of New York); Tuscarora Nation; United Keetoowah Band of Cherokee Indians in Oklahoma; and Wyandotte Nation that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28960 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22416; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Army Corps of Engineers, Huntington District, Huntington, WV

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers, Huntington District (Huntington District) has completed an inventory of human remains and associated funerary objects in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Huntington District. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Huntington District at the address in this notice by January 3, 2017.

ADDRESSES: Mr. Rodney Parker, District Archaeologist, U.S. Army Corps of Engineers, Huntington District, 502 Eighth Street, Huntington, WV 25701, telephone (304) 399–5729, email *rodney.d.parker@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Huntington District and in the possession of the Ohio Historical Society, Columbus, OH; Veterans Curation Program, Alexandria, VA; University of Kentucky, Lexington, KY; and the University of Akron, Akron, OH. The human remains and associated funerary objects were removed from Bluestone Lake in Summer County, WV; Deer Creek Lake in Pickaway County, OH; Fishtrap Lake in Pike County, KY; Meldahl Lock and Dam in Adams County, OH; Paint Creek Lake in Highland County, OH; and Paintsville Lake in Johnson County, KY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Huntington District and the St. Louis District's Mandatory Center of Expertise for the Curation and Management of Archaeological Collections professional staff in consultation with representatives of the Absentee Shawnee Tribe of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Cayuga Nation; Cherokee Nation; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as the Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Band of

Cherokee Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Minnesota Chippewa Tribe, Minnesota (six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grant Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as the Huron Potawatomi, Inc.); Oneida Nation (previously listed as the Oneida Tribe of Indians of Wisconsin); Oneida Nation of New York; Onondaga Nation; Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as the Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Saint Regis Mohawk Tribe (previously listed as the St. Regis Band of Mohawk Indians of New York); Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as the Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Tonawanda Band of Seneca (previously listed as the Tonawanda Band of Seneca Indians of New York); Tuscarora Nation; United Keetoowah Band of Cherokee Indians in Oklahoma; and Wyandotte Nation (hereafter referred to as ''The Consulted Tribes'').

History and Description of the Remains

In 1963 and 1964, human remains representing, at a minimum, 71 individuals were removed from 15PI11 (the Slone Site), Fishtrap Lake, Pike County, KY. The burials were excavated during legally authorized excavations by the University of Kentucky, and the human remains have been housed at the University of Kentucky, Lexington, since their excavation. No known individuals were identified. The 846 associated funerary objects are 613 shell beads, 13 shell pendants, 1 biface fragment, 2 miscellaneous rocks, 45 ceramic sherds, 109 fragments of unmodified fauna remains, 2 fragments modified faunal remains, 1 bone fish hook, 1 bone bead, 48 fragments of unmodified shell, 3 shell spoon fragments, and 8 soil samples.

In 1966, human remains representing, at a minimum, 1 individual were removed from 15PI15 (the Justice-Baird Site), Fishtrap Lake, Pike County, KY. The burials were excavated during legally authorized excavations by the University of Kentucky. In 1967, Robert C. Dunnell, a Yale graduate student, donated the collection to the Yale University Peabody Museum. No known individuals were identified. No associated funerary objects are present.

In 1973, 1974, and 1977, human remains representing, at minimum, 2 individuals were removed from 15JO23 (the Dameron Rockshelter), Paintsville Lake, Johnson County, KY. The burials were excavated during legally authorized excavation by the University of Kentucky and University of Pittsburgh, and the human remains and associated funerary objects have been housed at the University of Kentucky and University of Pittsburgh since their excavation. No known individuals were identified. The 46 associated funerary objects are 21 fragments of unmodified animal bone, 22 fragments of unmodified mussel shell, and 3 fragments of charcoal.

In 1972, human remains representing, at minimum, 1 individual were removed from 33PI44 (the Tick Ridge Site), Pickaway County, OH. The burials were excavated during legally authorized excavation by the Ohio Historical Society, and the human remains and associated funerary objects have been housed that the Ohio History Society. No known individuals were identified. The 4 associated funerary objects are 3 unmodified animal bone and 1 projectile point fragment.

In 1983, human remains representing, at minimum, 1 individual were removed from 33AD25 (the Island Creek Village site), Captain Meldahl Lock and Dam, Adams County, OH. The burials were excavated during legally authorized excavations by the University of Akron, and the human remains have been housed at the University of Akron, since their excavation. No known individuals were identified. No associated funerary objects are present.

In 1970, human remains representing, at minimum, 3 individuals were removed from 33HI20 (the Paint Creek Lake Dam Burial), Paint Creek Lake, Highland County, OH. The burials were excavated during grading of the dam, and the human remains have been housed at the Ohio Historical Society, since their excavation. No known individuals were identified. The 55 associated funerary objects are 4 chert tools, 9 flakes, 1 slate forget, 34 fragments of unmodified faunal remains, 1 fragment of modified faunal remain, 1 fragment modified antler, 1 fossil, 1 mica fragment, 1 fragment unmodified shell, 1 fragment of charcoal, and 1 fragment of burned clay.

In 1977, human remains representing, at minimum, 7 individuals were removed from 46SU3 (the Barker's Bottom site) Bluestone Lake, Summers County, WV. Two individuals were excavated during legally authorized excavation by the University of Pittsburgh in 1977. The human remains and associated funerary objects were originally stored at the University of Pittsburgh, but were later transferred to Grave Creek Historic Mound site in Grave Creek, WV. In September 2014, the remains were transferred to the Veterans Curation Program Laboratory in Alexandria, VA. The remaining five individuals were found eroding out of the site in the 1980s and collected by the U.S. Army Corps of Engineers, Huntington District. The human remains and associated funerary object were sent to the West Virginia University Medical school for analysis and then stored at the Grave Creek Historic Mound Site in Grace Creek, WV. In September 2014, the remains were transferred to the Veterans Curation Program Laboratory in Alexandria, VA. No known individuals were identified. The 771 funerary objects are 7 core fragments, 1 groundstone tool, 82 flakes, 3 miscellaneous rock fragments, 167 ceramic sherds, 418 fragments of unmodified faunal remains, 2 fragments of modified faunal remains, 85 fragments of unmodified shell, and 6 shell beads.

In 1979, human remains representing, at a minimum, 3 individuals, were removed 46SU9, Bluestone Lake, Summers County, WV. The burials were excavated during legally authorized excavation by the University of Akron, and the human remains and funerary objects were originally housed at the University of Pittsburgh, but were later transferred to Grave Creek Historic Mound site in Grave Creek, WV. In September 2014, the remains were transferred to the Veterans Curation Program Laboratory in Alexandria, VA. No known individuals were identified. The 1,408 funerary objects are 1,387 bird hone beads, 19 shell beads, 1 faunal pendent, and 1 fragment of unmodified faunal remains.

In March 1990, human remains representing, at a minimum, 1 individual, were removed from an unknown site, Deer Creek Lake, Pickaway County, OH. There are no published documents or original field documents detailing the discovery and collection of this material. The human remains and funerary objects have been housed at the Ohio Historical Society. No known individuals were identified. The 16 funerary objects are 1 broken bottle glass fragment, 1 miscellaneous stone, 1 biface, 1 flake, 6 fragments of unworked faunal remains, 5 worked deer antler tips, and 1 field tile.

Based on the physical characteristics of the remains and associated objects listed in this notice, the human remains are determined to be of Native American ancestry. Archaeological evidence indicated a Fort Ancient period occupation at this site from A.D. 1000 to 1700. Five lines of evidence support a cultural affiliation finding for the site including geographical, archeological, anthropological, historical, and oral history information gathered during consultation. The Shawnee are generally considered the 'southerners' or the southernmost of the Algonquian-speaking tribes, and oral tradition places their homeland along the central Ohio River Valley. The Shawnee are often associated with the Fort Ancient peoples who occupied the Ohio River Valley and have a long association with this territory in which they were first encountered by the Europeans by the mid seventeenth century including areas of southern Ohio, northern Kentucky, and western West Virginia. The location of Fort Ancient archeological sites within the Huntington District indicates that a strong historical and ethnohistorical link showing the region was occupied by the Shawnees in the early historic period. Based on the geographic, anthropological, linguistic, anthropological, and historical evidence, and information gained during consultation, Huntington District has determined that the human remains and associated funerary objects from the sites listed in this notice are culturally affiliated with the Shawnee. The three federally recognized tribes with standing under NAGPRA are the Absentee-Shawnee Tribe of Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Shawnee Tribe.

Determinations Made by the Huntington District

Officials of the Huntington District have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 90 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 3,146 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Absentee-Shawnee Tribe of Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Shawnee Tribe.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Mr. Rodney Parker, District Archaeologist, U.S. Army Corps of Engineers, Huntington District, 502 Eighth Street, Huntington, WV 25701, telephone (304) 399–5729, email *rodney.d.parker@usace.army.mil,* by January 3, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Absentee-Shawnee Tribe of Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Shawnee Tribe may proceed.

The Huntington District is responsible for notifying The Consulted Tribes that this notice has been published.

Dated: November 15, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–28959 Filed 12–1–16; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–566 and 731–TA–1342 (Preliminary)]

Softwood Lumber Products From Canada; 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–566 and 731–TA–1342 (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 softwood lumber from Canada, provided for in subheadings 4407.10.01, 4409.10.05, 4409.10.10, 4409.10.20, 4409.10.90, 4418.90.25. Subject merchandise may also be classified in subheadings 4415.20.40, 4415.20.80, 4418.90.46, 4421.90.70, 4421.90.94, and 4421.90.97 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 Canada. Unless the Department of 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 January 9, 2017. The Commission's views must be transmitted to Commerce within five business days thereafter, or by January 17, 2017.

DATES: *Effective Date:* November 25, 2016.

FOR FURTHER INFORMATION CONTACT: Fred Ruggles (202–205–3187 or *fred.ruggles@usitc.gov*), 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 this investigation 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 November 25, 2016, by the Committee Overseeing Action for Lumber International Trade

Investigations or Negotiations (the ''Coalition'').[1]

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Participation in the investigation 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 sections 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 section 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 Commission's Director of Investigations has scheduled a conference in connection with these investigations for 9:30 a.m. on December 16, 2016, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the conference should be emailed to *William.bishop@usitc.gov* and *Sharon.bellamy@usitc.gov* (DO NOT FILE ON EDIS) on or before December 14, 2016. Parties in support of the imposition of countervailing and antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before December 21, 2016, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

In accordance with sections 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 section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this/these investigation(s) 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 this/these investigation(s) 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 this/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 section 207.12 of the Commission's rules.

By order of the Commission.

Issued: November 28, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–28922 Filed 12–1–16; 8:45 am]

BILLING CODE 7020–02–P

[1] The Coalition is an ad hoc association whose members are: U.S. Lumber Coalition, Inc., Collum's Lumber Products, L.L.C., Hankins, Inc., Potlach Corp., Rex Lumber Company, Seneca Sawmill Company, Sierra Pacific Industries, Stimson Lumber Company, Swanson Group, Weyerhaeuser Company, Carpenters Industrial Council, Giustina Land and Timber Company, Sullivan Forestry Consultants, Inc. The Coalition is ''an association, a majority of whose members is composed of interested parties'' described in Section 771(9)(C) of the Act, 19 U.S.C. 1677(9)(C).

DEPARTMENT OF JUSTICE

[OMB Number 1121–0277]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change, of a Previously Approved Collection OJJDP National Training and Technical Assistance Center (NTTAC) Feedback Form Package

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until January 31, 2017.

FOR FURTHER INFORMATION CONTACT: If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Linda Rosen, Training and Technical Assistance Specialist at 1–202–353–9222, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Department of Justice, 810 7th Street NW., Washington, DC 20530 or by email at *Linda.Rosen@usdoj.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Office of Juvenile Justice and Delinquency Prevention, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* OJJDP NTTAC Feedback Form Package.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* All forms approved under number 1121–0277. The applicable component within the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* The Office for Juvenile Justice and Delinquency Prevention National Training and Technical Assistance Center (NTTAC) Feedback Form Package is designed to collect in-person and online data necessary to continuously assess the outcomes of the assistance provided for both monitoring and accountability purposes and for continuously assessing and meeting the needs of the field. OJJDP NTTAC will send these forms to technical assistance (TA) recipients; conference attendees; training and TA providers; online meeting participants; in-person meeting participants; and focus group participants to capture important feedback on the recipients' satisfaction with the quality, efficiency, referrals, information and resources provided and assess the recipients' additional training and TA needs. The data will then be used to advise NTTAC on ways to improve the support provided to its users; the juvenile justice field at-large; and ultimately improve services and outcomes for youth.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 5140 respondents will complete forms and the response time will range from .03 hours to 1.5 hours.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 470.83 total annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: November 29, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–28979 Filed 12–1–16; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of *August 22, 2016 through September 2, 2016.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) the increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) there has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) there has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) the shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) a significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to

the article or service that was the basis for such certification; and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(e) of the Act must be met.

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) not withstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
91,209	L&M Radiator, Inc., Always There Staffing, Inc	Hibbing, MN	December 9, 2014.
91,639	FMC Technologies Measurement Solutions, Inc., Measurement Products Division, FMC Technologies, Inc., Remedy Staffing, etc.	Erie, PA	March 29, 2015.
91,741	Precision Computer Services, Inc., Kenzie & Company, LLC and Advantage Technical Resourcing.	Shelton, CT	April 22, 2015.
91,758	Alexander & Baldwin, LLC, Hawaiian Commercial & Sugar Company, Alexander & Baldwin, Exceptional Inc.	Puunene, HI	April 26, 2015.
91,758A	Alexander & Baldwin, LLC, Hawaiian Commercial & Sugar Company, Alexander & Baldwin, Exceptional Inc.	Puunene, HI	November 17, 2016.
91,804	American Grass Seed Producers	Tangent, OR	May 12, 2015.
91,804A	Stalford Seed Farm	Tangent, OR	May 12, 2015.
91,845	Olympic Panel Products LLC, New Wood Resources LLC, Express Employment Professionals.	Shelton, WA	May 24, 2015.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
91,143	Citizens Bank, NA, Citizens Financial Group, Infrastructure Services Division, Bridge, etc.	Riverside, RI	November 16, 2014.
91,143A	Citizens Bank, NA, Citizens Financial Group, Infrastructure Services Division, Bridge, etc.	Cranston, RI	November 16, 2014.
91,380	Gardner Denver Nash, LLC, R&D Engineering Department, The Marine Group, Gardner Denver Inc.	Trumbull, CT	January 22, 2015.
91,598	Qualcomm Technologies, Inc., Product and Test Engineering Division, Qualcomm, Inc.	San Diego, CA	March 15, 2015.
91,638	EMC Corporation, Disk Library for Mainframe (DLM) Division	Hopkinton, MA	June 5, 2015.
91,638A	On-Site Leased Workers from Advantage Technical Resources, IGATE (Now Capgemini), and TATA America reporting to EMC Corporation, etc.	Hopkinton, MA	March 29, 2015.
91,644	Qualcomm Technologies, Inc., Technical Publications Group, Qualcomm, Inc.	San Diego, CA	March 18, 2015.
91,644A	Qualcomm Technologies, Inc., Technical Publications Group, Qualcomm, Inc.	San Jose, CA	March 18, 2015.
91,645	ITT Corporation—Interconnect Solutions, ITT Cannon LLC, ITT Corporation.	Santa Ana, CA	December 12, 2016.
91,778	Fujitsu America, Inc., Retail Managed Services and Technical Maintenance Services, etc.	Richardson, TX	May 4, 2015.
91,778A	Fujitsu America, Inc., Retail Managed Services and Technical Maintenance Services, etc.	Schaumburg, IL	May 4, 2015.

TA–W No.	Subject firm	Location	Impact date
91,782	Veris Industries, Schneider Electric USA, KForce Inc., Express Services Inc., etc.	Tualatin, OR	May 5, 2015.
91,921	Centrex Revenue Solutions, LLC, Integra Connect, LLC, Randstad Temporary Services.	Ellicott City, MD	June 14, 2015.
91,927	DIRECTV Customer Services, Inc., DIRECTV Care Division, AT&T, Inc., Sitel, Convergys, Alorica, VXI, TPUSA.	Tulsa, OK	June 15, 2015.
91,945	Kennametal, Inc	Houston, TX	June 21, 2015.
91,952	Maersk Agency USA Inc., Maersk Group, Customer Service, Operations, Marketing Divisions.	Charlotte, NC	May 26, 2015.
91,952A	Maersk Agency USA Inc., Maersk Group, Finance, Customer Service, Operations, Marketing Divisions.	Oakbrook Terrace, IL	May 26, 2015.
91,952B	Maersk Agency USA Inc., Maersk Group, Customer Service, Operations, Marketing Divisions.	Florham Park, NJ	May 26, 2015.
91,952C	Maersk Agency USA Inc., Maersk Group, Operations, Marketing Divisions.	The Woodlands, TX	May 26, 2015.
91,984	EMC Corporation, Resource Management Division	Hopkinton, MA	July 5, 2015.
91,994	Strippit, Inc., LVD Company NV, Durham Staffing, Inc., and SelectOne.	Akron, NY	May 21, 2016.
91,994A	JaniMart Janitorial Sales & Services and AppleOne, Strippit, Inc., LVD Company NV.	Akron, NY	July 1, 2015.
92,002	Havells USA, Inc., Havells India Limited, Randstad	Atlanta, GA	July 8, 2015.
92,005	CTS Corporation, Specialized Staffing, Manpower, Aerotek, Personnel Partners, etc.	Elkhart, IN	July 8, 2015.
92,033	Viskase Companies, Inc., Staffmark	Osceola, AR	July 19, 2015.
92,095	360training.com, Inc., *360training.com*	El Segundo, CA	August 8, 2015.
92,118	CVG Alabama, LLC, Global Truck and Bus Segment, Commercial Vehicle Group, Inc., etc.	Piedmont, AL	June 24, 2015.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
90,287	Blackhawk Engineering, Inc., EXX, Inc	Cedar Falls, IA	January 1, 2014.
91,298	Furin & Shea Welding & Fabricating, Inc., Always There Staffing, Inc., Express Services, Inc.	Hibbing, MN	January 6, 2015.
91,305	Waste Management of Oregon, Pacific NW Division	Newberg, OR	January 7, 2015.
91,967	Prime Electric Motors, Inc., Bonney Staffing	Gorham, ME	June 27, 2015.
92,085	T. Bruce Sales, Inc	West Middlesex, PA	August 3, 2015.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
91,107	Hartzell Veneer Products LLC, Hartzell Veneer International LLC, US Staffing and Elwood Staffing.	Hillsdale, MI.	

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
90,324	Embarq Management Company/United Telephone of Pennsylvania, Embarq Corporation, CenturyLink, Inc.	Carlisle, PA.	
90,328	Dixie Consumer Products, LLC, Georgia Pacific, Aerotek Staffing Agency.	Parchment, MI.	
90,338	Unverferth Manufacturing Company, Inc	Shell Rock, IA.	
91,153	Horizon Mud Company, Inc., Irvin Wellsite Consultants, LLC	Midland, TX.	
91,398	K Building Components, Inc	Hibbing, MN.	
91,401	William J. Schwartz & Son, Inc	Bovey, MN.	
91,463	Volvo Trucks North America, New River Valley Facility, Volvo Trucks, Additional Technical Support, etc.	Dublin, VA.	

TA–W No.	Subject firm	Location	Impact date
91,526	Fairmont Supply Company, Formerly Fairmont Supply Oil and Gas, LLC.	Troy, PA.	
91,787	Jersey Shore Steel Company	Jersey Shore, PA.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
91,637	Georgia Chair Company	Gainesville, GA.	
91,805	Greenwillow Grains, LLC	Tangent, OR.	
92,036	Illinois Tool Works, Inc	New Berlin, WI.	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
91,711	Broadcom Limited, Avago Technologies Limited	Norcross, GA.	
91,806	Stalford Seed Farm	Tangent, OR.	
91,870	International Business Machines (IBM), Global Technology Services (GTS), Collabera, Artech, CDI, Infinite.	Endicott, NY.	
91,870A	International Business Machines (IBM), Global Technology Services (GTS), Collabera, Artech, CDI, Infinite.	Omaha, NE.	
91,972	Sensata Technologies, Inc., Staffmark, Signature Consultants, Aerotek.	Springfield, TN.	

I hereby certify that the aforementioned determinations were issued during the period of *August 22, 2016 through September 2, 2016.* These determinations are available on the Department's Web site *https://www.doleta.gov/tradeact/taa/taa_search_form.cfm* under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 18th day of November 2016.

Hope D. Kinglock

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2016–28910 Filed 12–1–16; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–91,138]

Graftech International Holdings Inc., Engineered Solutions Division, A Subsidiary of Brookfield Asset Management Inc., Anmoore, West Virginia; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated November 10, 2016, the Department of Labor (Department) received a request for administrative reconsideration from a company official of the Department's Notice of Termination of Investigation regarding workers' eligibility to apply for Trade Adjustment Assistance applicable to workers and former workers of GrafTech International Holdings Inc., Engineered Solutions Division, a subsidiary of Brookfield Asset Management Inc., Anmoore, West Virginia (subject firm). The subject firm is engaged in activities related to the production of synthetic graphite articles, such as molds and crucibles, used in high temperature applications. The Notice was issued on November 4, 2016 and has yet to be published in the **Federal Register**.

The Department has carefully reviewed the request for reconsideration, the existing record, and the new and additional information provided by the company official, and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 15th day of November, 2016.

Del-Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2016–28911 Filed 12–1–16; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–91,562]

Halliburton Energy Services, Inc. Technology, Duncan, Oklahoma; Notice of Revised Determination on Reconsideration

On August 22, 2016, the Department of Labor issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of Halliburton Energy Services, Inc., Technology, Duncan, Oklahoma.

To support the request for reconsideration, the petitioners supplied additional information regarding their activities to supplement that which was gathered during the initial investigation. In the initial investigation, the Department determined that the worker group was engaged in the production of crude oil, natural gas, and natural gas liquids (NGLs). The petitioners supplied additional information that the worker group is engaged in activities related to the production of oilfield equipment, specifically.

Based on information from the petitioners and the company officials provided during the reconsideration investigation, the Department of Labor determines that the worker group is engaged in activities related to the production of oilfield equipment, specifically designing internal and customer specified oilfield service equipment to be manufactured. The Department also determines that increased company imports of oilfield equipment have contributed importantly to the production declines and workers separations at Halliburton Energy Services, Inc., Technology, Duncan, Oklahoma.

Conclusion

After careful review of the additional facts obtained on reconsideration, I determine that workers of Halliburton Energy Services, Inc., Technology, Duncan, Oklahoma, who were engaged in activities related to the production of oilfield equipment, meet the worker group certification criteria under Section 222(a) of the Act, 19 U.S.C. 2272(a). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

All workers of Halliburton Energy Services, Inc., Technology, Duncan, Oklahoma who became totally or partially separated from employment on or after March 7, 2015, through two years from the date of this certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 20th day of October, 2016

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2016–28912 Filed 12–1–16; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, no later than December 12, 2016.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than December 12, 2016.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 18th day of November 2016.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[41 TAA petitions instituted between 9/5/16 and 9/16/16]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
92176	Delphi Automotive Systems, LLC (State/One-Stop)	Warren, OH	09/06/16	09/02/16
92177	Berry Plastics Corporation (Workers)	Dunkirk, NY	09/07/16	09/06/16
92178	Micron Technology (Workers)	Longmont, CO	09/07/16	09/06/16
92179	Nortech Systems, Inc. (Company)	Augusta, WI	09/07/16	09/06/16
92180	Zodiac Seat Shells US LLC (Company)	Santa Maria, CA	09/07/16	09/06/16
92181	Carpenter Company (State/One-Stop)	Lathrop, CA	09/07/16	07/25/16
92182	Calvert City Mill (State/One-Stop)	Calvert City, KY	09/07/16	09/06/16
92183	Applied Materials (State/One-Stop)	Austin, TX	09/07/16	09/06/16
92184	TE Connectivity (Company)	Middletown, PA	09/08/16	09/07/16
92185	Ashley Furniture Industries, Inc. (State/One-Stop)	Colton, CA	09/08/16	09/07/16
92186	BHP Billiton Petroleum (State/One-Stop)	Houston, TX	09/08/16	09/06/16
92187	Alcoa Fastening Systems and Rings (State/One-Stop)	Fontana, CA	09/08/16	09/07/16
92188	TMS International (Union)	Granite City, IL	09/08/16	09/07/16
92189	GE Energy Power Conversion US, Inc. (Workers)	Pittsburgh, PA	09/08/16	09/07/16
92190	VTI of Indiana Doors, Inc. (State/One-Stop)	New Albany, IN	09/08/16	08/31/16
92191	East Moline Products Company (Company)	East Moline, IL	09/09/16	09/08/16

APPENDIX—Continued

[41 TAA petitions instituted between 9/5/16 and 9/16/16]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
92192	Magna Techform of America (Company)	Portland, TN	09/09/16	09/08/16
92193	White Pine Electric Power, LLC (Company)	White Pine, MI	09/12/16	09/09/16
92194	Marine Spill Response Corporation (Workers)	Portland, ME	09/12/16	09/09/16
92195	Daimler Trucks North America LLC (Union)	Mt. Holly, NC	09/12/16	08/18/16
92196	Volt Workforce Solutions (State/One-Stop)	Indianapolis, IN	09/12/16	09/09/16
92197	Kohler Company (Company)	Union City, TN	09/12/16	09/10/16
92198	Ericsson (State/One-Stop)	Plano, TX	09/12/16	09/12/16
92199	Dell, Inc. dba Dell Financial Services, L.P. (State/One-Stop)	Round Rock, TX	09/12/16	09/12/16
92200	Celestica, Inc. (State/One-Stop)	Ontario, CA	09/13/16	09/12/16
92201	SMA America Production, LLC (Workers)	Denver, CO	09/13/16	09/12/16
92202	New York Life Insurance Company (State/One-Stop)	Lebanon, NJ	09/13/16	08/15/16
92203	Chanel, Inc. (State/One-Stop)	Piscataway Township, NJ	09/13/16	08/30/16
92204	Sanofi US Services Inc. (State/One-Stop)	Bridgewater, NJ	09/13/16	08/30/16
92205	CTS Corporation (State/One-Stop)	Elkhart, IN	09/14/16	09/13/16
92206	Massachusetts Mutual Life Insurance Company (State/One-Stop).	Springfield, MA	09/14/16	09/13/16
92207	International Business Machines Corporation (IBM) (State/One-Stop).	Rochester, MN	09/14/16	09/13/16
92208	HUSCO International (Company)	Waukesha, WI	09/15/16	09/14/16
92209	Dental Invisions, Inc. (Company)	Delray Beach, FL	09/15/16	09/14/16
92210	Maritime Association (State/One-Stop)	Crystal Bay, NV	09/15/16	09/14/16
92211	Petram Enterprises Inc.—dba Construction Equipment Company (State/One-Stop).	Tualatin, OR	09/15/16	09/14/16
92212	ITT Technical (Workers)	Dearborn, MI	09/16/16	09/09/16
92213	Chubb & Sons (State/One-Stop)	Warren, NJ	09/16/16	09/15/16
92214	Quantum Spatial, Inc. (State/One-Stop)	Various,	09/16/16	09/15/16
92215	Epicor Software Corporation (State/One-Stop)	Dublin, CA	09/16/16	09/15/16
92216	Norton Industries, Inc. (State/One-Stop)	Hayward, CA	09/16/16	09/15/16

[FR Doc. 2016–28909 Filed 12–1–16; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of September 5, 2016 through September 16, 2016.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) the increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) there has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) the shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) a significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(e) of the Act must be met.

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) not withstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
90,178	Wingspan Portfolio Advisors, LLC	Monroe, LA	January 1, 2014.
90,242	PSC Metals, Inc., Staffmark	London, KY	January 1, 2014.
91,080	ATI Specialty Alloys and Components, Millersburg Operations, Allegheny Technologies Incorporated, etc.	Albany, OR	October 23, 2014.
91,424	Hydralift AmClyde, Inc., Rig Systems Offshore/Lifting and Handling Division, Randstad, Entegee.	St. Paul, MN	February 2, 2015.
91,579	Republic Steel, Value-Add Division	Massillon, OH	July 18, 2015.
91,634	Caterpillar Emissions Solution, Large Power Systems Division, Caterpillar, Inc.	Santa Fe, NM	March 28, 2015.
92,051	Upper Columbia Mill, LLC, 71410 E Columbia Avenue, GTFF Mill Corporation, Collins Management, etc.	Boardman, OR	July 25, 2015.
92,051A	Upper Columbia Mill, LLC, 77200 Poleline Road, GTFF Mill Corporation, Collins Management, etc.	Boardman, OR	July 25, 2015.
92,077	Exodus Machines, LLC	Superior, WI	August 1, 2015.
92,097	Terex USA, LLC, Terex Cranes NA Division, Terex Corporation	Waverly, IA	August 8, 2015.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
90,209	Primary Financial Services LLC, CBV Collection Services Ltd	Amherst, NY	January 1, 2014.
90,209A	Primary Financial Services LLC, CBV Collection Services Ltd	Cheektowaga, NY	January 1, 2014.
91,040	Verizon Business Network Services, Inc., Client Service Assurance Group.	Cary, NC	October 9, 2014.
91,041	Nike, Inc., Procure To Pay Operations Group, Finance Department	Beaverton, OR	October 8, 2014.
91,462	Sprint, Handset Retrieval Team	Rio Rancho, NM	February 12, 2015.
91,523	Eaton Gainesboro, Industrial Sector, Hydraulics Group, Eaton Corporation, etc.	Gainesboro, TN	February 22, 2015.
91,642	Wells Fargo and Company, Division of Community Banking, Covenant Monitoring Unit.	Diamond Bar, CA	March 29, 2015.
91,783	Iron Mountain Information Management, LLC, Iron Mountain Incorporated, Customer Service Team, Allegis, etc.	Cerritos, CA	May 5, 2015.
91,795	York International Corporation, Industrial Refrigeration Division, Johnson Controls, Inc., Aerotek.	Waynesboro, PA	May 16, 2016.
91,795A	Magic Workforce Solutions, York International Corporation, Industrial Refrigeration Division, etc.	Waynesboro, PA	May 11, 2015.
91,816	Nike Foundation, Girl Effect, Nike, Inc., Prounlimited	Beaverton, OR	May 16, 2015.
91,818	Johnson Controls, Inc., Finance Shared Service Center	Milwaukee, WI	May 16, 2015.
91,818A	Johnson Controls, Inc., Information Technology	West Allis, WI	May 16, 2015.

TA–W No.	Subject firm	Location	Impact date
91,867	Agilent Technologies, Inc., Order Fulfillment and Supply Chain Group.	Danbury, CT	May 31, 2015.
91,932	Continental Casualty Company, Continental Corporation, Special Funds Unit & Claims Operations Unit.	Syracuse, NY	June 16, 2015.
91,963	International Business Machines Corporation (IBM), The US SPO Team, Technical Support Services, etc.	Camp Hill, PA	June 20, 2015.
91,963A	Manpower, International Business Machines Corporation (IBM), The US SPO Team, etc.	Camp Hill, PA	October 18, 2015.
91,964	Mark Architectural Lighting, Acuity Brands Lighting, Inc., Spherion, Aerotek, Ajulia.	Edison, NJ	June 24, 2015.
91,973	International Business Machines Corporation (IBM), Priority Support Team, Technical Support Services, etc.	Austin, TX	June 28, 2015.
91,974	W.W. Grainger, Inc., Expeditor Team	Lake Forest, IL	June 29, 2015.
91,983	CDK Global LLC, Hosting Solutions Division, Aerotek/Teksystems US, Apex Systems, Inc., etc.	Ann Arbor, MI	July 5, 2015.
92,000	Greatbatch, Ltd., Greatbatch, Inc., Superior Group, Volt Management Company, etc.	Plymouth, MN	November 8, 2016.
92,006	Dionex Corporation, Chromatography Analytical Technologies Division, Thermo Fisher Scientific.	Chelmsford, MA	June 29, 2015.
92,012	International Business Machines Corporation (IBM), ZKRA and ZB8A Departments, Technical Support Services, etc.	Schaumburg, IL	July 13, 2015.
92,012A	International Business Machines Corporation (IBM), ZKRA and ZB8A Departments, Technical Support Services, etc.	Smyrna, GA	July 13, 2015.
92,031	JP Morgan Chase, Hedge Fund Services Division, Robert Half, Manpower, and Randstad.	Brooklyn, NY	July 19, 2015.
92,049	Leonard's Metal, Inc	Wichita, KS	July 22, 2015
92,064	Groupon, Inc., Customer Service Department	Chicago, IL	July 27, 2015
92,067	Overland Solutions, Inc., An EXL Company, EXL Service Holdings, Inc.	Overland Park, KS	July 27, 2015.
92,081	International Business Machines Corporation (IBM), Sales Management Support, Sales and Distribution Division.	Somers, NY	August 2, 2015.
92,081A	International Business Machines Corporation (IBM), Sales Management Support, Sales and Distribution Division.	Phoenix, AZ	August 2, 2015.
92,081B	International Business Machines Corporation (IBM), Sales Management Support, Sales and Distribution Division.	Cincinnati, OH	August 2, 2015.
92,083	The ESAB Group, Inc., Colfax Corporation, Manpower	Florence, SC	September 19, 2016.
92,090	Ardagh Metal Packaging, Ardagh Group, S.A., Ajilon and Labor Ready.	Terminal Island, CA	August 4, 2015.
92,091	NMC Group, Inc. DBA Nylon Molders Corporation, Esterline Incorporated, Selec Staffing, Integrity Staffing, etc.	Pomona, CA	August 4, 2015.
92,099	Springer Science+Business Media LLC, Illustration Department	Philadephia, PA	August 9, 2015.
92,103	ADP, LLC, Order to Invoice Division	Augusta, GA	August 9, 2015.
92,109	Malvern Instruments Inc., Spectris Inc.	Houston, TX	August 12, 2015.
92,113	GE Power Chattanooga Turbines, fka Alstom Power Turbomachines LLC, General Electric Company, etc.	Chattanooga, TN	August 16, 2015.
92,115	International Business Machines Corporation (IBM), Service Delivery Managers, Information Technology Service Management, etc.	Hartford, CT	August 16, 2015.
92,126	IBM, Systems Management Operations (SMO), Business Analytics Service Team, etc.	Boulder, CO	August 19, 2015.
92,130	Bloomington Production Operations, LLC, Haier U.S. Appliance Solutions, GE Appliances.	Bloomington, IN	January 24, 2016.
92,131	Compressor Controls Corporation, Manpower, Palmer Group, Networks Inc., GNET Group, and IP Pathways.	Urbandale, IA	August 22, 2015.
92,136	International Business Machines Corporation (IBM), QXZA Department, 2F Division, Global Technology Services Div (GTS), etc.	Boulder, CO	August 23, 2015.
92,179	Nortech Systems, Inc., Insperity, United Employment, Inc	Augusta, WI	September 6, 2015.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
91,608	Harsco Metals & Minerals, North America, Koppel Plant, Harsco Corporation.	Koppel, PA	March 17, 2015.

The following certifications have been issued. The requirements of Section 222(f) (firms identified by the International Trade Commission) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
92,001	Boise Packaging & Newsprint, L.L.C., Packaging Corporation of America, Boise, Inc., Boise Paper Holdings, etc.	Santa Fe Springs, CA	February 22, 2015.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1) (employment decline or threat of separation) of section 222 has not been met.

TA–W No.	Subject firm	Location	Impact date
90,261	Verizon, MTS Engineers and Information Technology Quality Assurance.	Hempstead, NY	
90,286	Verizon Business Network Services, Inc., Conferencing Operations	Davenport, IA	

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
91,575	Swanson Group Manufacturing LLC, Glendale Sawmill, Glendale Plywood/Veneer Divisions, etc.	Glendale, OR	
91,875	Manitowoc Cranes, LLC, Manitowoc Company, Inc., Aerotek, FlexStaff, Waterstone, Zyqest, etc.	Manitowoc, WI	

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
85,355	Chevron Mining, Inc., Chevron Corporation, Stu Blattner, Inc. (SBI)	Questa, NM.	
91,041A	Nike, Inc., Corporate Services, Logistics & Services and Program/Process Excellence.	Beaverton, OR.	
91,327	W.P. & R.S. Mars Company	Hibbing, MN.	
91,475	Sprint	Blountville, TN.	
91,619	Allen Harim Foods, LLC, Allen Harim, Quality Staffing Services, Express Employment, etc.	Cordova, MD.	
91,626	Strata Mine Services, LLC, Sanders Contracting, LLC, Strata Products Worldwide, LLC.	Canonsburg, PA.	
91,874	UnitedHealthcare, UnitedHealthcare Employer and Individual Division, etc.	Richardson, TX.	
91,893	Sez Sew Stitching, Inc	Osceola Mills, PA.	
91,913	Helmerich & Payne International Drilling Company, Helmerich & Payne, Inc., RAMS Group.	Tulsa, OK.	
91,925	Paragon Geophysical Services, Inc	Wichita, KS.	
91,940	Halliburton Energy Services, Inc., Drilling and Evaluation Division, Sperry Drilling Services.	Bakersfield, CA.	
91,969	Silvanus Products, Inc., Employment Staffing Group, Inc. d/b/a/Talent Force.	St. Genevieve, MO.	
92,014	Mahar Tool Supply Company, Inc., Kelly Services	Dundee, MI.	
92,084	Northern Industrial Erectors, Inc	Grand Rapids, MN.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
91,572	Lehigh Specialty Melting Inc., WHEMCO, Inc	Latrobe, PA.	
92,128	FT Eng., Inc	Escondido, CA.	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
91,823	The News & Observer, The McClatchy Company	Raleigh, NC..	
92,050	Centrex Revenue Solutions, LLC, Integra Connect, LLC	Ellicott City, MD.	
92,088	MEMC Pasadena, Inc., SunEdison, Inc	Pasadena, TX.	
92,112	Mattel, Inc., Mattel Global Shared Service Solutions (MGSSS)	East Aurora, NY.	

The following determinations terminating investigations were issued because the petitions are the subject of ongoing investigations under petitions filed earlier covering the same petitioners.

TA–W No.	Subject firm	Location	Impact date
92,200	Celestica, Inc., Adecco	Ontario, CA.	

I hereby certify that the aforementioned determinations were issued during the period of *September 5, 2016 through September 16, 2016.* These determinations are available on the Department's Web site *https://www.doleta.gov/tradeact/taa/taa_search_form.cfm* under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 18th day of November 2016.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2016–28908 Filed 12–1–16; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–92,005]

CTS Corporation, Including On-Site Leased Workers From Specialized Staffing, Manpower, Aerotek, Personnel Partners, Talent Source Staffing, and Tech USA, Elkhart, Indiana; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 31, 2016, applicable to workers of CTS Corporation, including on-site leased workers from Specialized Staffing and Manpower, Elkhart, Indiana. The workers' firm is engaged in activities related to the production of accelerator pedals and actuators for the automotive industry. The notice has not been published in the **Federal Register** as of yet.

At the request of the state workforce office, the Department reviewed the certification for workers of CTS Corporation.

The subject firm reports that workers leased from Aerotek, Personnel Partners, Talent Source Staffing, and Tech USA were employed on-site at the Elkhart, Indiana location of CTS Corporation. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Aerotek, Personnel Partners, Talent Source Staffing, and Tech USA working on-site at the Elkhart, Indiana location of CTS Corporation.

The amended notice applicable to TA–W–92,005 is hereby issued as follows:

All workers of CTS Corporation, including on-site leased workers from Specialized Staffing, Manpower, Aerotek, Personnel Partners, Talent Source Staffing, and Tech USA, Elkhart, Indiana, who became totally or partially separated from employment on or after July 8, 2015, through August 31, 2018, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 20th day of October, 2016.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2016–28914 Filed 12–1–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, no later than December 12, 2016.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than December 12, 2016.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 18th day of November 2016.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[53 TAA petitions instituted between 8/22/16 and 9/2/16]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
92125	Soo Line Railroad Company d/b/a Canadian Pacific (State/One-Stop).	Minneapolis, MN	08/22/16	08/19/16
92126	IBM (State/One-Stop)	Boulder, CO	08/22/16	08/19/16
92127	Bank of America (State/One-Stop)	Portland, OR	08/22/16	08/19/16
92128	FT Eng., Inc. (Union)	Escondido, CA	08/22/16	08/19/16
92129	MAPE USA Inc. (State/One-Stop)	Cambridge, MN	08/23/16	08/22/16
92130	Bloomington Production Operations, LLC (Union)	Bloomington, IN	08/23/16	08/22/16
92131	Compressor Controls Corporation (Company)	Urbandale, IA	08/23/16	08/22/16
92132	Carrier Corporation (Company)	Indianapolis, IN	08/23/16	08/18/16
92133	Lego Systems, Inc. (Company)	Enfield, CT	08/24/16	08/04/16
92134	Pacific Crest Transformers, Inc. (State/One-Stop)	White City, OR	08/24/16	08/23/16
92135	International Business Machines Corporation (IBM) (State/One-Stop).	Boulder, CO	08/24/16	08/23/16
92136	International Business Machines Corporation (IBM) (State/One-Stop).	Boulder, CO	08/24/16	08/23/16
92137	Weyerhaeuser NR Company (State/One-Stop)	Columbia Falls, MT	08/24/16	08/23/16
92138	Hewlett Packard, Inc. (State/One-Stop)	Palo Alto, CA	08/25/16	08/24/16
92139	John Deere Seeding Group Moline (Union)	Moline, IL	08/25/16	07/21/16
92140	Bryant Rubber Corp. (State/One-Stop)	Harbor City, CA	08/25/16	08/24/16
92141	TE Connectivity (Company)	Rock Hill, SC	08/26/16	08/25/16
92142	Erickson Inc. (State/One-Stop)	Portland, OR	08/26/16	08/25/16
92143	BNY Mellon Investment Servicing US Inc. (Workers)	Westborough, MA	08/26/16	08/25/16
92144	Mitsui & Co. Precious Metals, Inc. (Workers)	New York, NY	08/26/16	07/26/16
92145	Medical Billing Specialist Limited (Workers)	Port Orange, IL	08/26/16	08/25/16
92146	Commercial Vehicle Group, Inc. (Company)	Monona, IA	08/26/16	08/23/16
92147	Daimler Components and Logistics (Union)	Gastonia, NC	08/26/16	08/18/16
92148	Fox Factory, Inc. (State/One-Stop)	Watsonville, CA	08/26/16	08/11/16
92149	Hertz Corporation (State/One-Stop)	Oklahoma City, OK	08/29/16	08/26/16
92150	Fibrant, LLC (Company)	Augusta, GA	08/29/16	08/26/16
92151	TaylorMade Golf Company, Inc. (State/One-Stop)	Carlsbad, CA	08/29/16	08/26/16
92152	Dura Automotive Systems (Company)	Stockton, IL	08/29/16	08/29/16
92153	Duro Textiles, LLC (Union)	Fall River, MA	08/30/16	08/29/16
92154	Benu Networks, Inc. (State/One-Stop)	Billerica, MA	08/30/16	08/29/16
92155	Hewlett Packard Enterprise (State/One-Stop)	Plano, TX	08/30/16	08/29/16
92156	Saran Industries (Workers)	Shelbyville, IN	08/30/16	08/30/16
92157	Columbia Industries (State/One-Stop)	Hillsboro, OR	08/31/16	08/30/16
92158	IMMUNIO USA, Inc. (State/One-Stop)	Portland, OR	08/31/16	08/30/16
92159	Huntington Alloys Corporation/Special Metals Division (State/One-Stop).	Catlettsburg, KY	08/31/16	08/30/16
92160	Insight Optical Manufacturing Company of Florida Inc. (Company).	Hialeah, FL	08/31/16	08/25/16
92161	Maxim Integrated Products, Inc. (State/One-Stop)	San Jose, CA	08/31/16	08/30/16
92162	Suncoke Energy, Inc. (Workers)	Lisle, IL	08/31/16	08/30/16
92163	Acosta Sales & Marketing (State/One-Stop)	Marlborough, MA	09/01/16	08/29/16
92164	Triad Mining, LLC (Workers)	Oakland City, IN	09/01/16	08/31/16
92165	Lufkin Industries LLC (Workers)	Cullman, AL	09/01/16	08/31/16
92166	John William Siegel (State/One-Stop)	Atascadero, CA	09/01/16	08/31/16
92167	Valmark Interface Solutions (State/One-Stop)	Livermore, CA	09/01/16	08/31/16
92168	ALW-Architectural Lighting Works (State/One-Stop)	Hayward, CA	09/01/16	08/31/16
92169	International Business Machines Corporation (IBM) (Workers)	Austin, TX	09/01/16	08/31/16
92169B	International Business Machines Corporation (IBM) (Workers)	Coppell, TX	09/01/16	08/31/16
92169A	International Business Machines Corporation (IBM) (Workers)	Austin, TX	09/01/16	08/31/16
92170	QBE Americas, Inc. (State/One-Stop)	Overland Park, KS	09/01/16	08/31/16
92171	Health Care Service Corporation (Workers)	Chicago, IL	09/01/16	08/31/16
92172	John Deere Harvester Works (Union)	East Moline, IL	09/01/16	08/31/16
92173	Environments, Inc. (Workers)	Beaufort, SC	09/01/16	08/23/16
92174	Caterpillar Forest Products Prentice (Workers)	Prentice, WI	09/02/16	08/23/16
92175	Dow Business Services, LLC (State/One-Stop)	Midland, MI	09/02/16	09/01/16

[FR Doc. 2016–28913 Filed 12–1–16; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Cascades Job Corps College and Career Academy Pilot Evaluation

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of the Assistant Secretary for Policy (OASP) sponsored information collection request (ICR) proposal titled, ''Cascades Job Corps College and Career Academy Pilot Evaluation,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 3, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201609-1290-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OS, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks PRA authority for the Cascades Job Corps College and Career Academy (CCCA) Pilot Evaluation information collection to support an impact and implementation evaluation of that program. More specifically, this ICR is the first in a series of requests that correspond to an array of data collection activities for the evaluation of the CCCA pilot. The OASP seeks approval in this submission for: (1) A baseline information form to support the impact study, (2) tracking data to support the planned 18-month follow-up survey, and (3) stakeholder interview and student focus group discussion guides to support the implementation study. Workforce Innovation and Opportunity Act section 169 authorizes this information collection. *See* 29 U.S.C. 3224.

This proposed 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 it is approved by the OMB under the PRA 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 if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notice published in the **Federal Register** on June 27, 2016 (81 FR 41598).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB ICR Reference Number 201609–1290–001. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the 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 submission of responses.

Agency: DOL–OS.

Title of Collection: Cascades Job Corps College and Career Academy Pilot Evaluation.

OMB ICR Reference Number: 201609–1290–001.

Affected Public: Individuals or Households; State, Local, and Tribal Governments; and Private Sector—businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 749.

Total Estimated Number of Responses: 1,852.

Total Estimated Annual Time Burden: 372 hours.

Total Estimated Annual Other Costs Burden: $0.

Dated: November 25, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–28989 Filed 12–1–16; 8:45 am]
BILLING CODE 4510–HX–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 16–083]

NASA Federal Advisory Committees; Notice of Establishment Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App.

AGENCY: National Aeronautics and Space Administration.

The Administrator of the National Aeronautics and Space Administration (NASA) has determined that the establishment of five (5) NASA Federal advisory committees under the Federal Advisory Committee Act (FACA) is necessary and in the public interest in connection with the performance of duties imposed upon NASA by law. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Name of Federal Advisory Committees: Astrophysics Advisory Committee; Heliophysics Advisory Committee; Earth Science Advisory Committee; Planetary Science Advisory

Committee; Human Exploration and Operations Research Advisory Committee.

Purpose and Objectives: Each of the five (5) NASA Federal advisory committees will advise NASA on scientific matters within the scope of its respective area of responsibility. Specifically, the scientific matters involve NASA research programs, policies, plans, and priorities pertaining to astrophysics, heliophysics, Earth science, planetary science, and human exploration and operations research. The five (5) NASA Federal advisory committees will function solely as advisory bodies and will comply fully with the provisions of FACA.

Membership: Membership of each of the five (5) NASA Federal advisory committees and any subordinate groups formed under each committee shall consist of individual subject-matter experts who will serve as Special Government Employees (unless they are Regular Government Employees). They will be chosen from among academia, industry and government with demonstrated and well-recognized knowledge, expertise and experience in fields relevant to their respective scientific disciplines. The membership of each Federal advisory committee will be fairly balanced in terms of points of view represented and functions to be performed. Diversity shall be considered as well.

Duration: Each of the five (5) NASA Federal advisory committees is a discretionary committee and is envisioned to be continuing entity subject to charter renewals every two years.

Responsible NASA Official: Dr. Gale Allen, Deputy Chief Scientist, NASA Headquarters, (202) 358–4580, or *gale.allen@nasa.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Gale Allen, Deputy Chief Scientist, NASA Headquarters, (202) 358–4580, or *gale.allen@nasa.gov.*

Carol J. Hamilton,

Acting Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2016–28981 Filed 12–1–16; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, Division of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Or by email: *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: On October 26, 2016, the National Science Foundation published notices in the **Federal Register** of permit applications received. The permits were issued on November 29, 2016 to:

1. Wendell J. Long, Jr., Permit No. 2017–024
2. Andrew G. Fountain, Permit No. 2017–025
3. Donald Fortescue, Permit No. 2017–026

Nadene G. Kennedy,

Polar Coordination Specialist, Division of Polar Programs.

[FR Doc. 2016–28964 Filed 12–1–16; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2014–0254]

Advanced Light-Water Reactor Probabilistic Risk Assessment

AGENCY: Nuclear Regulatory Commission.

ACTION: Interim staff guidance; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Interim Staff Guidance (ISG), DC/COL–ISG–028, ''Assessing the Technical Adequacy of the Advanced Light-Water Reactor Probabilistic Risk Assessment for the Design Certification Application and Combined License Application.'' The purpose of this ISG is to provide guidance for assessing the technical adequacy of the probabilistic risk assessment (PRA) needed for advanced light-water reactor (ALWR) design certification (DC) and combined license (COL) applications. This guidance addresses only the typical conditions for the DC and COL application.

DATES: The DC/COL–ISG–028 is available on December 2, 2016.

ADDRESSES: Please refer to Docket ID NRC–2014–0254 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 Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0254. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@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 *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, the ADAMS accession numbers are provided in a table in the ''Availability of Documents'' section of this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Public Web site:* NRC posts its issued staff guidance at *http://www.nrc.gov/reading-rm/doc-collections/isg.*

FOR FURTHER INFORMATION CONTACT: Mark Lintz, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–4051; email: *Mark.Lintz@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC is issuing DC/COL–ISG–028, ''Assessing the Technical Adequacy of the Advanced Light-Water Reactor Probabilistic Risk Assessment for the Design Certification Application and Combined License Application,'' to provide specific review guidance for assessing the technical adequacy of the PRA needed for an application for a DC of an ALWR under part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' specifically 10 CFR 52.47(a)(27). This ISG will also apply to an application for a COL under 10 CFR 52.79(a)(46). Specifically, this guidance addresses how these applicants can use American Society of Mechanical Engineers/American Nuclear Society (ASME/ANS) RA-Sa-2009, ''Addenda to ASME/ANS RA–S–2008 Standard for Level 1/Large

Early Release Frequency Probabilistic Risk Assessment for Nuclear Power Plant Applications,'' (the PRA Standard), as endorsed by NRC's Regulatory Guide (RG) 1.200, Revision 2, ''An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities.''

The NRC staff intends to incorporate DC/COL–ISG–028 into the next revision of RG 1.200, Revision 2; RG 1.206, ''Combined License Applications for Nuclear Power Plants;'' NUREG–0800, ''Standard Review Plan (SRP) for the Review of Safety Analysis Reports for Nuclear Power Plants;'' and SRP Chapter 19.0, ''Probabilistic Risk Assessment and Severe Accident Evaluation for New Reactors,'' as appropriate.

II. Public Comments

The NRC issued draft DC/COL–ISG–028, ''Assessing the Technical Adequacy of the Advanced Light-Water Reactor Probabilistic Risk Assessment for the Design Certification Application and Combined License Application,'' in the **Federal Register** on November 26, 2014 (79 FR 70575), for a 60-day comment period. The comment period ended on January 26, 2015.

The Commission received 49 comments from the Nuclear Energy Institute (NEI). These comments were addressed and are available in the comment resolution document.

III. Backfitting and Issue Finality

The NRC is issuing this ISG to assist the NRC staff when assessing the technical adequacy of PRAs submitted as part of ALWR DC and COL applications. Issuance of this ISG does not constitute backfitting as defined in § 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR) (the Backfit Rule) or otherwise be inconsistent with the issue finality provisions in 10 CFR part 52. The NRC staff's position is based upon the following considerations.

1. The ISG positions do not constitute backfitting, inasmuch as the ISG is internal guidance to NRC staff.

The ISG provides interim guidance to the NRC staff on how to review an application for NRC regulatory approval in the form of licensing. Changes in internal NRC staff guidance are not matters for which either nuclear power plant applicants or licensees are protected under 10 CFR 50.109 or the issue finality provisions of 10 CFR part 52.

2. Backfitting and issue finality—with certain exceptions discussed below—do not protect current or future applicants.

Applicants are not, with certain exceptions, protected by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. This is because neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52—with certain exclusions discussed below—were intended to apply to every NRC action that substantially changes the expectations of current and future applicants.

The exceptions to the general principle are applicable whenever an applicant references a 10 CFR part 52 license (*e.g.,* an early site permit) or NRC regulatory approval (*e.g.,* a design certification rule) with specified issue finality provisions. The NRC staff does not, at this time, intend to impose the positions represented in the ISG in a manner that is inconsistent with any issue finality provisions. If, in the future, the NRC staff seeks to impose a position in the ISG in a manner that does not provide issue finality as described in the applicable issue finality provision, then the NRC staff must address the criteria for avoiding issue finality as described in the applicable issue finality provision.

3. NRC consideration of PRA impacts to address the application of the PRA Standard are outside the scope of matters subject to backfitting protection, and are not a violation of issue finality provisions.

The NRC consideration of PRA impacts to address the application of the PRA Standard, and an applicant's submission of risk-assessment information needed to support the NRC's assessment of the technical adequacy of the PRA, do not fall within the scope of matters that constitute backfitting. Consideration of PRA impacts to address the application of the PRA Standard falls within the scope of matters protected under issue finality provisions. However, this protection applies only if a COL application references a PRA. Therefore, issuance of this ISG does not constitute a violation or inconsistency of the issue finality provisions applicable to COL applications referencing a PRA.

IV. Congressional Review Act

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

V. Availability of Documents

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

Document title	ADAMS accession No.
Interim Staff Guidance-028, ''Assessing the Technical Adequacy of the Advanced Light-Water Reactor Probabilistic Risk Assessment for the Design Certification Application and Combined License Application'' (Clean Version).	ML16130A468
Interim Staff Guidance-028, ''Assessing the Technical Adequacy of the Advanced Light-Water Reactor Probabilistic Risk Assessment for the Design Certification Application and Combined License Application'' (Redline Version).	ML16155A055
Interim Staff Guidance-028, Comment Resolution Table	ML16130A466
NUREG–0800, Revision 3, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition, Chapter 19.0, Severe Accidents''.	ML15089A068
Regulatory Guide 1.200, Revision 2, ''An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities''.	ML090410014
Regulatory Guide 1.206, ''Combined License Applications for Nuclear Power Plants''	ML070720184

Dated at Rockville, Maryland, this 28th day of November, 2016.

For the Nuclear Regulatory Commission.

Joseph Colaccino,

Chief, New Reactor Rulemaking and Guidance Branch, Division of Engineering Infrastructure and Advanced Reactors, Office of New Reactors.

[FR Doc. 2016–28962 Filed 12–1–16; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meeting

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice of Federal Prevailing Rate Advisory Committee Meeting Date in 2017.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that a meeting of the Federal Prevailing Rate Advisory Committee will be held on Thursday, January 12, 2017.

The meeting will start at 10 a.m. and will be held in Room 5A06A, U.S. Office of Personnel Management Building, 1900 E Street NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal prevailing rate employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the U.S. Office of Personnel Management.

This scheduled meeting is open to the public with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the U.S. Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public. Reports for calendar years 2008 to 2015 are posted at *http://www.opm.gov/fprac.* Previous reports are also available, upon written request to the Committee.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee at U.S. Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5H27, 1900 E Street NW., Washington, DC 20415, (202) 606–2858.

U.S. Office of Personnel Management.

Sheldon Friedman,

Chairman, Federal Prevailing Rate Advisory Committee.

[FR Doc. 2016–28985 Filed 12–1–16; 8:45 am]

BILLING CODE 6325–39–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2017–46]

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:* December 5, 2016.

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

II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*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 3007.40.

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 3010, and 39 CFR part 3020, 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 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2017–46; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* November 23, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Max E. Schnidman; *Comments Due:* December 5, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–28907 Filed 12–1–16; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79405; File No. SR–MIAX–2016–44]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 518, Complex Orders

November 28, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 18, 2016, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 Exchange Rule 518, Complex Orders.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 518, Complex Orders, to state that (i) the System [3] will not commence a Complex Auction [4] within a defined time period prior to the end of the trading session as described below; and (ii) the size of an RFR Response (defined below) that is submitted with a size greater than the aggregate auctioned size (described below) will be capped for allocation purposes at the aggregate auctioned size (defined below).

Complex Auction Defined Time Period

Certain option classes, as determined by the Exchange and communicated to Members via Regulatory Circular, are eligible to participate in a Complex Auction for possible price improvement.[5] Members may submit Complex Auction-on-Arrival (''cAOA'') orders [6] that may initiate a Complex Auction, and the Exchange may determine to automatically submit a Complex Auction-eligible order [7] into a Complex Auction. Upon receipt of a Complex Auction-eligible order or upon an evaluation by the System [8] indicating that there is a Complex Auction-eligible order resting on the Strategy Book,[9] the Exchange may begin the Complex Auction process by sending a request for responses (''RFR'') message. Members may submit a response to the RFR message (an ''RFR Response'') during the ''Response Time Interval.'' [10] At the end of the Response Time Interval, Complex Auction-eligible orders (and other complex orders and quotes) may be executed in whole or in part against the best priced contra side interest.[11]

Exchange Rule 518(d)(2) governs the commencement of a Complex Auction. Upon receipt of a Complex Auction-eligible order or upon an evaluation by the System indicating that there is a Complex Auction-eligible order resting on the Strategy Book, the Exchange may begin the Complex Auction process by sending an RFR message to all subscribers to the Exchange's data feeds that deliver RFR messages.

The Exchange proposes to amend Exchange Rule 518(d)(2) by stating that, notwithstanding the foregoing provisions of the rule, the System will not commence a Complex Auction within a defined time period prior to the end of the trading session (the ''Defined Time Period'') established by the Exchange and communicated to Members via Regulatory Circular. The Defined Time Period shall be at least 100 milliseconds, and may not exceed 10 seconds. The Exchange believes that this proposed flexibility in the duration of the Defined Time Period is necessary because the duration of the Response Time Interval is flexible [12] and must not be able to exceed the Defined Time Period. For example, if the Response Time Interval is 300 milliseconds and the Defined Time Period is 200 milliseconds, a Complex Auction with a 300 millisecond Response Time Interval could commence within 200 milliseconds of the end of the trading session, and the Complex Auction could therefore not be completed. Flexibility in the establishment of the duration of the Defined Time Period would enable the Exchange to make the duration of the Response Time Interval and the Defined Time Period consistent in this regard. The 10-second maximum duration for the Defined Time Period is intended as an outlier to address situations where the Exchange may need to ensure a fair and orderly marketplace during times of extreme

[3] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[4] Certain option classes, as determined by the Exchange and communicated to Members via Regulatory Circular, will be eligible to participate in a Complex Auction (an ''eligible class''). Upon evaluation as set forth in Exchange Rule 518(c)(5), the Exchange may determine to automatically submit a Complex Auction-eligible order into a Complex Auction. Upon entry into the System or upon evaluation of a complex order resting at the top of the Strategy Book, Complex Auction-eligible orders may be subject to an automated request for responses (''RFR''). *See* Exchange Rule 518(d).

[5] *See id.*

[6] A cAOA order is a complex order designated to be placed into a Complex Auction upon receipt or upon evaluation. Complex orders that are not designated as cAOA will, by default, not initiate a Complex Auction upon arrival, but except as described herein will be eligible to participate in a Complex Auction that is in progress when such complex order arrives or if placed on the Strategy Book may participate in or may initiate a Complex Auction. *See* Exchange Rule 518(b)(2)(i).

[7] A ''Complex Auction-eligible order'' means a complex order that, as determined by the Exchange, is eligible to initiate or join a Complex Auction based in a variety of factors. *See* Exchange Rule 518(d)(1).

[8] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[9] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex Quotes. *See* Exchange Rule 518(a)(17).

[10] The ''Response Time Interval'' means the period of time during which responses to the RFR may be entered. The Exchange will determine the duration of the Response Time Interval, which shall not exceed 500 milliseconds, and will communicate it to Members via Regulatory Circular. *See* Exchange Rule 518(d)(3).

[11] For a complete description of the Complex Auction process, *see* Exchange Rule 518(d).

[12] *See supra* note 10.

volatility and thus may deem it necessary not to commence Complex Auctions as the end of the trading session approaches.

For consistency, the Exchange is proposing a corresponding amendment to the definition of a cAOA order [13] in Exchange Rule 518(b)(2)(i) by stating that a cAOA order received during the Defined Time Period prior to the end of the trading session (as described in proposed Rule 518(d)(2)) will not initiate a new Complex Auction.

The purpose of this provision is to ensure that Complex Auctions that are commenced on the Exchange can be completed prior to the close of trading. Upon receipt of a Complex Auction-eligible order or upon an evaluation by the System indicating that there is a Complex Auction-eligible order resting on the Strategy Book, the Exchange may begin the Complex Auction process by sending an RFR message, which then begins the Response Time Interval during which Complex Auction responses may be submitted.

The Exchange believes it is necessary to ensure that a Complex Auction will not commence when the trading session would end prior to the end of the Response Time Interval. Thus, any Complex Auction commenced on the Exchange will be completed during the trading session.

Capping the RFR Response Size

The Exchange proposes to amend rules relating to the Complex Auction to limit the size of RFR Responses for trade allocation purposes.

Exchange Rule 518(d)(4), RFR Response, states that RFR Responses must be a Complex Auction-or-Cancel order (a ''cAOC order'') [14] or a Complex Auction or Cancel eQuote (a ''cAOC eQuote'').[15] RFR Responses must indicate their size and are firm (*i.e.,* guaranteed at the RFR Response price and size) at the end of the Response Time Interval. The Exchange is proposing to amend Exchange Rule 518(d)(4) to cap the size of RFR Responses (*i.e.,* cAOC orders and cAOC eQuotes) by stating that an RFR Response with a size greater than the aggregate size of interest at the same price on the same side of the market as the initiating Complex Auction-eligible order (the ''aggregate auctioned size'') [16] will be capped for allocation purposes at the aggregate auctioned size. Thus, an RFR Response with a size greater than the aggregate auctioned size will be deemed to be for a size that is equal to the aggregate auctioned size.

For consistency, the Exchange is proposing to amend Exchange Rule 518(b)(3), which defines a cAOC order, to state that a cAOC order with a size greater than the aggregate auctioned size will be capped for allocation purposes at the aggregate auctioned size. Additionally, the Exchange is proposing to amend Rule 518, Interpretations and Policies .02, which defines a cAOC eQuote, to state that a cAOC eQuote with a size greater than the aggregate auctioned size (as defined in Rule 518(d)(4)) will be capped for allocation purposes at the aggregate auctioned size.

The purpose of capping the size of RFR Responses is to ensure that the System allocates contracts among participants in the Complex Auction based on the aggregate size of the Complex Auction-eligible order and interest joining the Complex Auction-eligible order being auctioned. Contracts in the Complex Auction are allocated on a pro-rata basis pursuant to Exchange Rule 514(c)(2) [17] among participants in various categories that are ranked in priority order [18] in Rule 518(d)(7).

Capping the size of RFR Responses for purposes of pro-rata allocation is also designed to reduce the possibility that participants could circumvent or ''game'' the allocation rules through the submission of oversized RFR Responses. In fact, for the same purpose, the Exchange currently caps the size of certain orders in the simple market for allocation purposes. For example, the System will cap individual responses received during a liquidity refresh pause timer on the opposite side from the initiating order to the size of the initiating order and any same side joiners received during the liquidity refresh pause timer for purposes of pro-rata allocation against the initiating order and any same side joining interest received during the liquidity refresh pause.[19] Also, in the MIAX PRIME Auction for simple orders, an RFR response with a size greater than the size of the Agency Order will be capped at the size of the Agency Order.[20] The Exchange believes that adding the additional language regarding a cap applied to the size of RFR Responses will clarify the manner in which the System allocates contracts at the end of the Complex Auction so that market participants more clearly understand the treatment of their orders and quotes during the Complex Auction process, and will also reduce the impact of potentially manipulative behavior by market participants to alter the pro-rata allocation.

2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act [21] in general, and furthers the objectives of Section 6(b)(5) of the Act [22] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

In particular, the Exchange's proposal to set a Defined Time Period during which a Complex Auction will not be commenced is designed to remove impediments to and perfect the mechanisms of a free and open market and a national market system and to protect investors and the public interest by ensuring that the System can complete the Complex Auction process before the end of the trading session. This guarantees that investors will receive the full benefit of the Complex Auction process and that Complex auctions on the Exchange will be

[13] *See supra* note 6.

[14] A cAOC order is a complex limit order used to provide liquidity during a specific Complex Auction with a time in force that corresponds with that event. cAOC orders are not displayed to any market participant, and are not eligible for trading outside of the event. *See* Exchange Rule 518(b)(3).

[15] cAOC eQuote is an eQuote submitted by a Market Maker that is used to provide liquidity during a specific Complex Auction with a time in force that corresponds with the duration of the Complex Auction. cAOC eQuotes will not: (i) Be executed against individual orders and quotes resting on the Simple Order Book; (ii) be eligible to initiate a Complex Auction, but may join a Complex Auction in progress; (iii) rest on the Strategy Book; or (iv) be displayed. *See* Exchange Rule 518, Interpretations and Policies .02(c)(1).

[16] Incoming unrelated complex orders and quotes that are eligible to join a Complex Auction and are received during the Response Time Interval for a Complex Auction-eligible order will join the Complex Auction, will be ranked by price, and will be allocated pursuant to Rule 518(d)(7). *See* Exchange Rule 518(d)(8).

[17] Exchange Rule 514(c)(2), Pro-Rata Allocation, states that under this method, resting quotes and orders on the Book are prioritized according to price. If there are two or more quotes or orders at the best price then the contracts are allocated proportionally according to size (in a pro-rata fashion). If the executed quantity cannot be evenly allocated, the remaining contracts will be distributed one at a time based upon price-size-time priority.

[18] Orders and quotes executed in a Complex Auction are allocated pursuant to Exchange Rule 518(d)(7).

[19] *See* Exchange Rule 515, Interpretations and Policies .03.

[20] See Exchange Rule 515A(a)(2)(i)(G).

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(5).

completed prior to the end of the trading session.

The proposed rule change promotes just and equitable principles of trade by capping the size of RFR Responses, which ensures that the system allocates contracts among participants in the Complex Auction based on the actual aggregate size of the Complex Auction-eligible order and interest joining the Complex Auction-eligible order being auctioned.

Furthermore, capping the size of RFR Responses for purposes of pro-rata allocation is designed to prevent fraudulent and manipulative acts and practices by reducing the possibility that participants could circumvent or ''game'' the allocation rules through the submission of an oversized RFR Response. Moreover, the Exchange believes that adding the additional language regarding a cap applied to the size of RFR Responses removes impediments to and perfects the mechanisms of a free and open market and a national market system by clarifying the manner in which the System allocates contracts at the end of the Complex Auction so that market participants more clearly understand the treatment of their orders and quotes during the Complex Auction process.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Specifically, the Exchange believes that its proposal to cap the size of RFR Responses enhances competition in the Complex Auction by eliminating the ability of Complex Auction participants to ''game'' the pro-rata allocation, thus encouraging participants to submit competitive RFR Responses and ensuring that the size associated with their RFR Response will be calculated fairly as a percentage of the size associated with RFR Responses submitted to the Complex Auction.

Additionally, the Exchange's proposal to establish a Defined Time Period prior to the end of the trading session within which the Exchange will not commence a Complex Auction is not competitive in nature. This proposal is intended to ensure that the Complex Auction process can be completed once it has begun, and to safeguard the orderliness of the MIAX marketplace at the end of the trading session.

For all the reasons stated, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and believes the proposed change will in fact enhance competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [23] and Rule 19b–4(f)(6) thereunder.[24]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) [25] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay to allow the proposal to become immediately effective. As discussed above, the Exchange states that the proposal to set a Defined Time Period will help guarantee that Complex Auctions on the Exchange will be completed prior to the end of the trading session. The Exchange also states that its proposal to cap the size of RFR Responses for purposes of pro-rata allocation is designed to reduce the possibility that participants could circumvent or ''game'' the allocation rules through the submission of an oversized RFR Response. In addition, as discussed above, MIAX also caps the size of responses to its PRIME Auction and responses received during a liquidity refresh pause in its simple market. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change will allow the Exchange to implement the Defined Time Period in its Complex Auction, which the Exchange states will ensure that Complex Auctions begun just prior to the end of the trading session will be completed before the end of the trading session. In addition, the Commission believes that waiving the 30-day operative delay for the Exchange's proposal to cap the size of RFR Responses is consistent with the protection of investors and the public interest because the proposed rule change is consistent with treatment of certain orders in the Exchange's simple market.[26]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MIAX–2016–44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2016–44. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[25] 17 CFR 19b–4(f)(6)(iii).

[26] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 Web site 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2016–44 and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28928 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79407; File No. SR–Phlx–2016–114]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Commentary .14 to Rule 3317 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

November 28, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 14, 2016, NASDAQ PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .14 to Rule 3317 (Compliance with Regulation NMS Plan to Implement a Tick Size Pilot) to provide the SEC with notice of its efforts to re-program its systems to eliminate a re-pricing functionality for certain orders in Test Group Three securities in connection with the Regulation NMS Plan to Implement a Tick Size Pilot Program (''Plan'' or ''Pilot'').[3]

The text of the proposed rule change is set forth below. Proposed new language is italicized; deleted text is in brackets.

* * * * *

NASDAQ PHLX Rules

* * * * *

3317. Compliance With Regulation NMS Plan To Implement a Tick Size Pilot

(a) through (d) No Change.

Commentary: .01–.13 No change.

.14 Until [November 14, 2016] *December 12, 2016,* the treatment of Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols in Test Group Three securities shall be as follows:

Following entry, and if market conditions allow, a Price to Comply Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Price to Display Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Display Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price.

Following entry, and if market conditions allow, the Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the Exchange Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

* * * * *

[3] *See* Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (''Approval Order'').

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

On September 7, 2016, the Exchange filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change (''Proposal'') to adopt paragraph (d) and Commentary .12 to Exchange Rule 3317 to describe changes to system functionality necessary to implement the Plan. The Exchange also proposed amendments to Rule 3317(a) and (c) to clarify how the Trade-at exception may be satisfied. The SEC published the Proposal in the **Federal Register** for notice and comment on September 20, 2016.[4] Phlx subsequently filed three Partial Amendments to clarify aspects of the Proposal. The Commission approved the Proposal, as amended, on October 7, 2016.[5]

In SR–Phlx–2016–92, Phlx had initially proposed a re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Group Three securities.[6] Phlx subsequently

[4] *See* Securities Exchange Act Release No. 78835 (September 14, 2016), 81 FR 64552 (September 20, 2016) (SR–Phlx–2016–92).

[5] *See* Securities Exchange Act Release No. 79074 (October 7, 2016) (SR–Phlx–2016–92).

[6] As originally proposed, Rule 3317(d)(2) stated that Price to Comply Orders in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price. Rule 3317(d)(3) stated that, if market

Continued

determined that it would not offer this re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Group Three securities. As part of Partial Amendment No. 2 to SR–Phlx–2016–92, Phlx proposed to delete the relevant language from Rule 3317 related to this re-pricing functionality.

In that amendment, Phlx noted that this change would only impact the treatment of Price to Comply Orders, Non-Displayed Orders, and Post-Only orders that are submitted through the OUCH and FLITE protocols in Test Group Three Pilot Securities, as these types of Orders that are currently submitted to Phlx through the RASH or FIX protocols are already subject to this re-pricing functionality and will remain subject to this functionality under the Pilot.

In the Amendment, Phlx further noted that its systems are currently programmed so that Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Securities may be adjusted repeatedly to reflect changes to the NBBO and/or the best price on the Phlx book. Phlx stated that it is re-programming its systems to remove this functionality for Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Securities. In the Amendment, Phlx stated that it anticipated that this re-programming shall be completed no later than November 30, 2016. If it appeared that this functionality would remain operational by October 17, 2016, Phlx indicated that it would file a proposed rule change with the SEC and will provide notice to market participants sufficiently in advance of that date to provide effective notice. The rule change and the notice to market participants would describe the current operation of the Phlx systems in this regard, and the timing related to the re-programming.

On October 17, 2016, Phlx filed a proposal to extend the date by which it would complete the re-programing of its systems to eliminate the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols.[7] In that proposal, Phlx stated that it anticipated that this re-programming shall be complete on or before October 31, 2016.[8]

On October 31, 2016, Phlx submitted a proposed rule change to extend the date by which it would eliminate the re-pricing functionality to November 14, 2016.[9] In that proposal, Phlx stated that it was still determining how to modify its systems to eliminate the current re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols.

At this time, Phlx is in the process of re-programming its systems to eliminate the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols. Phlx anticipates that this re-programming shall be complete on or before December 12, 2016.

Therefore, the current treatment of Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols in Test Group Three securities shall be as follows:

Following entry, and if market conditions allow, a Price to Comply Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Price to Display Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Display Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price.

Following entry, and if market conditions allow, a Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the Phlx Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The purpose of this filing is to inform the SEC and market participants of the status of Phlx's attempts to re-program its systems to remove the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, and the current treatment of such orders pending the removal of this functionality. This proposal is consistent with the Act because it provides the SEC and market participants with notice of Phlx's efforts in this regard, and is being submitted in connection with the statements made by Phlx in SR–Phlx–2016–92, SR–Phlx–2016–106, and SR–Phlx–2016–110 in proposing the removal of this functionality.

Phlx also believes that the proposal is consistent with the Act because the re-pricing functionality will not significantly impact the data gathered pursuant to the Pilot. Phlx notes that this re-pricing functionality only affects Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols for Test Group Three securities until the re-pricing functionality is eliminated, and only becomes relevant when an Order in a Test Group Three security would cross a Protected Quotation of another market center. Phlx has analyzed data relating to the frequency

conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price. Rule 3317(d)(4) stated that, if market conditions allow, the Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the Phlx Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

[7] *See* Securities Exchange Act Release No. 79156 (October 25, 2016) (SR–Phlx–2016–106).

Subsequent to the approval of SR–Phlx–2016–92, Phlx become aware that this re-pricing functionality also applies to Price to Display Orders that are entered through the OUCH and FLITE protocols in Test Group Three Securities, and included those Orders as part of SR–Phlx–2016–106 accordingly. Price to Display Orders will be treated in the same manner as Price to Comply Orders under the re-pricing functionality.

[8] *Id.*

[9] *See* Securities Exchange Act No. 79261 (November 8, 2016) (SR–Phlx–2016–110).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

with which Orders in Test Group Three securities are entered with a limit price that would cross a Protected Quotation of another market center, and believes that the re-pricing functionality will be triggered infrequently.[12] The Exchange also notes that it is diligently working to eliminate the current re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, and that it anticipates this re-programming to be complete on or before December 12, 2016.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The purpose of this proposal is to provide the SEC and market participants with notice of Phlx's efforts to remove its re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, consistent with its statements in SR–Phlx–2016–92, SR–Phlx–2016–106, and SR–Phlx–2016–110.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing change has become effective pursuant to Section 19(b)(3)(A)(iii) [13] of the Act and Rule 19b–4(f)(6) [14] thereunder, in that it effects a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2016–114 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2016–114. 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 Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2016–114 and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28930 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

[12] For example, for the time period between October 17 and November 11, 2016, 0.08% of orders that were entered on the NASDAQ Stock Market LLC in Test Group Three securities were entered at a price that crossed the NBBO.

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79409; File No. SR–BX–2016–061]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Commentary .14 to Rule 4770 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

November 28, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 14, 2016, NASDAQ BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .14 to Rule 4770 (Compliance with Regulation NMS Plan to Implement a Tick Size Pilot) to provide the SEC with notice of its efforts to re-program its systems to eliminate a re-pricing functionality for certain orders in Test Group Three securities in connection with the Regulation NMS Plan to Implement a Tick Size Pilot Program (''Plan'' or ''Pilot'').[3]

The text of the proposed rule change is set forth below. Proposed new language is italicized; deleted text is in brackets.

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (''Approval Order'').

NASDAQ BX Rules

* * * * *

4770. Compliance With Regulation NMS Plan To Implement a Tick Size Pilot

(a) through (d) No Change.

Commentary

.01–.13 No change.

.14 Until [November 14, 2016] *December 12, 2016,* the treatment of Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols in Test Group Three securities shall be as follows:

Following entry, and if market conditions allow, a Price to Comply Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Price to Display Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Display Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price.

Following entry, and if market conditions allow, the Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the Exchange Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

* * * * *

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

On September 7, 2016, the Exchange filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change (''Proposal'') to adopt paragraph (d) to Exchange Rule 4770 to describe changes to system functionality necessary to implement the Plan. The Exchange also proposed amendments to Rule 4770(a) and (c) to clarify how the Trade-at exception may be satisfied. The SEC published the Proposal in the **Federal Register** for notice and comment on September 20, 2016.[4] BX subsequently filed three Partial Amendments to clarify aspects of the Proposal. The Commission approved the Proposal, as amended, on October 7, 2016.[5]

In SR–BX–2016–050, BX had initially proposed a re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Group Three securities.[6] BX subsequently determined that it would not offer this re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Group Three securities. As part of Partial Amendment No. 2 to SR–BX–2016–050, BX proposed to delete the relevant language from Rule 4770 related to this re-pricing functionality.

In that amendment, BX noted that this change would only impact the treatment of Price to Comply Orders, Non-Displayed Orders, and Post-Only orders that are submitted through the OUCH and FLITE protocols in Test Group Three Pilot Securities, as these types of Orders that are currently submitted to BX through the RASH or FIX protocols are already subject to this re-pricing functionality and will remain subject to this functionality under the Pilot.

In the Amendment, BX further noted that its systems are currently programmed so that Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Securities may be adjusted repeatedly to reflect changes to the NBBO and/or the best price on the BX book. BX stated that it is re-programming its systems to remove this functionality for Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Securities. In the Amendment, BX stated that it anticipated that this re-programming shall be completed no later than November 30, 2016. If it appears that this functionality will remain operational by October 17, 2016, BX indicated that it would file a proposed rule change with the SEC and will provide notice to market participants sufficiently in advance of that date to provide effective notice. The rule change and the notice to market participants will describe the current operation of the BX systems in this regard, and the timing related to the re-programming.

On October 17, 2016, BX filed a proposal to extend the date by which it would complete the re-programing of its systems to eliminate the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols.[7] In that proposal, BX stated that it anticipated that this re-programming shall be complete on or before October 31, 2016.[8]

On October 31, 2016, BX submitted a proposed rule change to extend the date by which it would eliminate the re-pricing functionality to November 14, 2016.[9] In that proposal, BX stated that it was still determining how to modify its systems to eliminate the current re-pricing functionality in Test Group Three securities for Price to Comply

[4] *See* Securities Exchange Act Release No. 78838 (September 14, 2016), 81 FR 64566 (September 20, 2016) (SR–BX–2016–050).

[5] *See* Securities Exchange Act Release No. 79076 (October 7, 2016) (SR–BX–2016–050).

[6] As originally proposed, Rule 4770(d)(2) stated that Price to Comply Orders in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price. Rule 4770(d)(3) stated that, if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price. Rule 4770(d)(4) stated that, if market conditions allow, the Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the BX Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

[7] *See* Securities Exchange Act Release No. 79154 (October 25, 2016) (SR–BX–2016–054).

Subsequent to the approval of SR–BX–2016–050, BX become aware that this re-pricing functionality also applies to Price to Display Orders that are entered through the OUCH and FLITE protocols in Test Group Three Securities, and included those Orders as part of SR–BX–2016–054 accordingly. Price to Display Orders will be treated in the same manner as Price to Comply Orders under the re-pricing functionality.

[8] *Id.*

[9] *See* Securities Exchange Act Release No. 79262 (November 8, 2016) (SR–BX–2016–153).

Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols.

At this time, BX is in the process of re-programming its systems to eliminate the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols. BX anticipates that this re-programming shall be complete on or before December 12, 2016.

Therefore, the current treatment of Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols in Test Group Three securities shall be as follows:

Following entry, and if market conditions allow, a Price to Comply Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Price to Display Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Display Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price.

Following entry, and if market conditions allow, a Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the BX Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The purpose of this filing is to inform the SEC and market participants of the status of BX's attempts to re-program its systems to remove the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, and the current treatment of such orders pending the removal of this functionality. This proposal is consistent with the Act because it provides the SEC and market participants with notice of BX's efforts in this regard, and is being submitted in connection with the statements made by BX in SR–BX–2016–050, SR–BX–2016–054, and SR–BX–2016–153 in proposing the removal of this functionality.

BX also believes that the proposal is consistent with the Act because the re-pricing functionality will not significantly impact the data gathered pursuant to the Pilot. BX notes that this re-pricing functionality only affects Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols for Test Group Three securities until the re-pricing functionality is eliminated, and only becomes relevant when an Order in a Test Group Three security would cross a Protected Quotation of another market center. BX has analyzed data relating to the frequency with which Orders in Test Group Three securities are entered with a limit price that would cross a Protected Quotation of another market center, and believes that the re-pricing functionality will be triggered infrequently.[12] The Exchange also notes that it is diligently working to eliminate the current re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, and that it anticipates this re-programming to be complete on or before December 12, 2016.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The purpose of this proposal is to provide the SEC and market participants with notice of BX's efforts to remove its re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, consistent with its statements in SR–BX–2016–050, SR–BX–2016–054 and SR–BX–2016–153.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing change has become effective pursuant to Section 19(b)(3)(A)(iii) [13] of the Act and Rule 19b–4(f)(6) [14] thereunder, in that it effects a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2016–061 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] For example, for the time period between October 17 and November 11, 2016, 0.08% of orders that were entered on the NASDAQ Stock Market LLC in Test Group Three securities were entered at a price that crossed the NBBO.

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2016–061. 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 Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–BX–2016–061 and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28932 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79404; File No. SR–NYSEArca–2016–149]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of a Proposed Rule Change Amending Rule 6.91NY

November 28, 2016.

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 November 14, 2016, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.91NY (Electronic Complex Order Trading) to clarify the priority of Electronic Complex Orders and to modify aspects of its Complex Order Auction Process. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 6.91 to clarify the priority of Electronic Complex Orders (''ECO'')[3] and to modify aspects of its Complex Order Auction (''COA'') Process.

Rule 6.91 sets forth how the Exchange conducts trading of ECOs in its Complex Matching Engine (''CME''). The Exchange proposes to streamline the rule text governing the execution of ECOs during Core Trading Hours[4] to provide specificity and transparency regarding such order processing, without modifying the substance of such processing. The Exchange also proposes to amend the rules governing how ECOs that are eligible for a COA Process are executed and allocated to clarify the description of current functionality and to provide additional detail regarding order processing. The Exchange also proposes additional amendments to Rule 6.91 to clarify and add transparency to the COA Process, as described below.

Execution of ECOs during Core Trading Hours

The Exchange proposes to streamline its description of the priority of ECOs during Core Trading Hours, which the Exchange believes would add specificity and transparency to Exchange rules. Every ECO, upon entry to the System, is routed to the CME for possible execution against other ECOs or against individual quotes and orders residing in the Consolidated Book (''leg markets'').[5] The Exchange ranks and allocates ECOs residing in the Consolidated Book according to price/time priority based on the total or net debit or credit and the time of entry of the order.[6] Paragraph (a)(2) to the Rule sets forth how ECOs are executed, including that ECOs submitted to the System may be executed without consideration of prices of the same complex order that might be available on other exchanges.[7] The Exchange proposes to specify that ECOs may be executed without regard to prices of ''either single-legged or the same complex order strategy'' that might be available on other exchanges, which adds specificity and transparency to Exchange rules.[8] The Exchange proposes to amend Rule 6.91(a)(2) by re-

[3] Per Rule 6.91, ''an 'Electronic Complex Order' means any Complex Order as defined in Rule 6.62(e) that is entered into the NYSE Arca System.'' Rule 6.62(e) defines Complex Order as ''any order involving the simultaneous purchase and/or sale of two or more different option series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.''

[4] Core Trading Hours are the regular trading hours for business set forth in the rules of the primary markets underlying those option classes listed on the Exchange. *See* Rule 6.1A(a)(3).

[5] *See* proposed Rule 6.91(a) (the Exchange proposes to define ''leg markets'' in reference to individual quotes and orders in the Consolidated Book as used throughout the rule text). The Exchange also proposes to define ''System'' as a shorthand reference to the term ''NYSE Arca System'' and replace uses of the term ''NYSE Arca System'' with the term ''System'' throughout the rule text. *See, e.g.,* proposed Rule 6.91(preamble) and paragraph (a).

[6] *See* Rule 6.91(a)(1).

[7] *See* Rule 6.91(a)(2). The Rule also provides that ''[n]o leg of a [ECO] will be executed at a price outside the NYSE Arca best bid/offer for that leg.'' *See id.*

[8] Rule 6.91(a)(2)(i) governs the execution of ECOs at the Open. The Exchange proposes a non-substantive amendment to add the term ''Electronic'' so that the rule text would read, ''Execution of Electronic Complex orders at the Open.''

numbering the rule text. As described in more detail below, proposed Rule 6.91(a)(2)(ii) would govern the execution of ECOs during Core Trading when marketable on arrival and proposed Rule 6.91(a)(2)(iii) would govern how ECOs would be ranked in the Consolidated Book and execute as resting interest on the Consolidated Book.

Rule 6.91(a)(2)(ii) governs executions of ECOs during Core Trading. Paragraph (A) to Rule 6.91(a)(2)(ii) currently provides that the CME will accept an incoming marketable ECO and will automatically execute the ECO giving first priority to ECOs in the Consolidated Book, ''provided, however, that if individual orders or quotes residing in the Consolidated Book can execute the incoming [ECO] in full (or in a permissible ratio) at the same total or net debit or credit as an [ECO] in the Consolidated Book, the individual orders or quotes will have priority.'' [9] In other words, the rule currently provides that, at the same price, the leg markets have priority over same-priced resting ECOs. Paragraph (B) to Rule 6.91(a)(2)(ii) provides that if an ECO in the CME is not marketable against another ECO ''it will automatically execute against individual orders or quotes residing in the Consolidated Book, provided the [ECO] can be executed in full (or in a permissible ratio).'' [10] In other words, if there are no better-priced ECOs in the Consolidated Book, an incoming ECO would trade with the resting leg markets. Further, the current rule provides that leg markets that execute against an ECO, per Rule 6.91(a)(2)(ii)(A) or (B), are allocated pursuant to Rule 6.76A.[11]

The Exchange proposes to revise and streamline the rule text governing execution of ECOs during Core Trading Hours in a manner that the Exchange believes would promote transparency regarding the processing of ECOs. The proposed rule text is not intended to change how the Exchange currently processes ECOs during Core Trading, which is described in the current rule, but rather to specify the order processing in a more concise and logical manner. Thus, the Exchange proposes to delete the current rule text in paragraphs (a)(2)(ii)(A) and (B) to the Rule and replace it with revised text in proposed paragraph (a)(2)(ii).

Proposed Rule 6.91(a)(2)(ii) (*i.e.,* ''Core Trading Order Allocation'') would provide that the CME would accept incoming marketable ECO and automatically execute it against the best-priced contra-side interest resting in the Consolidated Book.[12] This proposed rule text makes clear that an incoming marketable ECO would trade against the best-priced contra-side interest resting in the Consolidated Book, which is consistent with the Exchange's price-time priority model. For example, if the best-price contra-side interest is an ECO resting on the Consolidated Book, the incoming ECO would trade with such ECO on arrival. However, if the best-price contra-side interest that can execute with the incoming ECO in full (or in a permissible ratio) is in the leg markets, the incoming ECO would trade with individual quotes and orders in the leg markets.

The proposed rule text would further specify that if, at a price, the leg markets can execute against an incoming ECO in full (or in a permissible ratio), the leg markets would have first priority at that price to trade with the incoming ECO—to be followed by resting ECOs—in price/time pursuant to Rule 6.76A.[13] This proposed text, therefore, describes how an incoming marketable ECO would be allocated if resting ECOs and leg markets in the Consolidated Book are at the same price, *i.e.,* the priority of same-priced interest in the Consolidated Book.

To distinguish the treatment of incoming marketable ECOs (that are immediately executed) from ECOs that are not marketable (and thus routed to the Consolidated Book) during Core Trading Hours, the Exchange proposes to renumber current Rule 6.91(a)(2)(ii)(C) and (D), as proposed Rule 6.91(a)(2)(iii)(A) and (B), under the new heading ''Electronic Complex Orders in the Consolidated Book.'' The Exchange also proposes to add language to Rule 6.91(a)(2)(iii)(A) to specify that an ECO, or portion of an ECO, that is not executed on arrival would be ranked in the Consolidated Book and that any new orders and quotes entered into the Consolidated Book that can execute against an ECO would be executed against such new orders or quotes ''according to paragraph (a)(2)(ii) above.'' [14] The Exchange believes that the proposed additional heading and re-numbering of the rule text provides clarity regarding the treatment of non-marketable—as opposed to marketable—ECOs, which makes the rule text easier to navigate, without altering the functionality described in rule.

Proposed Modifications to COA Process

The Exchange proposes to modify its description of the COA Process and the execution of COA-eligible orders, which the Exchange believes would provide additional specificity and transparency to Exchange rules.[15] Because of the number of modifications that the Exchange proposes to current paragraph (c), the Exchange proposes to delete paragraph (c) of the Rule in its entirety and replace it with new Rule 6.91(c), which the Exchange believes more clearly, accurately and logically describes the COA Process. Proposed Rules 6.91(c)(1)–(7) would describe the COA Process.

Execution of COA-Eligible Orders, Initiation of COAs and RFR Responses

Proposed Rule 6.91(c) would provide that, upon entry into the System, ECOs may be immediately executed, in full (or in a permissible ratio), or may be subject to a COA as described in the Rule. This rule text is based on current Rule 6.91(c), which provides that COA-eligible orders, upon entry into the System, ''may be subject to an automated request for responses (''RFR'') auction.'' [16] As discussed below, the current rule text is silent as to the factors involved in whether and when an incoming COA-eligible order may trigger a COA, which would be addressed in proposed Rules 6.91(c)(2) and (c)(3).

Proposed Rule 6.91(c)(1) would define the term ''COA-eligible order'' to mean an ECO that is entered in a class designated by the Exchange and is:

(i) Designated by the OTP Holder as COA-eligible; and

(ii) received during Core Trading Hours.[17]

The proposed definition is based, in part, on the current Rule, which provides that whether an order is COA-eligible ''would be determined by the Exchange on a class-by-class basis'' [18] and that the OTP Holder must provide

[9] *See* Rule 6.91(a)(2)(ii)(A).

[10] *See id.*

[11] *See* Rule 6.91(a)(2)(ii)(A) and (B).

[12] *See* proposed Rule 6.91(a)(2)(ii).

[13] *See id.*

[14] The current rule text cross-references ''(ii) above'' but in light of the proposed addition of subsection (a)(2)(iii), the Exchange proposes to instead cross-reference ''paragraph (a)(2)(ii),'' which would add clarity to the proposed rule. Consistent with the proposed change to define ''leg markets'' in Rule 6.91(a), the Exchange proposes to replace ''bids and offers in the leg markets'' with ''leg markets'' in proposed Rule 6.91(a)(2)(iii)(A).

[15] To the extent that the proposed streamlined rule text mirrors existing language, the Exchange cites the relevant section of both the proposed and existing rule.

[16] The Exchange describes the concept of the Request for Response or ''RFR'' in connection with a COA in new paragraph (c)(3) to Rule 6.91.

[17] *See* proposed Rule 6.91(c)(1).

[18] *See* Rule 6.91(c)(1).

direction that an auction be initiated.[19] In addition, the Exchange believes that explicitly stating that an ECO would be COA-eligible only if submitted during Core Trading Hours would add clarity and transparency. The Exchange proposes to eliminate from the current definition (set forth in Rule 6.91(c)(1)) features of ECOs that are not determinative of COA eligibility on the Exchange, such as the ''size, number of series, and complex order origin types (*i.e.,* Customers, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange).'' The Exchange is also not including language from current Rule 6.91(c)(1) that provides that ECOs ''processed through the COA Process may be executed without consideration to prices of the same complex orders that might be available on other exchanges,'' as this requirement is already set forth in paragraph (a)(2) of the Rule. Finally, the Exchange proposes to remove consideration of an ECO's ''marketability (defined as a number of ticks away from the current market)'' as a requirement for COA-eligibility and to instead include this requirement in proposed paragraph (c)(3) regarding whether a COA-eligible order would actually trigger (as opposed to be *eligible* to trigger) a COA, as discussed below.

Proposed Rule 6.91(c)(2) would add new rule text describing the ''Immediate Execution of COA-eligible orders.'' The proposed text would clearly state that, upon entry of a COA-eligible order into the System, it would trade immediately, in full (or in a permissible ratio), with any ECOs resting in the Consolidated Book that are priced better than the contra-side Complex BBO, pursuant to proposed Rule 6.91(a)(2)(ii).[20] In such case, the arriving COA-eligible order would trade in a manner consistent with proposed Rule 6.91(a)(2)(ii) (*i.e.,* ''Core Trading Order Allocation'') and seek an immediate execution with the best-priced contra-side interest. The proposed paragraph would further specify that any portion of the COA-eligible order that does not execute immediately upon entry may start a COA, subject to the conditions set forth in proposed paragraph (c)(3).

The Exchange believes that the proposed rule text promotes transparency regarding when, under current functionality, a COA-eligible order would receive an immediate execution (*i.e.,* when it can receive price improvement from resting ECOs) versus being subject to a COA. The Exchange believes that the immediate price improvement opportunity for an incoming COA-eligible order from resting ECOs in the Consolidated Book obviates the need to start a COA, which is why incoming orders first trade against price-improving interest in the Consolidated Book before initiating a COA.

Proposed Rule 6.91(c)(3) would specify the conditions required for the ''Initiation of a COA'' and, if those conditions are met, sets forth how a COA would be initiated. As proposed, and consistent with current functionality, for any portion of a COA-eligible order not executed immediately under proposed Rule 6.91(c)(2), the Exchange would initiate a COA based on the limit price of the COA-eligible order in relation to a number of factors.

- First, as set forth in proposed Rule 6.91(c)(3)(i), the limit price of the COA-eligible order to buy (sell) would have to be higher (lower) than the best-priced, same-side interest in both the leg markets and any ECOs resting in the Consolidated Book. In other words, the limit price of the COA-eligible order would have to improve the current same-side market.
- Second, as set forth in proposed Rule 6.91(c)(3)(ii), the COA-eligible order would have to be marketable, which, based on current Rule 6.91(c)(1), is defined as a number of ticks away from the current, contra-side market.
- Finally, as set forth in proposed Rule 6.91(c)(3)(iii), to initiate a COA, the limit price of the COA-eligible order to buy (sell) would have to be executable at a price at or within the NYSE Arca best bid/offer for each leg of the order, which is based on current Rule 6.91(a)(2) regarding the execution of ECOs in general.

Proposed Rule 6.91(c)(3) further provides that the Exchange would initiate a COA by sending a Request for Response (''RFR'') message to all OTP Holders that subscribe to RFR messages.[21] This requirement is based on the first sentence of current Rule 6.91(c)(2). Proposed Rule 6.91(c)(3) would further provide that RFR messages would identify the component series, the size and side of the market of the order and any contingencies, which is based on the second sentence of current Rule 6.91(c)(2) without any changes. In addition, proposed Rule 6.91(c)(3) would include new rule text to specify that only one COA may be conducted at a time in any given complex order strategy, which is not explicitly stated in the current rule.[22] Finally, proposed Rule 6.91(c)(3) would specify that, at the time the COA is initiated, the Exchange would record the Complex BBO (the ''initial Complex BBO'') for purposes of determining whether the COA should end early pursuant to proposed paragraph (c)(6) of this Rule (discussed below). This is new rule text that is consistent with current functionality that ensures the COA respects the leg markets as well as principles of price/time priority.[23]

Proposed Rule 6.91(c)(4) would define the term Response Time Interval (''RTI'') as the period of time during which responses to the RFR may be entered. As further proposed, the Exchange would determine the length of the RTI; provided, however, that the duration would not be less than 500 milliseconds and would not exceed one (1) second. This rule text is based on current Rule 6.91(c)(3) insofar as it defines the RTI and the duration of the RTI, with the non-substantive modification to replace reference to ''shall'' with reference to ''will.'' Proposed Rule 6.91(c)(4) would also include new rule text providing that, at the end of the RTI, the COA-eligible order would be allocated pursuant to proposed Rule 6.91(c)(7), which describes the allocation of COA-eligible orders (hereinafter ''COA Order Allocation'') (described below). This proposed new rule text is based in part on current Rule 6.91(c)(5), which provides that at the expiration of the RTI, COA-eligible orders may be executed, in whole or in part, pursuant to Rule 6.91(c)(6) (Execution of COA-eligible orders). The proposed rule text refers instead to Rule 6.91(c)(7), which incorporates the order allocation concepts currently set forth in Rule 6.91(c)(6). The proposed change is intended to add clarity and transparency to the COA Process.

Proposed Rule 6.91(c)(5) would provide that any OTP Holder may submit responses to the RFR message (''RFR Responses'') during the RTI. This rule text is based on the first sentence of current Rule 6.91(c)(4) without any changes. Proposed Rule 6.91(c)(5)(A)–

[19] *See* Rule 6.91(c)(2) (requiring that an OTP Holder mark an ECO for auction in order for a COA to be conducted).

[20] *See* Rule 6.1A(2)(b) (defining Complex BBO as ''the BBO for a given complex order strategy as derived from the best bid on OX and best offer on OX for each individual component series of a Complex Order'').

[21] *See* proposed Rule 6.91(c)(3).

[22] The Exchange believes this can be inferred from the text describing the impact of COA-eligible orders that arrive during a COA in progress. *See, e.g.,* Rule 6.91(c)(8). Proposed Rule 6.91(c)(6), described below, provides specificity of when a COA may terminate early and when a subsequent COA may be initiated.

[23] *See* proposed Rule 6.91(a)(2)(ii) (leg markets have priority at a price).

(C) would provide additional specificity regarding RFR Responses.

• Proposed Rule 6.91(c)(5)(A) would provide that RFR Responses are ECOs that have a time-in-force contingency for the duration of the COA (*i.e.,* are designated as ''GTX''), must specify the price, size, and side of the market, and may be submitted in $0.01 increments. This rule text is based in part on the first sentence of Rule 6.91(c)(4), which provides that RFR Responses may be submitted in $.01 increments. Proposed Rule 6.91(c)(5)(A) is also based in part on the second to last sentence of current Rule 6.91(c)(7), which provides that RFR Responses expire at the end of the RTI, which is the same in substance as saying that an RFR Response has a time-in-force condition of GTX for the COA. The Exchange believes its proposed rule text is more accurate because it states that RFR Responses are valid for the duration of the COA, as opposed to the RTI, the latter being the period during which COA interest (including RFR Responses and incoming ECOs) is received and the former being the overall COA Process that allocates COA-eligible orders with the best-priced auction interest, including RFR Responses.

• Proposed Rule 6.91(c)(5)(B) would provide that RFR Responses must be on the opposite side of the COA-eligible order and any RFR Responses on the same side of the COA-eligible order would be rejected. This proposed rule text is based on the last sentence of current Rule 6.91(c)(4), which provides that RFR Responses must be on the opposite side of the COA-eligible order and any same-side RFR responses would be rejected by the Exchange, without any substantive changes.

• Proposed Rule 6.91(c)(5)(C) would provide that RFR Responses may be modified or cancelled during the RTI, would not be ranked or displayed in the Consolidated Book, and would expire at the end of the COA. The proposed text stating that RFR Responses may be modified or cancelled during the RTI is new rule text based in part on current Rule 6.91(c)(7), which provides that RFR Responses can be modified but may not be withdrawn at any time prior to the end of the RTI. The Exchange believes it is consistent with the current rule that states that an RFR Response may be modified to explicitly provide that an RFR Response may be cancelled, which is current functionality, and proposes to amend the rule to reflect that RFR Responses may also be cancelled. The proposed text stating that RFR Responses expire at the end of the COA make clear when RFR Responses are ''firm'' and thus obviate the need for current Rule 6.91(c)(7).[24] The proposed text of Rule 6.91(c)(5)(C) stating that RFR Responses would not be ranked or displayed in the Consolidated Book is based on the last sentence of current Rule 6.91(c)(7) without any changes.

The Exchange believes that the proposed Rules 6.91(c)(5)(A)–(C), which reorganizes information from existing rule text and add language to describe the requisite characteristics and behavior of an RFR Response, adds clarity and transparency to Exchange rules, including that, like all orders, an RFR Response may be modified or cancelled prior to the end of the RTI. The Exchange believes that specifying that RFR Reponses are GTX (*i.e.,* good for the duration of the COA) and may trade with interest received during the COA before expiring would encourage participation in the COA and would maximize the number of contracts traded.

Impact of ECOs, COA-Eligible Orders and Updated Leg Markets on COA in Progress

Proposed Rule 6.91(c)(6) would govern the impact of ECOs, COA-eligible orders, and updates to the leg markets that arrived during an RTI of a COA. This proposed rule text would replace current Rule 6.91(c)(8), as described in greater detail below. The Exchange believes that, because proposed Rule 6.91(c)(6) would establish what happens to a COA (*i.e.,* whether it will end early) before the COA-eligible order is allocated, it would be more logical to describe these processes before the rule describes how COA-eligible orders are allocated, which would be set forth in proposed Rule 6.91(c)(7). To streamline the rule and make the rule text more logical, the Exchange proposes to add headings (*see* proposed Rule 6.91(c)(6)(A)–(C)) to make clear which type of incoming interest is covered.

Proposed Rule 6.91(c)(6)(A) would describe the impact of incoming ECOs or COA-eligible orders on the opposite-side of the market as the initiating COA-eligible order. The current rule addresses the impact of opposite-side, incoming ECOs on a COA,[25] but because it does not address opposite-side COA-eligible orders, proposed paragraph (A) of Rule 6.91(c)(6) would be new rule text. The Exchange notes that the impact of an incoming COA-eligible order mirrors that of an incoming ECO in the scenarios covered in proposed Rules (c)(6)(A)(i)–(iii) (discussed below), which adds internal consistency and specificity to Exchange rules.[26]

• Proposed Rule 6.91(c)(6)(A)(i) would provide that incoming ECOs or COA-eligible orders that lock or cross the initial Complex BBO would cause the COA to end early. The concept of the initial Complex BBO as a benchmark against which incoming opposite-side interest would be measured is new rule text, but is consistent with current functionality. As noted above (*see supra* note 21), the initial Complex BBO is the BBO for a given complex order strategy as derived from the Best Bid (''BB'') and Best Offer (''BO'') for each individual component series of a Complex Order as recorded at the start of the RTI. Proposed Rule 6.91(c)(6)(A)(i) would further provide that if such incoming ECO or COA-eligible order is also executable against the limit price of the initiating COA-eligible order, it would be ranked with RFR Responses to execute with the initiating COA-eligible order. The Exchange believes that addressing this scenario would better enable market participants to understand how their ECOs, including COA-eligible orders, may be treated, and the proposed change therefore is designed to add clarity and transparency to Exchange rules.

• The proposed rule text relating to how an incoming opposite-side ECO or COA-eligible order would be processed is based on current Rule 6.91(c)(8)(A), which provides that incoming ECOs received during the RTI ''that are on the opposite side of the market and marketable against the limit price of the initiating COA-eligible order will be ranked and executed in price time with RFR Responses.'' [27] The proposed rule text would also include opposite-side COA-eligible orders and would not include any reference to Customer and non-Customer ''account type,'' which, as discussed below, is unnecessary.[28] The proposed rule text also does not include reference to ''price time,'' as the COA-eligible order would interact with

[24] Rule 6.91(c)(7) sets forth the Firm Quote Requirements for COA-eligible orders.

[25] *See* Rule 6.91(c)(8)(A) (providing that ''[i]ncoming Electronic Complex orders received during the Response Time Interval that are on the opposite side of the market and marketable against the limit price of the initiating COA-eligible order will be ranked and executed in price time with RFR Responses by account type (as described in (6) above). Any remaining balance of either the initiating COA-eligible order or the incoming Electronic Complex order will be placed in the Consolidated Book and ranked as described in (a)(1) above'').

[26] The differential treatment of the balance of the incoming order, depending on whether it is an ECO or a COA-eligible order is covered in proposed rules Rule 6.91(c)(6)(A)(iv) and (v), respectively.

[27] *See* Rule 6.91(c)(8)(A), *supra* note 26.

[28] *See* proposed Rule 6.91(c)(6)(A)(i). *See also* discussion of ''COA Order Allocation'' below.

the best-priced contra-side interest received during the RTI, per proposed paragraph (c)(7) of this Rule.[29]

• Proposed Rule 6.91(c)(6)(A)(ii) would provide that incoming ECOs or COA-eligible orders that are executable against the limit price of the initiating COA-eligible order, but do not lock or cross the initial Complex BBO, would not cause the COA to end early and would be ranked with RFR Responses to execute with the initiating COA-eligible order. This proposed paragraph specifies that the COA would continue uninterrupted by such incoming orders because such interest does not trigger priority concerns (because the incoming order isn't priced better than the leg markets at the start of the COA), but is eligible to participate in the COA. This proposed text would be new rule text, which reflects current functionality that is based on the principles set forth in Rule 6.91(c)(8)(A).

• Proposed Rule 6.91(c)(6)(A)(iii) would provide that incoming ECOs or COA-eligible orders that are either not executable on arrival against the limit price of the initiating COA-eligible order or do not lock or cross the initial Complex BBO would not cause the COA to end early. Per this proposed paragraph, the COA would proceed uninterrupted as the incoming interest does not trigger priority concerns (*i.e.,* does not lock or cross the initial Complex BBO) nor can the interest participate in the COA (*i.e.,* because it is not executable against the initiating COA-eligible order). This would be new rule text, which reflects current functionality.

• Proposed Rule 6.91(c)(6)(A)(iv) would provide that any incoming ECO(s), or the balance thereof, that was not executed with the initiating COA-eligible order or was not executable on arrival would trade pursuant to proposed paragraph (a)(2)(ii) of this Rule (*i.e.,* Core Trading Allocation). This proposed rule text is based on the last sentence of current Rule 6.91(c)(8)(A), regarding ECOs, but provides additional detail regarding the ability for any balance on the incoming ECO to trade with the best-priced, resting contra-side interest before (or instead of) being ranked in the Consolidated Book, which is consistent with the Exchange's processing of incoming ECOs.

• Proposed Rule 6.91(c)(6)(A)(v) would provide that any incoming COA-eligible order(s), or the balance thereof, that was not executed with the initiating COA-eligible order or was not executable on arrival would initiate subsequent COA(s) in price-time priority. Because the treatment of opposite-side COA-eligible orders is not described in the current rule, this would be new rule text. Unlike the treatment of incoming opposite-side ECOs—where any remaining balance of the ECOs would be subject to Core Trading Allocation or would be posted to the Consolidated Book after trading with the initiating COA-eligible order—any balance of the incoming contra-side COA-eligible order that does not trade with the initiating COA-eligible order would initiate a new COA.

The Exchange believes that proposed Rule 6.91(c)(6)(A)(i)–(v) would provide additional specificity regarding the impact of opposite-side ECOs or COA-eligible orders on the COA Process, which adds transparency to Exchange rules. Specifically, the Exchange believes that providing for a COA to terminate early when an incoming order locks or crosses the initial Complex BBO, as proposed, would allow an initiating COA-eligible order to execute (ahead of the incoming order) against any RFR Responses or ECOs received during the RTI up until that point, while preserving the priority of the incoming order to trade with the resting leg markets. The Exchange believes that early conclusion of the COA would avoid disturbing priority in the Consolidated Book and would allow the Exchange to appropriately handle incoming orders. The proposed rule text is consistent with the processing of ECOs during Core Trading and ensures that the leg markets respect the COA as well as principles of price/time priority.[30] Moreover, the Exchange believes that the proposed impact of incoming COA-eligible orders aligns with the treatment of incoming ECOs, which adds internal consistency to Exchange rules, and affords additional opportunities for price improvement to the initiating COA-eligible order, which may trade with the opposite-side order(s).

The Exchange proposes to process any remaining balance of such orders differently from any balance of the incoming ECO because an ECO would either execute against resting interest or be ranked with ECOs in the Consolidate Book, whereas any balance of an incoming COA-eligible order would initiate a new COA, affording that order additional opportunities for price improvement. The Exchange believes that this proposed rule text, which is consistent with current functionality, maximizes the execution opportunities to the incoming order(s), with potential price improvement, as these orders may trade with interest received in the (initiating) COA; and, for the incoming COA-eligible order, the potential for additional price improvement in a subsequent COA.

Proposed Rule 6.91(c)(6)(B) would describe the impact of incoming ECOs or COA-eligible orders on the same side of the market as the initiating COA-eligible order on a COA. The current rule addresses the impact of same-side, incoming COA-eligible orders on a COA,[31] but because it does not address same-side ECOs, this aspect of the proposed rule would be new. The impact of an incoming ECO mirrors that of an incoming COA-eligible order in the scenarios covered in proposed Rule (c)(6)(B)(i)–(iv) (discussed below), which adds internal consistency and specificity to Exchange rules.[32]

• Proposed Rule 6.91(c)(6)(B)(i) would provide that incoming ECOs or COA-eligible orders that are priced better than the initiating COA-eligible order would cause the COA to end.[33] This proposed rule text is based in part on current Rule 6.91(c)(8)(D), which provides that better-priced incoming COA-eligible orders that arrive during the RTI will cause a COA to end.[34]

• Proposed Rule 6.91(c)(6)(B)(ii) would provide that an incoming ECO or COA-eligible order that is priced equal to or worse than the initiating COA-eligible order,[35] and also locks or crosses the contra-side initial Complex BBO, would cause the COA to end early. The proposed rule is based in part on current Rules 6.91(c)(8)(B) and (C), which describe how the Exchange processes COA-eligible orders that are received during a COA that are on the same side of the market of the initiating COA and priced equal to or worse than

[29] *See* proposed Rule 6.91(c)(7).

[30] *See* proposed Rule 6.91(a)(2)(ii) (leg markets have priority at a price).

[31] *See* Rule 6.91(c)(8)(B)–(C) (addressing the impact of same-side incoming COA-eligible orders on a COA).

[32] The Exchange notes that the differential treatment of the balance of the incoming order, depending on whether it is an ECO or a COA-eligible order is covered in proposed rules Rule 6.91(c)(6)(B)(v) and (vi), respectively.

[33] An incoming ECO or COA-eligible order priced ''better than'' the COA-eligible order means it is priced higher (lower) than the initiating COA-eligible order to buy (sell). *See* proposed Rule 6.91(c)(6)(B)(ii).

[34] *See* Rule 6.91(c)(8)(D) (providing, in part, that ''[i]ncoming COA-eligible orders received during the Response Time Interval for the original COA-eligible order that are on the same side of the market and that are priced better than the initiating order will cause the auction to end'').

[35] An incoming ECO or COA-eligible order priced ''worse than'' the COA-eligible order means it is priced lower (higher) than the initiating COA-eligible order to buy (sell). *See* proposed Rule 6.91(c)(6)(B)(ii).

the initiating COA.[36] However, the current rule does not specify that a COA would terminate early when an incoming ECO locks or crosses the contra-side initial Complex BBO, therefore this would be new rule text.

• Proposed Rule 6.91(c)(6)(B)(iii) would provide that incoming ECOs or COA-eligible orders that are priced equal to or worse than the initiating COA-eligible order,[37] but do not lock or cross the contra-side Complex BBO, would not cause the COA to end early. Proposed Rule 6.91(c)(6)(B)(i) is based on current Rules 6.91(c)(8)(B) and (C), which describe how the Exchange processes COA-eligible orders that are received during a COA that are on the same side of the market of the initiating COA-eligible order and priced equal to or worse than the initiating COA-eligible order. However, the current rule does not address whether the incoming orders lock or cross the contra-side initial Complex BBO. The Exchange believes that this additional detail promotes internal consistency regarding how the COA process and how it intersects with the price/time priority of the initial Complex BBO.

• The Exchange notes that current Rules 6.91(c)(8)(B) and (C) state that an incoming same-side COA-eligible order (priced equal to or worse than the initiating order) joins a COA in progress and is executed in price/time with the COA-eligible order, with any balance placed in the Consolidated Book pursuant to (a)(1).[38] The proposed rule text would clarify how such incoming COA-eligible orders would be processed. Specifically, the Exchange proposes to clarify how such incoming COA-eligible orders (as well as ECOs) would be processed, including any remaining balance thereof, in proposed paragraphs (c)(6)(iv)–(vi) of the Rule, discussed below.[39]

• Proposed Rule 6.91(c)(6)(B)(iv) would provide that any incoming ECO or COA-eligible order that caused a COA to end early, if executable, would trade against any RFR Responses and/or ECOs that did not trade with the initiating COA-eligible order. This proposed paragraph reflects current functionality and is based on current Rule 6.91(c)(8)(D) inasmuch as it addresses incoming same-side COA-eligible orders that cause the COA to end early.

• Proposed Rule 6.91(c)(6)(B)(v) would provide that any remaining balance of incoming ECOs that do not trade against any remaining RFR Responses or ECOs received during the RTI would trade pursuant to Core Trading Allocation, pursuant to paragraph (a)(2)(ii) of this Rule. This proposed rule text is consistent with the treatment of the balance of incoming same-side ECOs set forth in current Rule 6.91(8)(A)–(C), with the added detail that the ECO would first be subject to Core Trading Allocation pursuant to proposed Rule 6.91(a)(2)(ii) before being ranked in the Consolidated Book.

• Proposed Rule 6.91(c)(6)(B)(vi) would provide that the remaining balance of any incoming COA-eligible order(s) that does not trade against any remaining RFR Responses or ECOs received during the RTI would initiate new COA(s) in price-time priority. This proposed rule text is based in part on current Rule 6.91(c)(8)(D), which provides that any unexecuted portion of the incoming COA-eligible would initiate a new COA.[40]

The Exchange believes that proposed Rules 6.91(c)(6)(B)(i)–(vi) would provide greater specificity regarding the impact of arriving same-side COA-eligible orders and ECOs on a COA, which adds internal consistency, clarity and transparency to Exchange rules. Specifically, the Exchange believes that providing for a COA to terminate early under the circumstances specified in proposed Rules 6.91(c)(6)(B)(i) and (ii) would allow a COA-eligible order to execute (ahead of the incoming order) against any RFR Responses or ECOs received during the RTI up until that point, while preserving the priority of the incoming order to trade with the resting leg markets. The Exchange believes that early conclusion in this circumstance would ensure that the COA interacts seamlessly with the Consolidated Book so as not to disturb the priority of orders on the Book.

The proposed rule text is consistent with the processing of ECOs during Core Trading and ensures that the COA respects the leg markets as well as principles of price/time priority.[41] In addition, the proposed rule would also provide greater specificity that the incoming COA-eligible order or ECO would, if executable, trade against any remaining RFR Responses and/or ECOs received during the RTI, which allows the incoming orders opportunities for price improvement. The proposed rule would also make clear that any remaining balance of the incoming COA-eligible order would then initiate a new COA. The Exchange believes that these proposed changes maximize the execution opportunities to the incoming order(s), with potential price improvement, as these orders may trade with interest received in the (original) COA; and, for the incoming COA-eligible order, the potential for additional price improvement in a subsequent COA.

Proposed Rule 6.91(c)(6)(C): would describe the impact of new individual quotes or orders (*i.e.,* updates to the leg markets) during the RTI on the same or opposite side of the COA-eligible order. In each event described below, regardless of whether the COA ends early, the COA-eligible order would execute pursuant to proposed Rule 6.91(c)(7) (described below); and, consistent with Core Trading Allocation, the updated leg markets would execute pursuant to proposed paragraph (a)(2)(ii) of this Rule.[42]

• Proposed Rule 6.91(c)(6)(C)(i) would provide that updates to the leg markets that would cause the same-side Complex BBO to lock or cross any RFR Response(s) and/or ECO(s) would cause the COA to end early. The Exchange believes that providing for a COA to terminate early when the leg markets update in this manner would allow a COA-eligible order to execute against any RFR Responses or ECOs received during the RTI up until that point, while preserving the priority of the updated leg markets.

• Proposed Rule 6.91(c)(6)(C)(ii) would provide that updates to the leg markets that would cause the same-side Complex BBO to be priced better than the COA-eligible order,[43] but do not lock or cross any RFR Responses and/or ECOs received would not cause the COA to end early.

• Proposed Rule 6.91(c)(6)(C)(iii) would provide that updates to the leg markets that would cause the contra-

[36] *See* Rule 6.91(c)(8)(B)–(C), *supra* note 32.

[37] An incoming ECO or COA-eligible order priced ''worse than'' the COA-eligible order means it is priced lower (higher) than the initiating COA-eligible order to buy (sell). *See* proposed Rule 6.91(c)(6)(B)(iii).

[38] *See* Rule 6.91(c)(8)(B) and (C) (providing, in part, that ''[i]ncoming COA-eligible orders received during the [RTI] for the original COA-eligible order that are on the same side of the market, that are priced [equal to or worse] than the initiating order, will join the COA'').

[39] *See, e.g.,* proposed Rule 6.91(c)(6)(B)(iv),(vi) (providing that, rather than joining the COA, these incoming COA-eligible orders may trade with RFR Responses or ECOs that don't execute in the COA and, if any balance remains still, would initiate a new COA—but would not execute during the COA in progress as the current rule suggests).

[40] *See* Rule 6.91(c)(8)(D) (providing, in part, that ''[t]he COA-eligible order that caused the auction to end will ''if marketable, initiate another COA''). *See supra* note 35 (noting inaccuracy in current rule, which provides that incoming COA-eligible orders would execute during the COA in progress).

[41] *See* proposed Rule 6.91(a)(2)(ii) (leg markets have priority at a price).

[42] *See* proposed Rule 6.91(c)(6)(C).

[43] Individual orders and quotes cause the same-side Complex BBO to be ''better'' than the COA-eligible order if they cause the Complex BBO to be higher (lower) than the COA-eligible order to buy (sell). *See* proposed Rule 6.91(c)(6)(C)(i).

side Complex BBO to lock or cross the same-side initial Complex BBO would cause the COA to end early.

• Proposed Rule 6.91(c)(6)(C)(iv) would provide that updates to the leg markets that would cause the contra-side Complex BB (BO) to improve (*i.e.,* become higher (lower)), but not lock or cross the same-side initial Complex BBO, would not cause the COA to end early.

The believes that proposed Rule 6.91(c)(6)(C)(i)–(iv) respect the COA process, while at the same time ensuring a fair and orderly market by maintaining the priority of quotes and orders on the Consolidated Book as they update. The proposed rule is based in part on Rule 6.91(c)(9)(A)[44] and (B),[45] which address the impact of updates to the leg markets on a COA. However, the current rule text does not specify on which side of the market the leg markets have updated. The Exchange proposes to include this detail in the new rule text for additional clarity and transparency. In addition, the current rule text uses the term ''derived Complex BBO,'' which is not a defined term. In the proposed rule, the Exchange proposes to use the term Complex BBO, which is a defined term.[46] The Exchange further believes this proposed rule text promotes transparency and clarity to Exchange rules.

COA Order Allocation

Current Rules 6.91(c)(6)(A)–(D) set forth how a COA-eligible order executes against same-priced contra-side interest (*i.e.,* at the same net price) after executing against any better-priced contra-side interest. However, the current rule text does not reflect priority and order allocation, including that current paragraphs (c)(6)(B) and (C) refer to affording priority to Customer ECOs which is not consistent with the Exchange's price/time priority model.

In short, current Rule 6.91(c)(6) provides that COA-eligible orders will be executed against the best priced contra-side interest. The rule further provides that at the same net price, the order will be allocated as provided for in Rules 6.91(c)(6)(A)–(D). Current Rule 6.91(c)(6)(A) provides that individual orders and quotes in the leg markets resting in the Consolidated Book prior to the initiation of a COA have first priority to trade against a COA-eligible order, provided the COA-eligible order can be executed in full (or in a permissible ratio), on a price/time basis pursuant to Rule 6.76A.[47] Current Rules 6.91(c)(6)(B) and (C) provide that Customer ECOs resting in the Consolidated Book before, or that are received during, the RTI, and Customer RFR Responses shall, collectively have second priority to trade against a COA-eligible order followed by resting non-Customer ECOs, those received during the RTI, and non-Customer RFR Responses, which would have third priority.[48] Pursuant to the current Rule, the allocation of a COA-eligible order against these Customer and non-Customer ECOs and RFR Responses shall be on a Size Pro Rata basis as defined in Rule 6.75(f)(6).[49] Finally, current Rule 6.91(c)(6)(D) provides that individual orders and quotes in the leg markets that cause the derived Complex BBO to be improved during the COA and match the best RFR Response and/or ECOs received during the RTI will be filled after ECOs and RFR Responses at the same net price pursuant to Rule 6.76A.[50]

The Exchange proposes to clarify and update the rule text describing the priority and allocation of COA-eligible orders during the COA process in proposed Rule 6.91(c)(7), under the heading ''Allocation of COA-Eligible Orders,'' which would replace current paragraph (c)(6) in its entirety. Proposed Rule 6.91(c)(7) would provide that at the end of the RTI, a COA-eligible order would be executed against contra-side interest as provided for in proposed Rules 6.91(c)(7)(A) and (B), and any unexecuted portion of the COA-eligible order would be ranked in the Consolidated Book pursuant to proposed Rule 6.91(a)(1).

• Proposed Rule 6.91(c)(7)(A) would provide that RFR Responses and ECO priced better than[51] the initial Complex BBO would be eligible to trade first with the COA-eligible order, beginning with the highest (lowest), at each price point, on a Size Pro Rata basis as defined in Rule 6.75(f)(6). This proposed rule text is based in part on current Rule 6.91(c)(6), which provides that COA-eligible orders would be executed against the best priced contra side interest (which in this case, would be ECOs and RFR Responses) and current Rule 6.91(c)(6)(C), which provides that ECOs and RFR Responses are allocated on a Size Pro Rata basis. The Exchange believes this proposed change streamlines how the allocation process works, and clarifies that if ECOs and RFR Responses are the best-priced interest, they would trade with the incoming COA-eligible order on a Size Pro Rata basis.

• Proposed Rule 6.91(c)(7)(B) provides that after COA allocations pursuant to paragraph (c)(7)(A) of this Rule, the COA-eligible order would trade with the best-priced contra-side interest pursuant to paragraph (a)(2)(ii) above. In other words, once the COA-eligible order has traded with any ECOs or RFR Responses priced better than the initial Complex BBO (*i.e.,* any price-improving interest to arrive during the RTI), the initiating COA-eligible order would follow regular allocation rules for an incoming marketable ECO. This rule text is based in part on current Rule 6.91(c)(6)(A), which provides that if the COA-eligible order can be executed in full (or a permissible ratio) by the orders and quotes in the Consolidated Book, they will be allocated pursuant to Rule 6.76A. Because this allocation is identical to how a regular marketable ECO would be allocated, the Exchange believes it would streamline the rule and provide greater transparency to provide a cross reference to proposed Rule 6.91(a)(2)(ii) instead of Rule 6.76.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)(5) of the Securities Exchange Act of 1934 (the ''Act''),[52] which requires the

[44] *See* Rule 6.91(c)(9)(A) (providing that ''[i]ndividual orders and quotes that are entered into the leg markets that cause the derived Complex Best Bid/Offer to be better than the COA-eligible order and to cross the best priced RFR Response will cause the auction to terminate, and individual orders and quotes in the leg markets will be allocated pursuant to (a)(2)(i) above and matched against Electronic Complex Orders and RFR Responses in price time priority pursuant to (6) above. The initiating COA-eligible order will be matched and executed against any remaining unexecuted Electronic Complex Orders and RFR Responses pursuant to (6) above''). The Exchange also notes that proposed Rule 6.91(c)(6)(C)(i) clarifies that the Complex BBO in question is the same-side Complex BBO, as the current rule text is silent in this regard, which adds clarity and transparency to Exchange rules.

[45] *See* Rule 6.91(c)(9)(B) (providing that ''[i]ndividual orders and quotes that are entered into the leg markets that cause the derived Complex Best Bid/Offer to cross the price of the COA-eligible order will cause the auction to terminate, and individual orders and quotes in the leg markets will be allocated pursuant to (a)(2)(i) above and matched against Electronic Complex Orders and RFR Responses in price time priority pursuant to (6) above.''). The Exchange also notes that proposed paragraph (c)(6)(C)(ii) clarifies that the Complex BBO in question is the contra-side Complex BBO, as the current rule text is silent in this regard, which adds clarity and transparency to Exchange rules.

[46] *See supra* 21. The Exchange notes that the word ''derived'' is no longer needed as it is encompassed in the definition of Complex BBO. *See id.*

[47] *See* Rule 6.91(c)(6)(A).

[48] *See* Rule 6.91(c)(6)(B) and (C).

[49] *See id.*

[50] *See* Rule 6.91(c)(6)(D).

[51] To qualify as ''better than,'' RFR Responses and ECOs to buy (sell) would need to be priced higher (lower) than the initial Complex BBO. *See* proposed Rule 6.91(c)(7)(A).

[52] 15 U.S.C. 78f(b).

rules of an exchange 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.

Overall, the Exchange is proposing various changes that would promote just and equitable principles of trade, because ECOs, including COA-eligible orders, would be handled in a fair and orderly manner, as described above. The various modifications and clarifications, many of which are consistent with current functionality are intended to improve the rule overall by adding more specificity and transparency. The Exchange believes that the proposed rule changes would promote just and equitable principles of trade as well as protect investors and the public interest by making more clear how ECOs and COA-eligible orders are handled on the Exchange, both during Core Trading Hours and when there is a COA in progress. In particular, the proposed changes are intended to help ensure a fair and orderly market by maintaining price/priority of incoming ECOs (including COA-eligible orders) and updated leg markets. Similarly, the proposed changes are designed to promote just and equitable principles by seeking to execute as much interest as possible at the best possible price(s).

Execution of ECOs During Core Trading Hours

The Exchange believes that the proposed rule changes regarding Core Trading Order Allocation, which do not alter the substance of the rule but instead condense and streamline the rule text, would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes are designed to protect investors and the public interest by making the Exchange's rules more clear, concise, transparent and internally consistent, which enhances the overall comprehensibility to investors without altering the operation of the rule. Specifically, the Exchange believes that, although it does not alter the substance of the rule, the proposed rule text regarding Core Trading Order Allocation provides additional specificity regarding processing of ECOs against same-priced contra-side interest and, in particular, under what circumstances the leg markets would have first priority to execute against an incoming marketable ECO. The Exchange believes this additional transparency, which makes the rule clearer and more complete for market participants, would encourage additional ECOs to be directed to the Exchange.

Proposed Modifications to COA Process

Overall, the Exchange believes that the proposed changes to the COA Process maximize execution opportunities for the initiating COA-eligible Order, RFR Responses and ECOs entered during the COA, and the leg markets at the best possible price consistent with the principles of price/time priority, which would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes are designed to protect investors and the public interest.

Execution of COA-Eligible Orders, Initiation of COAs and RFR Responses

In particular, the proposed rule text promotes transparency regarding the definition of what constitutes a COA-eligible order and the circumstances under which an arriving COA-eligible order would receive an immediate execution (*i.e.,* when it can receive price improvement from resting ECOs) versus being subject to a COA. The proposed rule text is not intended to change how the Exchange currently processes ECOs, but rather to provide clarity regarding the processing of COA-eligible orders and whether such orders are subject to a COA. Specifically, the proposed changes would help ensure a fair and orderly market because this information adds clarity and transparency to the COA process and would allow market participants to be more informed about the COA process. Moreover, the proposed change maximizes the opportunities for price improvement for the entire COA-eligible order as it would first trade against any price-improving interest in the Consolidated Book, and, if any residual interest remains, the order would be subject to a COA. Further, the Exchange believes that the proposed rule text regarding the requisite characteristics and behavior of an RFR Response adds clarity and transparency to Exchange rules, including that, like all orders, an RFR Response may be modified or cancelled prior to the end of the RTI, which promotes just and equitable principles of trade. In addition, the Exchange believes that specifying that RFR Reponses are valid for the duration of the COA would encourage participation in the COA and would maximize the number of contracts traded, which benefits all market participants and protects investors and the investing public.

Impact of ECOs, COA-Eligible Orders and Individual Order/Quotes on COA in Progress

Regarding interest that arrives during a COA in progress, the Exchange believes that the proposed rule text provides clarity regarding the impact of opposite- and same-side ECOs or COA-eligible orders on the COA Process, which promotes transparency and adds clarity to Exchange rules. Moreover, the Exchange notes that because the COA is intended to operate seamlessly with the Consolidated Book, the proposed changes would promote just and equitable principles of trade by providing price-improvement opportunities for COA-eligible orders while at the same time providing an opportunity for such orders to interact with orders or quotes received during the RTI, including incoming ECOs. In addition, the Exchange believes that this practice of honoring the updated leg markets would help ensure a fair and orderly market by maintaining the priority of quotes and orders on the Consolidated Book as they update. The Exchange believes that the proposed changes to the COA would increase the number of options orders that are provided with the opportunity to receive price improvement.

The Exchange also believes that the proposed modification regarding when the balance of an initiating (or incoming) COA-eligible order would initiate a new COA (as opposed to being posted to the Consolidated Book) is likewise consistent with the Act because it would remove impediments to and perfect the mechanism of a free and open market and a national market system clarifying the rule text to the benefit of market participants, particularly those interested in submitting COA-eligible orders. In addition, the proposed changes also promote additional transparency and internal consistency in Exchange rules. The Exchange believes that, as proposed, COA Order Allocation maximizes price discovery and liquidity while employing price priority, which benefits all market participants.

COA Order Allocation

The Exchange believes that the proposed rule changes, which clarify the priority and order allocation and processing of COA-eligible orders would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes are designed to protect investors and the public interest by making the Exchange's rules more clear, concise, transparent and

internally consistent, which enhances the overall comprehensibility to investors without altering the operation of the rule. For example, the Exchange believes that the revised rule text governing the execution of COA-Eligible orders provides clarity regarding the circumstances under which the leg markets would have first priority to execute against an incoming COA-eligible or ECO. The Exchange also believes that the proposed changes would conform to the Exchange's price/time priority model and reduce the potential for investor confusion.

Non-Substantive Changes

The Exchange believes that the proposed non-substantive, technical changes, including updated cross references that conform rule text to proposed changes, promotes just and equitable principles of trade, fosters cooperation and coordination among persons engaged in facilitating securities transactions, and removes impediments to and perfects the mechanism of a free and open market by ensuring that members, regulators and the public can more easily navigate the Exchange's rulebook and better understand the defined terms used by the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed changes would encourage increased submission of ECOs, as well as increased participation in COAs, which will add liquidity to the Exchange to the benefit all market participants and is therefore pro-competitive. The proposal does not impose an intra-market burden on competition, because these changes make the rule clearer and more complete for all participants. Nor does the proposal impose a burden on competition among the options exchanges, because of the vigorous competition for order flow among the options exchanges. To the extent that market participants disagree with the particular approach taken by the Exchange herein, market participants can easily and readily direct complex order flow to competing venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2016–149 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–2016–149. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–149 and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[53]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28927 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79406; File No. SR–CBOE–2016–080]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change To Amend Rule 6.53C

November 28, 2016.

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 November 17, 2016, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') 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 seeks to amend Rule 6.53C. The text of the proposed rule change is provided below.

[53] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Chicago Board Options Exchange, Incorporated Rules

* * * * *

Rule 6.53C. Complex Orders on the Hybrid System

(a)–(d) No change.

. . . Interpretations and Policies:

.01–.09 No change.

.10 Execution of Complex Orders in Hybrid 3.0 Classes: For each class trading on the Hybrid 3.0 Platform, the Exchange may determine to not allow marketable complex orders entered into COB and/or COA to automatically execute against individual quotes residing in the EBook. The Exchange also may determine for each class trading on the Hybrid 3.0 Platform to not allow leg orders to be generated pursuant to paragraph (c)(iv) for complex orders resting in the COB. *If the Exchange authorizes a group of series of a Hybrid 3.0 class for trading on the Hybrid Trading System pursuant to Rule 8.14.01, this Interpretation and Policy .10 applies to a complex order with at least one leg in a series from the group authorized for trading on the Hybrid 3.0 Platform, including if the order has another leg(s) in a series from the group authorized for trading on the Hybrid Trading System.* The allocation of such marketable complex orders against orders residing in the EBook and other complex orders shall be based on the best net price(s) and, at the same net price, multiple orders will be allocated as provided in paragraphs (c) and/or (d) in the Rule, as applicable, subject to the following:

(a) A marketable complex order *that solely consists of a group of series that is authorized for trading on the Hybrid 3.0 Platform* will automatically execute against individual orders residing in the EBook provided the complex order can be executed in full (or in a permissible ratio) by the orders in the EBook and the orders in the EBook are priced equal to or better than the individual quotes residing in the EBook. *A marketable complex order that consists of a group of series that is authorized for trading on the Hybrid 3.0 Platform and a group of series authorized for trading on the Hybrid Trading System will not automatically execute against individual orders residing in the EBook.*

(b)–(e) No change.

.11–.12 No change.

* * * * *

The text of the proposed rule change is also available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange seeks to amend Rule 6.53C in order to allow complex orders in Hybrid 3.0 classes consisting of series in both the group authorized for trading on the Hybrid 3.0 Platform and the group authorized for trading on the Hybrid Trading System to execute electronically in the same manner as complex orders consisting solely of series in the Hybrid 3.0 group.[3]

In 2003, CBOE introduced the Hybrid Trading System (''Hybrid'' or ''Hybrid System''), an electronic trading platform integrated with CBOE's floor-based open-outcry auction market.[4] The original Hybrid Trading System permitted Market-Makers to stream electronic quotes in their appointed classes provided they were physically present at the trading station.[5] CBOE subsequently implemented an enhanced version of Hybrid (f/k/a the Hybrid 2.0 platform), which allows remote quoting in option classes.[6] CBOE subsequently implemented the Hybrid 3.0 Platform, which is a trading platform on the Hybrid Trading System that allows one or more quoters to submit electronic quotes that represent the aggregate Market-Maker quotation interest in a series for the trading crowd.[7]

When the Hybrid 3.0 Platform was first implemented it was the third trading platform operating on the Exchange's trade engine CBOE*direct* (the CBOE command trade engine replaced CBOE*direct* in 2012)[8]—the other two platforms were the original Hybrid Trading System and the Hybrid 2.0 Platform.[9] In 2007, the Exchange removed the distinction between hybrid option classes (a/k/a classes on the original Hybrid Trading System) and Hybrid 2.0 option classes and deleted references to the Hybrid 2.0 Platform because over time CBOE migrated all option classes (other than the option classes traded on the Hybrid 3.0 Platform) from the original Hybrid Trading System to the Hybrid 2.0 Platform.[10] After the removal of the Hybrid 2.0 distinction, all options classes (other than those trading on the Hybrid 3.0 Platform) have been referred to as Hybrid classes trading on the Hybrid Trading System.[11] In order to distinguish between Hybrid classes trading on the Hybrid Trading System and Hybrid 3.0 classes trading on the Hybrid 3.0 Platform references in the Rulebook to ''Hybrid,'' ''Hybrid System,'' or ''Hybrid Trading System'' include all platforms unless otherwise provided by rule.[12] Currently, there are two platforms operating on the Exchange's trade engine CBOE Command (which replaced CBOE*direct*): (i) The Hybrid Trading System (f/k/a the Hybrid 2.0 Platform) and (ii) the Hybrid 3.0 Platform.

For each Hybrid 3.0 class, the Exchange may determine to authorize a group of series of the class for trading on the Hybrid Trading System[13] and establish trading parameters ''on a group basis to the extent rules otherwise provide such parameters to be established on a class basis.''[14] Currently, options on the Standard & Poor's 500 (''S&P 500'') are the only Hybrid 3.0 class.[15] However, pursuant to Rule 8.14.01 the Exchange authorized a group of series within the S&P 500 options class to trade on the Hybrid Trading System (*i.e.,* SPXW options). Thus, currently, the S&P 500 options class contains series trading under symbols SPX and SPXW.[16] The SPX options series are a.m.-settled contracts with standard third Friday expirations

[3] *See* Rule 6.53C.10.

[4] *See* Securities Exchange Act Release No. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003) (SR–CBOE–2002–05).

[5] *Id.*

[6] *See* Securities Exchange Act Release No. 50003 (July 12, 2004), 69 FR 43028 (July 19, 2004) (SR–CBOE–2004–24) (implementing enhancements to the Hybrid Trading System that are referred to in subsequent filings as Hybrid 2.0); Release No. 50175 (August 10, 2004), 69 FR 51129 (August 17, 2004) (SR–CBOE–2004–38) (implementing fees associated with, among other things, SR–CBOE–2004–24 and referring to the enhancements to the Hybrid Trading System as Hybrid 2.0); and Release No. 51366 (March 14, 2005), 70 FR 13217 (March 18, 2005) (amending the Rulebook by, among other things, adding the term Hybrid 2.0).

[7] *See* Securities Exchange Act Release No. 55874 (June 7, 2007), 72 FR 32688 (June 13, 2007) (SR–CBOE–2006–101).

[8] *See* Information Circular IC12–057.

[9] *Id.*

[10] *See* Securities Exchange Act Release No. 58153 (July 14, 2008), 73 FR 41386 (July 18, 2008) (SR–CBOE–2008–067) (deleting references to ''Hybrid 2.0 Platform'' and ''non-Hybrid'' classes because non-Hybrid classes no longer exist).

[11] *Id.*

[12] *See* Rule 1.1(aaa).

[13] *See* Rule 8.14.01.

[14] *See* Rule 8.14.01(c).

[15] *See* Rule 8.3(c)(iii).

[16] Options trading under the symbol SPXPM are a separate class from the SPX and SPXW options.

trading on the Hybrid 3.0 Trading System. The SPXW options series are p.m.-settled contracts with non-standard expirations trading on the Hybrid Trading System.

Currently, when the Exchange receives a complex order[17] during regular trading hours that consists of both SPX and SPXW options series (hereinafter an ''SPX/SPXW order'') the order is routed to a PAR workstation pursuant to Rule 6.12(a)(1) in order to provide an opportunity for these orders to trade in open outcry.[18] If an SPX/SPXW order is received during extended trading hours, the order is rejected back to the sender.[19] CBOE handles SPX/SPXW orders in this manner because currently the System cannot accept complex orders consisting of series that trade on different trading platforms, even if part of the same class. The Exchange is updating its systems to accept SPX/SPXW orders so they can trade against each other electronically during regular trading hours and extended trading hours. Thus, the Exchange is seeking to amend Rule 6.53C in order to specify the manner in which SPX/SPXW orders will be executed electronically.[20]

Rule 6.53C sets forth the manner in which complex orders are executed on the Hybrid Trading System. Interpretation and Policy .10 to Rule 6.53C sets forth the specific manner in which complex orders in Hybrid 3.0 classes trading on the Hybrid 3.0 Platform are to be executed, which is generally the same as the manner in which complex orders are executed on the Hybrid Trading System except as set forth in that Interpretation and Policy .10. For example, one primary difference is, for Hybrid 3.0 classes, the Exchange may determine to not allow marketable complex orders to execute against resting quotes in the leg markets,[21] and the Exchange has determined to not allow complex orders in SPX to trade against the quotes in the leg markets.[22]

The Exchange is proposing to amend in Rule 6.53C.10 to allow SPX/SPXW orders may [sic] be executed in accordance with Rule 6.53C.10 in the same manner as complex orders that solely consist of a group of series that are authorized for trading on the Hybrid 3.0 Platform (*i.e.,* SPX complex orders); however, due to system limitations that in the Exchange's experience were prohibitively expensive to modify, SPX/SPXW orders (unlike SPX complex orders) will not automatically execute against individual orders residing in the EBook. SPX/SPXW orders that are marketable against individual orders residing in the EBook will instead be routed to a PAR workstation during Regular Trading Hours and rejected during Extended Trading Hours, which is exactly how all SPX/SPXW orders are treated today.

SPX/SPXW orders will trade using a price-time matching algorithm.[23] The Exchange will handle SPX/SPXW orders during regular trading hours in the following manner:[24]

- SPX/SPXW orders with more than 4 legs will be routed for manual handling, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[25]
- SPX/SPXW orders for the accounts of non-customers will not be allowed to rest in the Complex Order Book (''COB'') but will instead be routed for manual handling, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[26] All other participants will be allowed to rest in the COB.
- SPX/SPXW orders for the accounts of customers and non-customers will be permitted to participate in the COB opening process and trade against SPX/SPXW orders resting in the COB, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[27]
- Marketable SPX/SPXW orders will not be eligible to automatically execute against individual orders residing in the EBook for the legs.[28] Although SPX complex orders are eligible to automatically execute against individual orders residing in the EBook for the legs, not allowing SPX/SPXW orders to automatically execute against individual orders residing in the EBook for the legs effectively means that the Exchange is not changing how these particular SPX/SPXW orders will treated by the Exchange. These particular SPX/SPXW orders will be routed to a PAR workstation during regular trading hours, which is consistent with how all SPX/SPXW orders are treated during regular trading hours.
- Marketable SPX/SPXW orders will be eligible to automatically execute against other SPX/SPXW orders resting in the COB provided the execution is at a net price that has priority over the individual orders and quotes residing in the EBook, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[29]
- Marketable SPX/SPXW orders will not be eligible to automatically execute against individual Market-Maker quotes resting in the EBook for the legs, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[30]
- SPX/SPXW orders resting in the COB that become marketable against Market-Maker quotes in the individual legs will be subject to COA, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[31] Such orders (or remaining portion of such orders) that are not executed but are still marketable will be routed for manual handling, which is consistent with the manner in which

[17] For the purposes of the electronic trading of complex orders a complex order is defined as ''any order involving the execution of two or more different options series in the same underlying security occurring at or near the same time in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) (or such lower ratio as may be determined by the Exchange on a class-by-class basis) and for the purpose of executing a particular investment strategy. For the purpose of applying the aforementioned ratios to complex orders comprised of both mini-option contracts and standard option contracts, ten (10) mini-option contracts will represent one (1) standard option contract. Only those complex orders with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis, are eligible for processing.'' *See* Rule 6.53C(a)(1).

[18] The Exchange determines which options classes are eligible for COB and COA. *See* Rules 6.53C(c)(i) and (d)(i)(2).

[19] *See* Rule 6.1A(b) and RG15–013.

[20] While this rule filing focuses on SPX, as it is currently the only Hybrid 3.0 class, the proposed rule text applies to all Hybrid 3.0 classes to accommodate any future classes that may be authorized to trade on the Hybrid 3.0 Platform.

[21] *See* Rule 6.53.10.

[22] *See* RG 12–025.

[23] *See* Rule 6.45B(a) (giving the Exchange the ability to determine the matching algorithm—*i.e.,* the particular priority method) and Rule 8.14.01(c) (providing that when the Exchange authorizes a group of series of a Hybrid 3.0 class to trade on the Hybrid Trading System the trading parameters will be established by the Exchange on a group basis to the extent the Exchange Rules otherwise provide for such parameter to be established on a class basis).

[24] As noted throughout this filing, the Exchange may, by Rule, configure many of the order handling parameters.

[25] *See* Rule 6.53C(a)(1) (providing that complex orders with no more than the applicable number of legs as determined by the Exchange are eligible for processing). The current number of legs permitted for complex orders for electronic processing is four. Pursuant to Rule 6.12(a)(1), orders initially routed for electronic processing that are not eligible for automatic execution or book entry will by default route to PAR or back to the TPH.

[26] *See* Rule 6.53C(c)(i) (giving the Exchange the ability to determine which classes and origin types are eligible for entry into the COB) and RG15–195.

[27] *See* Rule 6.53C.11 and RG15–195.

[28] *See* Proposed Rule 6.53C.10(a).

[29] *See* Rule 6.53C.10(b)

[30] *See* Rule 6.53C.10 (providing that the Exchange may determine to not allow marketable complex orders entered into COB and/or COA to automatically execute against individual quotes residing in the EBook) and RG 12–025 (providing marketable SPX complex orders will not execute with individual quotes).

[31] *See* Rule 6.53C.10(d).

SPX complex orders are handled by the Exchange.[32]

During extended trading hours, SPX/SPXW orders for the accounts of customers and non-customers will be allowed to rest in the COB, and thus participate in the COB opening process and trade against SPX/SPXW orders resting in the COB, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[33] Additionally, any SPX/SPXW order that would normally be routed for manual handling during regulator trading hours will instead be returned to the order entry firm during extended trading hours because open outcry trading is unavailable during extended trading hours, which is consistent with the manner in which SPX complex orders are handled by the Exchange.[34]

Conclusion

The proposed rule change simply provides SPX/SPXW orders with an opportunity to execute electronically instead of automatically being routed to the floor for manual execution. Any electronic execution of SPX/SPXW orders will be in the same manner as complex orders with all SPX legs, except SPX/SPXW orders will not automatically execute against individual orders in the EBook for the legs, which will result in those specific SPX/SPXW orders being treated in exactly the same manner in which they are treated currently (*i.e.,* routed for manual handling during regular trading hours and rejected back to the order entry frim during extended trading hours). The Exchange will announce the implementation date of this rule filing via Regulatory Circular at least 7 days prior to the implementation date. The implementation date will be within 120 days of the approval date of this filing.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[35] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[36] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[37] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, SPX/SPXW orders currently may only be executed in open outcry during regular trading hours, and these orders are not executable during extended trading hours. The proposed rule change merely provides that these orders will be eligible for electronic processing (including electronic execution) in the same manner as complex orders consisting solely of SPX options series, except SPX/SPXW orders will not automatically execute against individual orders in the EBook for the legs, which will result in those specific SPX/SPXW orders being treated in exactly the same manner in which they are treated currently (*i.e.,* routed for manual handling during regular trading hours and rejected back to the order entry frim during extended trading hours). Since routing all SPX/SPXW orders for manual handling during regular trading hours and rejecting all SPX/SPXW orders during extended hours is currently consistent with the Act it is consistent with the Act to allow a subset of SPX/SPXW orders to continue to be treated in such a manner.

Allowing certain SPX/SPXW orders to COA and rest in the COB helps remove impediments to and perfect the mechanism of a free and open market and generally helps to protect investors and the public interest by giving SPX/SPXW orders increased opportunities for execution. However, the Exchange's flexibility to determine which market participants' orders may COA or rest in the COB also helps to protect investors and the public interest by allowing the Exchange to manage the ecosystem for all market participants. Regardless, since the Exchange already has the flexibility to determine which market participants' orders may COA[38] or rest in the COB,[39] it is consistent with the Act for the Exchange to have the flexibility to determine which market participants' SPX/SPXW orders may COA and rest in the COB. Finally, the manual handling of SPX, SPXW, and SPX/SPXW orders continues to have tremendous value for customers, particularly for orders with a large number of legs; however, COB and COA are additional functionalities that may provide increased opportunity to receive an execution and/or receive price improvement, both of which benefit investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. SPX/SPXW orders can currently be represented and executed in open outcry, and the proposed rule change merely provides these orders will be eligible for electronic processing (including electronic execution). The Exchange's flexibility to determine which market participants' orders may COA or rest in the COB will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because the flexibility allows the Exchange to manage the ecosystem for all market participants. Regardless, since the Exchange already has the flexibility to determine which market participants' orders may COA[40] or rest in the COB,[41] it is not unduly burdensome for the Exchange to have the flexibility to determine which market participants' SPX/SPXW orders may COA and rest in the COB. Additionally, these orders will execute electronically in the same manner as complex orders with all SPX legs currently do, except SPX/SPXW orders will not automatically execute with individual orders in the EBook for the legs, which will result in those specific SPX/SPXW orders being treated in exactly the same manner in which they are treated currently (*i.e.,* routed for manual handling during regular trading hours and rejected back to the order entry frim during extended trading hours). Since routing all SPX/SPXW orders for manual handling during regular trading hours and

[32] *See* Rule 6.53C.10(d). Because an SPX/SPXW that is marketable will not be permitted under the proposed rule to automatically execute against individual Market-Maker quotes or the individual orders residing in the EBook for the legs, an SPX/SPXW order that is marketable will route via the order handling system pursuant to Rule 6.12 in the same manner as marketable SPX complex orders.

[33] *See* Rule 6.53C(c) and RG15–013.

[34] *See* Rule 6.1(A)(b) (providing in extended trading hours if in accordance with the Rules an order would route to PAR, the order entry firm's booth or otherwise for manual handling the System will return the order the Trading Permit Holder during extended trading hours).

[35] 15 U.S.C. 78f(b).

[36] 15 U.S.C. 78f(b)(5).

[37] *Id.*

[38] *See* Rule 6.53C(d)(i)(2).

[39] *See* Rule 6.53C(c)(i).

[40] *See* Rule 6.53C(d)(i)(2).

[41] *See* Rule 6.53C(c)(i).

rejecting all SPX/SPXW orders during extended hours is currently not unduly burdensome it is not unduly burdensome to allow a subset of SPX/SPXW orders to continue to be treated in such a manner. Additionally, allowing such orders to be executed electronically will not impose any burden on intermarket competition as options on the S&P 500 are exclusively listed on the Exchange. To the extent the proposed changes make CBOE a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become CBOE market participants.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2016–080 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–CBOE–2016–080. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2016–080 and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28929 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79408; File No. SR–NASDAQ–2016–159]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Commentary .14 to Rule 4770 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

November 28, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 14, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .14 to Rule 4770 (Compliance with Regulation NMS Plan to Implement a Tick Size Pilot) to provide the SEC with notice of its efforts to re-program its systems to eliminate a re-pricing functionality for certain orders in Test Group Three securities in connection with the Regulation NMS Plan to Implement a Tick Size Pilot Program (''Plan'' or ''Pilot'').[3]

The text of the proposed rule change is set forth below. Proposed new language is italicized; deleted text is in brackets.

* * * * *

The NASDAQ Stock Market Rules

* * * * *

4770. Compliance With Regulation NMS Plan To Implement a Tick Size Pilot

(a) through (d) No Change.

Commentary: .01–.13 No change.

.14 Until [November 14, 2016]*December 12, 2016,* the treatment of Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols in Test Group Three securities shall be as follows:

Following entry, and if market conditions allow, a Price to Comply Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Price to Display Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Display Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in

---

[42] 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. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (''Approval Order'').

accordance with changes to the NBBO up (down) to the Order's limit price.

Following entry, and if market conditions allow, the Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the Nasdaq Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

* * * * *

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

On September 7, 2016, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change (''Proposal'') to adopt paragraph (d) and Commentary .12 to Exchange Rule 4770 to describe changes to system functionality necessary to implement the Plan. The Exchange also proposed amendments to Rule 4770(a) and (c) to clarify how the Trade-at exception may be satisfied. The SEC published the Proposal in the **Federal Register** for notice and comment on September 20, 2016.[4] Nasdaq subsequently filed three Partial Amendments to clarify aspects of the Proposal. The Commission approved the Proposal, as amended, on October 7, 2016.[5]

In SR–NASDAQ–2016–126, Nasdaq had initially proposed a re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Group Three securities.[6] Nasdaq subsequently determined that it would not offer this re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Group Three securities. As part of Partial Amendment No. 2 to SR–NASDAQ–2016–126, Nasdaq proposed to delete the relevant language from Rule 4770 related to this re-pricing functionality.

In that amendment, Nasdaq noted that this change would only impact the treatment of Price to Comply Orders, Non-Displayed Orders, and Post-Only orders that are submitted through the OUCH and FLITE protocols in Test Group Three Pilot Securities, as these types of Orders that are currently submitted to Nasdaq through the RASH, QIX or FIX protocols are already subject to this re-pricing functionality and will remain subject to this functionality under the Pilot.

In the Amendment, Nasdaq further noted that its systems are currently programmed so that Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Securities may be adjusted repeatedly to reflect changes to the NBBO and/or the best price on the Nasdaq book. Nasdaq stated that it is re-programming its systems to remove this functionality for Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Securities. In the Amendment, Nasdaq stated that it anticipated that this re-programming shall be completed no later than November 30, 2016. If it appeared that this functionality would remain operational by October 17, 2016, Nasdaq indicated that it would file a proposed rule change with the SEC and will provide notice to market participants sufficiently in advance of that date to provide effective notice. The rule change and the notice to market participants would describe the current operation of the Nasdaq systems in this regard, and the timing related to the re-programming.

On October 17, 2016, Nasdaq filed a proposal to extend the date by which it would complete the re-programing of its systems to eliminate the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols.[7] In that proposal, Nasdaq stated that it anticipated that this re-programming shall be complete on or before October 31, 2016.[8]

On October 31, 2016, Nasdaq submitted a proposed rule change to extend the date by which it would eliminate the re-pricing functionality to November 14, 2016.[9] In that proposal, Nasdaq stated that it was still determining how to modify its systems to eliminate the current re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols.

At this time, Nasdaq is in the process of re-programming its systems to eliminate the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols. Nasdaq anticipates that this re-programming shall be complete on or before December 12, 2016.

Therefore, the current treatment of Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols in Test Group Three securities shall be as follows:

Following entry, and if market conditions allow, a Price to Comply Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price.

[4] *See* Securities Exchange Act Release No. 78837 (September 14, 2016), 81 FR 64544 (September 20, 2016) (SR–NASDAQ–2016–126).

[5] *See* Securities Exchange Act Release No. 79075 (October 7, 2016) (SR–NASDAQ–2016–126).

[6] As originally proposed, Rule 4770(d)(2) stated that Price to Comply Orders in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price. Rule 4770(d)(3) stated that, if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price. Rule 4770(d)(4) stated that, if market conditions allow, the Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the Nasdaq Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

[7] *See* Securities Exchange Act Release No. 79155 (October 25, 2016) (SR–NASDAQ–2016–143).

Subsequent to the approval of SR–NASDAQ–2016–126, Nasdaq become aware that this re-pricing functionality also applies to Price to Display Orders that are entered through the OUCH and FLITE protocols in Test Group Three Securities, and included those Orders as part of SR–NASDAQ–2016–143 accordingly. Price to Display Orders will be treated in the same manner as Price to Comply Orders under the re-pricing functionality.

[8] *Id.*

[9] *See* Securities Exchange Release No. 79263 (November 8, 2016) (SR–NASDAQ–2016–151).

Following entry, and if market conditions allow, a Price to Display Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Display Order is able to be ranked and displayed at its original entered limit price.

Following entry, and if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order's limit price.

Following entry, and if market conditions allow, a Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the Nasdaq Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The purpose of this filing is to inform the SEC and market participants of the status of Nasdaq's attempts to re-program its systems to remove the re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, and the current treatment of such orders pending the removal of this functionality. This proposal is consistent with the Act because it provides the SEC and market participants with notice of Nasdaq's efforts in this regard, and is being submitted in connection with the statements made by Nasdaq in SR–NASDAQ–2016–126, SR–NASDAQ–2016–143 and SR–NASDAQ–2016–151 in proposing the removal of this functionality.

Nasdaq also believes that the proposal is consistent with the Act because the re-pricing functionality will not significantly impact the data gathered pursuant to the Pilot. Nasdaq notes that this re-pricing functionality only affects Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols for Test Group Three securities until the re-pricing functionality is eliminated, and only becomes relevant when an Order in a Test Group Three security would cross a Protected Quotation of another market center. Nasdaq has analyzed data relating to the frequency with which Orders in Test Group Three securities are entered with a limit price that would cross a Protected Quotation of another market center, and believes that the re-pricing functionality will be triggered infrequently.[12] The Exchange also notes that it is diligently working to eliminate the current re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, and that it anticipates this re-programming to be complete on or before December 12, 2016.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The purpose of this proposal is to provide the SEC and market participants with notice of Nasdaq's efforts to remove its re-pricing functionality in Test Group Three securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols, consistent with its statements in SR–NASDAQ–2016–126, SR–NASDAQ–2016–143, and SR–NASDAQ–2016–151.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing change has become effective pursuant to Section 19(b)(3)(A)(iii) [13] of the Act and Rule 19b–4(f)(6) [14] thereunder, in that it effects a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2016–159 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–159. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] For example, for the time period between October 17 and November 11, 2016, 0.08% of orders that were entered on Nasdaq in Test Group Three securities were entered at a price that crossed the NBBO.

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–159 and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28931 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–32373]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

November 28, 2016.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of November 2016. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 23, 2016, and should be accompanied by proof of service on 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 writing to the Commission's Secretary.

ADDRESSES: The Commission: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Jessica Shin, Attorney-Adviser, at (202) 551–5921 or Chief Counsel's Office at (202) 551–6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE., Washington, DC 20549–8010.

Dreyfus/Laurel Tax-Free Municipal Funds [File No. 811–03700]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On October 28, 2015, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $1,700.10 incurred in connection with the liquidation were paid by the applicant's investment adviser. A notice of applicant's application was included in the notice of applications for deregistration for September 2016 (Investment Company Act Release No. 32299). However, applicants subsequently amended their application on October 25, 2016 to correct an error in connection with the liquidation.

Filing Dates: The application was filed on August 8, 2016, and amended on August 31, 2016, October 13, 2016, and October 25, 2016.

Applicant's Address: c/o The Dreyfus Corporation, 200 Park Avenue, New York, New York 10166.

Templeton Russia and East European Fund, Inc. [File No. 811–08788]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 16, 2015 and December 18, 2016, applicant made liquidating distributions to its shareholders, based on net asset value. As of October 26, 2016, there remained 17,126.077 shares that have not been surrendered for exchange. The applicant's transfer agent will hold the shares' distribution pending surrender of the shares for exchange. If the holders do not surrender their shares for the payment and there is no contact from the holder, then the property will be deemed to be abandoned. Expenses of approximately $122,038 incurred in connection with the liquidation were paid by the applicant.

Filing Dates: The application was filed on October 4, 2016, and amended on November 4, 2016.

Applicant's Address: 300 SE 2nd Street, Fort Lauderdale, Florida 33301.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28935 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79403; File No. SR–BatsEDGX–2016–65]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make a Ministerial Change to Exchange Rules 11.8, 11.14, and 11.22

November 28, 2016.

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 November 17, 2016, Bats EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. 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 filed a proposal to make a ministerial change to Exchange Rules 11.8(d)(5), 11.14(g)(4), and 11.22(a)(7)(A)(i)(2) in order to remove erroneous and irrelevant rule text as well as correct a typographical error.

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make a ministerial change to Exchange Rules 11.8(d)(5) 11.14(g)(4), and 11.22(a)(7)(A)(i)(2) in order to remove erroneous and irrelevant rule text as well as correct a typographical error. First, the Exchange proposes to amend Rule 11.8(d)(5) remove an erroneous reference to the RMPT routing option. The Exchange notes that it does not offer the RMPT routing option, nor is such routing option currently described in its rules.[5] Second, the Exchange proposes to remove an erroneous reference to Rule 11.12 within Rule 11.14(g)(4). The Exchange notes that it previously revised Chapter XI of its rules, including the renumbering of current Rule 11.14, Limitation of Liability, which was previously Rule 11.12.[6] However, it failed at that time to update the rule reference within Rule 11.14(g)(4) from 11.12 to 11.14. The Exchange now proposes to delete this erroneous rule reference within Rule 11.14(g)(4) as reference to rule is not integral or necessary to the meaning or application of Rule 11.14 generally. Lastly, the Exchange proposes to amend Rule 11.22(a)(7)(A)(i)(2) to correct a typographical error by replacing the phrase ''one of more'' with ''one or more''.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(5) of the Act[8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes the proposed changes to Exchange Rules 11.8(d)(5), 11.14(g)(4), and 11.22(a)(7)(A)(i)(2) removing erroneous and irrelevant rule text as well as correcting a typographical error will provide clarity to the Exchange's rules and avoid potential investor confusion. The Exchange notes that neither change alters the meaning or application of each rule. As such, the proposed amendments would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. On the contrary, the proposed rule change will have no impact on competition as it is simply removes erroneous and irrelevant rule text while not altering the meaning or application of each rule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and subparagraph (f)(6) of Rule 19b–4 thereunder.[10]

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B) of the Act[11] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BatsEDGX–2016–65 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–BatsEDGX–2016–65. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

[5] The Exchange notes that the reference to RMPT was erroneously added in a previous rule filing. *See* Securities Exchange Act Release No. 75479 (July 17, 2015), 80 FR 43810 (July 23, 2015) (SR–EDGX–2015–33).

[6] *See* Securities Exchange Act Release No. 72676 (July 25, 2014), 79 FR 44519 (July 31, 2014) (SR–EDGX–2014–18).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(a)(iii).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 15 U.S.C. 78s(b)(2)(B).

inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsEDGX–2016–65, and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28926 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79361A; File No. SR–FINRA–2016–043]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Provide a Process for an Expedited Proceeding and Adopt a Rule To Prohibit Disruptive Quoting and Trading Activity

November 21, 2016.

Correction

In FR Document No. 2016–28458 beginning on page 85650 for Monday, November 28, 2016 the 34 Release number was incorrectly stated. The correct number is 34–79361.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28925 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79411; File No. SR–BatsEDGX–2016–66]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Non-Substantive Changes to the Fee Schedule

November 28, 2016.

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 November 18, 2016, Bats EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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 Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

The Exchange filed a proposal to make several non-substantive changes to the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to Exchange Rules 15.1(a) and (c).

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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make certain clarifying and non-substantive changes to its fee schedule in order to improve formatting, eliminate certain redundancies, increase overall readability, and provide users with straightforward descriptions to augment overall comprehensibility and usability of the existing fee schedule. The Exchange notes that these changes are purely clerical and do not substantively amend any fee or rebate, nor do they alter the manner in which the Exchange assesses fees or calculates rebates. The proposed changes are simply intended to provide greater transparency to market participants regarding how the Exchange assesses fees and calculates rebates. Specifically, the Exchange proposes to:

- Capitalize the title of the column setting forth each tier's rate under footnotes 1 and 2;
- ensure each tier requiring multiple criteria is conjoined using ''; and'' to clarify that all of a tier's criteria must be satisfied to receive the applicable rate;
- amend the name under first column of the tiers listed under footnote 2 to simply state ''Tier 1'', Tier 2'' to remove added language that is clearly set forth in and redundant with the tier's title;
- replace the phrases ''equal to or greater than'' and ''of at least'' with ''≥'' in all required criteria cells under footnotes 1 and 2.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[6] Specifically, the Exchange believes that the proposed rule change is consistent with Sections 6(b)(4) of the Act of the Act [sic],[7] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange believes that the proposed changes are reasonable and equitable because they are intended to simplify the Exchange's fee schedule and provide greater transparency to market participants regarding how the Exchange assesses fees and calculates rebates. The Exchange notes that these changes are purely clerical and do not substantively amend any fee or rebate, nor do they alter the manner in which the Exchange assesses fees or calculates rebates. The Exchange also believes that the proposal is non-discriminatory because it applies uniformly to all Members. Finally, the Exchange believes that the proposed changes will make the fee schedule clearer and eliminate potential investor confusion, thereby removing impediments to and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the Exchange believes that the [sic] will not impose any burden on competition as the changes are purely clerical and do not amend and [sic] fee or rebate.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and paragraph (f) of Rule 19b–4 thereunder.[9] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BatsEDGX–2016–66 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–BatsEDGX–2016–66. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsEDGX–2016–66, and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28933 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79412; File No. SR–BatsEDGA–2016–28]

Self-Regulatory Organizations; Bats EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make a Ministerial Change to Exchange Rules 11.10, 11.14, and 11.21

November 28, 2016.

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 November 17, 2016, Bats EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. 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 filed a proposal to make a ministerial change to Exchange Rules 11.10(a)(4)(D), 11.14(g)(4), and 11.21(a)(7)(A)(i)(2).

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make a ministerial change to Exchange Rules 11.10(a)(4)(D), 11.14(g)(4), and 11.21(a)(7)(A)(i)(2). First, the Exchange proposes to amend Rule 11.10(a)(4)(D) to correct a typographical error by replacing EDGX with EDGA. Second, the Exchange proposes to remove an erroneous reference to Rule 11.12 within Rule 11.14(g)(4). The Exchange notes that it previously revised Chapter XI of its rules, including the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

renumbering of current Rule 11.14, Limitation of Liability, which was previously Rule 11.12.[5] However, it failed at that time to update the rule reference within Rule 11.14(g)(4) from 11.12 to 11.14. The Exchange now proposes to delete this erroneous rule reference within Rule 11.14(g)(4) as reference to rule is not integral or necessary to the meaning or application of Rule 11.14 generally. Lastly, the Exchange proposes to amend Rule 11.21(a)(7)(A)(i)(2) to correct a typographical error by replacing the phrase ''one of more'' with ''one or more''.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes the proposed changes to Exchange Rules 11.10(a)(4)(D), 11.14(g)(4) and 11.21(a)(7)(A)(i)(2) will provide clarity to the Exchange's rules and avoid potential investor confusion. The Exchange notes that neither change alters the meaning or application of each rule. As such, the proposed amendments would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. On the contrary, the proposed rule change will have no impact on competition as it simply corrects a typographical error, and removes erroneous and irrelevant rule text while not altering the meaning or application of each rule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and subparagraph (f)(6) of Rule 19b–4 thereunder.[9]

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B) of the Act[10] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BatsEDGA–2016–28 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-BatsEDGA–2016–28. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsEDGA–2016–28, and should be submitted on or before December 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28934 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

[5] *See* Securities Exchange Act Release No. 72812 (August 11, 2014), 79 FR 48823 (August 18, 2014) (SR–EDGA–2014–20).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(a)(iii).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 15 U.S.C. 78s(b)(2)(B).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79410; File No. 4–631]

Joint Industry Plan; Notice of Filing of the Twelfth Amendment to the National Market System Plan To Address Extraordinary Market Volatility by Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.

November 28, 2016.

I. Introduction

On September 19, 2016, NYSE Group, Inc., on behalf of the following parties to the National Market System Plan to Address Extraordinary Market Volatility (''the Plan''): [1] Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., Chicago Stock Exchange, Inc., the Financial Industry Regulatory Authority, Inc. (''FINRA''), Investors Exchange LLC, National Stock Exchange, Inc., NASDAQ BX, Inc., NASDAQ PHLX LLC, The NASDAQ Stock Market LLC (''Nasdaq''), New York Stock Exchange LLC (''NYSE''), NYSE Arca, Inc., and NYSE MKT LLC (collectively, the ''Participants'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Exchange Act'') [2] and Rule 608 thereunder,[3] a proposal to amend the Plan (''Twelfth Amendment'').[4] The proposal reflects changes unanimously approved by the Participants. The Twelfth Amendment proposes to provide that a Trading Pause [5] will continue until the Primary Listing Exchange has reopened trading using its established reopening procedures, even if such reopening is more than 10 minutes after the beginning of a Trading Pause, and to require that trading centers may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock, as discussed below. A copy of the Plan, as proposed to be amended is attached as Exhibit A hereto. The Commission is publishing this notice to solicit comments from interested persons on the Twelfth Amendment.[6]

II.

III. Description of the Plan

Set forth in this Section II is the statement of the purpose and summary of the Twelfth Amendment, along with the information required by Rule 608(a)(4) and (5) under the Exchange Act,[7] prepared and submitted by the Participants to the Commission.[8]

A. Statement of Purpose and Summary of the Plan Amendment

The Participants filed the Plan on April 5, 2011, to create a market-wide Limit Up-Limit Down (''LULD'') mechanism intended to address extraordinary market volatility in NMS Stocks, as defined in Rule 600(b)(47) of Regulation NMS under the Exchange Act. The Plan sets forth procedures that provide for market-wide LULD requirements that prevent trades in individual NMS Stocks from occurring outside of the specified Price Bands. The LULD requirements are coupled with Trading Pauses, as defined in Section I(Y) of the Plan, to accommodate more fundamental price moves. In particular, the Participants adopted this Plan to address the type of sudden price movements that the market experienced on the afternoon of May 6, 2010.

As set forth in more detail in the Plan, all trading centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the requirements specified in the Plan. More specifically, the Participants will cause and enable the single plan processor responsible for consolidation of information for an NMS Stock pursuant to Rule 603(b) of Regulation NMS under the Exchange Act to calculate and disseminate a Lower Price Band and Upper Price Band, as provided for in Section V of the Plan. Section VI of the Plan sets forth the LULD requirements of the Plan, and in particular, that all trading centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trades at prices that are below the Lower Price Band or above the Upper Price Band for an NMS Stock, consistent with the Plan.

With respect to Trading Pauses, Section VII(A)(1) of the Plan provides that if trading for an NMS Stock does not exit a Limit State within 15 seconds of entry during Regular Trading Hours, then the Primary Listing Exchange shall declare a Trading Pause for such NMS Stock and shall notify the Processor. Section VII(B)(1) of the Plan further provides that five minutes after declaring a Trading Pause for an NMS Stock, and if the Primary Listing Exchange has not declared a Regulatory Halt, the Primary Listing Exchange shall attempt to reopen trading using its established procedures and the Trading Pause shall end when the Primary Listing Exchange reports a Reopening Price. However, Section VII(B)(3) of the Plan currently provides that if the Primary Listing Exchange does not report a Reopening Price within ten minutes after the declaration of a Trading Pause in an NMS Stock, and has not declared a Regulatory Halt, all trading centers may begin trading the NMS Stock.

Overview of Proposed Amendments

The Participants propose to amend the Plan to provide that a Trading Pause

[1] On May 31, 2012, the Commission approved the Plan, as modified by Amendment No. 1. *See* Securities Exchange Act Release No. 67091, 77 FR 33498 (June 6, 2012) (File No. 4–631) (''Plan Approval Order''). On February 20, 2013, the Commission noticed for immediate effectiveness the Second Amendment to the Plan. *See* Securities Exchange Act Release No. 68953, 78 FR 13113 (February 26, 2013). On April 3, 2013, the Commission approved the Third Amendment to the Plan. *See* Securities Exchange Act Release No. 69287, 78 FR 21483 (April 10, 2013). On August 27, 2013, the Commission noticed for immediate effectiveness the Fourth Amendment to the Plan. *See* Securities Exchange Act Release No. 70273, 78 FR 54321 (September 3, 2013). On September 26, 2013, the Commission approved the Fifth Amendment to the Plan. *See* Securities Exchange Act Release No. 70530, 78 FR 60937 (October 2, 2013). On January 7, 2014, the Commission noticed for immediate effectiveness the Sixth Amendment to the Plan. *See* Securities Exchange Act Release No. 71247, 79 FR 2204 (January 13, 2014). On April 3, 2014, the Commission approved the Seventh Amendment to the Plan. *See* Securities Exchange Act Release No. 71851, 79 FR 19687 (April 9, 2014). On February 19, 2015, the Commission approved the Eight Amendment to the Plan. *See* Securities Exchange Act Release No. 74323, 80 FR 10169 (February 25, 2015). On October 22, 2015, the Commission approved the Ninth Amendment to the Plan. *See* Securities Exchange Act Release No. 76244, 80 FR 66099 (October 28, 2015). On April 21, 2016, the Commission approved the Tenth Amendment to the Plan. *See* Securities Exchange Act Release No. 77679, 81 FR 24908 (April 27, 2016). On August 26, 2016, the Commission noticed for immediate effectiveness the Eleventh Amendment to the Plan. *See* Securities Exchange Act Release No. 78703, 81 FR 60397 (September 1, 2016).

[2] 15 U.S.C. 78k–1(a)(3).

[3] 17 CFR 242.608.

[4] *See* Letter from Elizabeth King, General Counsel and Corporate Secretary, NYSE, to Brent Fields, Secretary, Commission, dated September 16, 2016. (''Transmittal Letter'').

[5] Unless otherwise specified, the terms used herein have the same meaning as set forth in the Plan.

[6] 17 CFR 242.608.

[7] *See* 17 CFR 242.608(a)(4) and (a)(5).

[8] *See* Transmittal Letter, *supra* note 4.

will continue until the Primary Listing Exchange has reopened trading using its established reopening procedures and reports a Reopening Price. The Participants further propose to eliminate the current allowance for a trading center to resume trading in an NMS Stock following a Trading Pause if the Primary Listing Exchange has not reported a Reopening Price within ten minutes after the declaration of a Trading Pause and has not declared a Regulatory Halt. In addition, to preclude potential scenarios when trading may resume without Price Bands, the Participants propose to amend the Plan to provide that a trading center may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock. To address potential scenarios in which there is no Reopening Price from the Primary Listing Exchange to use to calculate Price Bands, the Participants propose to make related amendments to the Plan to address when trading may resume if the Primary Listing Exchange is unable to reopen due to a systems or technology issue and how the Reference Price would be determined in such a scenario or if the Primary Listing Exchange reopens trading on a zero bid or zero offer, or both.

In conjunction with filing this amendment to the Plan, each Primary Listing Exchange will file proposed rule changes with the Commission under Section 19(b) of the Exchange Act to amend their respective rules for automated reopenings following a Trading Pause consistent with a standardized approach agreed to by Participants that would allow for extensions of a Trading Pause if equilibrium cannot be met for a Reopening Price within specified parameters.[9] In addition, the Participants believe that the proposed amendments to the Plan, together with the proposed standardized approach to reopening trading following a Trading Pause, reduce the potential that an order or orders entered by a member of a Primary Listing Exchange would cause a reopening auction to execute at a clearly erroneous price. Accordingly, the Primary Listing Exchanges will file proposed rule changes with the Commission under Section 19(b) of the Exchange Act to amend their respective rules to preclude members from requesting review of a reopening auction as a clearly erroneous execution.[10]

Proposed Amendments to the Plan

To effect the proposed changes, the Participants propose the following amendments to the Plan:

First, the Participants propose to delete current Section VII(B)(3) of the Plan, which, as described above, currently provides that all trading centers may begin trading an NMS Stock if the Primary Listing Exchange does not report a Reopening Price within ten minutes after the declaration of a Trading Pause and has not declared a Regulatory Halt. By deleting current Section VII(B)(3) of the Plan, trading centers would no longer be permitted to begin trading an NMS Stock ten minutes after declaration of a Trading Pause in an NMS Stock if the Primary Listing Exchange has not either reported a Reopening Price or declared a Regulatory Halt.

The Participants propose to replace Section VII(B)(3) of the Plan with new text that would provide that trading centers may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock. This amendment would thus require that a trading center may resume trading only if there are Price Bands. This amendment, together with the requirement that the Trading Pause would not end until the Primary Listing Exchange reports a Reopening Price, would ensure that any trading based on Price Bands must be based on the Reopening Price of the Primary Listing Exchange as the Reference Price for such Price Bands.

Second, the Participants propose to amend the Plan to provide procedures for situations in which the Primary Listing Exchange is unable to reopen an NMS Stock due to a systems or technology issue. As described above, the Participants propose to amend the Plan to require that trading centers must wait to resume trading in an NMS Stock following a Trading Pause until the Primary Listing Exchange disseminates a Reopening Price, at which point Price Bands will be available. The Participants believe that the Plan should include provisions to address a circumstance in which a Primary Listing Exchange is unable to reopen an NMS Stock due to a systems or technology issue. As proposed, in such case, trading centers may resume trading an NMS Stock, but only if (i) the Primary Listing Exchange notifies the Processor that it is unable to reopen trading due to a systems or technology issue *and* (ii) the Processor has disseminated Price Bands based on a Reference Price.

To reflect this change, the Participants propose to amend Section VII(B)(2) of the Plan, which currently provides that the Primary Listing Exchange shall notify the Processor if it is unable to reopen trading in an NMS Stock for any reason other than a significant order imbalance and if it has not declared a Regulatory Halt. This section further provides that the Processor shall disseminate this information to the public, and all trading centers may begin trading the NMS Stock at this time. The Participants propose to amend this Section to be clear that the only time a trading center may resume trading in an NMS Stock in the absence of a Reopening Price from the Primary Listing Exchange is if the Primary Listing Exchange notifies the Processor that it is unable to reopen trading in an NMS Stock due to a systems or technology issue. The Participants believe that if a Primary Listing Exchange is unable to reopen trading due to a systems or technology issue, trading should be permitted to resume in that NMS Stock.

The Participants also propose to amend the last sentence of Section VII(B)(2) of the Plan to delete the phrase, ''and all trading centers may begin trading the NMS Stock at this time'' so that the sentence provides instead that ''The Processor shall disseminate this information to the public.'' The Participants believe that this proposed amendment clarifies that if a Primary Listing Exchange notifies the Processor that it is unable to reopen trading due to a systems or technology issue, the Processor would disseminate that information to the public.

Third, to clarify how Price Bands may be determined, the Participants propose to amend Section V(A)(1) of the Plan to add a new sentence before the last sentence of that section that would address how a trading center may calculate and apply Price Bands that are the same as the Price Bands that would have been disseminated by the Processor before the trading center receiving such Price Bands from the Processor (''Synthetic Price Bands''). Currently, the first sentence of Section V(A)(1) provides that the Processor shall calculate and disseminate Price Bands for each NMS Stock to the public. However, there are limited circumstances currently in which a trading center may resume trading using Synthetic Price Bands calculated by the trading center, rather than using Price Bands received from the Processor. For

[9] The Commission notes that the Primary Listing Exchanges have filed associated proposed rule changes. *See* Securities Exchange Act Release Nos. 79162 (October 26, 2016), 81 FR 75875 (November 1, 2016) (SR–BatsBZX–2016–61); 79158 (October 26, 2016), 81 FR 75879 (November 1, 2016) (SR–NASDAQ–2016–131); and 79107 (October 18, 2016), 81 FR 73159 (October 24, 2016) (File No. SR–NYSEArca–2016–130).

[10] *See supra* note 9.

example, in 2016, Primary Listing Exchanges implemented procedures to calculate and apply Synthetic Price Bands based on the Opening or Reopening Price sent to the Processor until Price Bands are received from the Processor. The proposed amendment would clarify the Plan and make clear that any trading center could calculate and apply Synthetic Price Bands.

Specifically, as proposed, if the Processor has not yet disseminated Price Bands, but a Reference Price is available, a trading center may calculate and apply Synthetic Price Bands based on the same Reference Price that the Processor would use for calculating such Price Bands until such trading center receives Price Bands from the Processor. The Participants believe that this proposed amendment would clarify that before Price Bands have been received from the Processor, a trading center may calculate and apply its own Synthetic Price Bands. An exception to a trading center trading based on Synthetic Price Bands would be, as described above in proposed amendments to Section VII(B)(3) [sic],[11] when the Primary Listing Exchange is unable to reopen due to a systems or technology issue. In that scenario, all trading centers must wait for the Processor to disseminate Price Bands before trading may resume.

Fourth, the Participants propose to amend Section V(C), which describes how the Reference Price will be determined following a reopening. Currently, Section V(C)(1) specifies that the next Reference Price following a Trading Pause will be the Reopening Price on the Primary Listing Exchange if such Reopening Price occurs within ten minutes after the beginning of the Trading Pause. Because, as described above, trading centers may not resume trading an NMS Stock if the Primary Listing Exchange does not disseminate a Reopening Price ten minutes after the beginning of the Trading Pause, the Participants propose to amend the first sentence of Section V(C)(1) of the Plan to delete the phrase ''if such Reopening Price occurs within ten minutes after the beginning of the Trading Pause.'' The Participants also propose to delete the penultimate sentence of Section V(C)(1), which specifies that if the Reopening Price does not occur within ten minutes after the beginning of the Trading Pause, the first Reference Price following the Trading Pause shall be equal to the last effective Reference Price before the Trading Pause. With the proposed amendments to Section VII(B)(3), this Plan text is no longer necessary.

Fifth, the Participants propose to amend Section V(C)(1) to specify how the Reference Price would be determined following a Reopening. Currently, this Section provides that if the Primary Listing Exchange has not declared a Regulatory Halt, the next Reference Price shall be the Reopening Price on the Primary Listing Exchange. The Participants propose to close a gap in the current Plan that would allow for trading to resume without any Price Bands. Specifically, if a Primary Listing Exchange were to resume trading on a quote with either a zero bid or zero offer, or both, there would be no midpoint to report to the Processor as a Reopening Price, and therefore the Processor would not have a first Reference Price from which to calculate Price Bands following such Trading Pause. Currently, in such case, the Processor does not calculate and disseminate Price Bands until five minutes after the conclusion of the Trading Pause or if a trade occurs. Thus, the first trade following the Trading Pause, if effected within five minutes following the end of the Trading Pause, would not be subject to Price Bands.

The Participants propose to amend the first sentence of Section V(C)(1) to provide that use of the Reopening Price from a Primary Listing Exchange as the first Reference Price is only when there is a transaction or quotation that does not include a zero bid or a zero offer from which to derive a midpoint. As with the current Plan, subsequent Reference Prices shall be determined in the manner prescribed for normal openings, as specified in Section V(B)(1) of the Plan.

To close the gap described above, the Participants also propose to specify what the first Reference Price would be if either the Primary Listing Exchange notifies the Processor that it is unable to reopen an NMS Stock due to a systems or technology issue or the Primary Listing Exchange reopens trading with a quotation that has a zero bid or offer, or both. For these circumstances, the Participants propose to add a new sentence to Section V(C)(1) of the Plan that would provide that the next Reference Price would be the last effective Price Band that was in a Limit State before the Trading Pause. For example, if the Limit State that triggered a Trading Pause was the Lower Price Band price and the Primary Listing Exchange is unable to reopen to a systems or technology issue or the reopening quotation has a zero bid or zero offer, or both, the first Reference Price that the Processor would use to calculate Price Bands would be the last Lower Price Band. The Participants believe that in such circumstances, using the last effective Limit State that triggered the Trading Pause would be a closer approximation of the most recent trading in that NMS Stock. By using that Limit State Price as a Reference Price, the next calculated Price Bands would take into consideration the directional movement of the trading in that NMS Stock because it would allow for additional trading in the direction of the last Limit State. As with the current Plan, any subsequent Reference Prices shall be calculated as specified in Section V(A) of the Plan.

Sixth, the Participants propose to make a related change to Section V(A)(1) of the Plan regarding how Price Bands are calculated. The last sentence of this section currently provides that if a Reopening Price does not occur within ten minutes after the beginning of a Trading Pause, the Price Band, for the first 30 seconds following reopening after that Trading Pause, shall be calculated by applying triple the Percentage Parameters set forth in Appendix A. Because the Plan would provide for a resumption of trading in the absence of a Reopening Price only if the Primary Listing Exchange is unable to reopen due to a systems or technology issue, the Participants propose to revise this Plan text to reflect this proposed amendment. As proposed, this sentence would instead provide that if under Section VII(B)(2), the Primary Listing Exchange notifies the Processor that it is unable to reopen an NMS Stock due to a systems or technology issue and it has not declared a Regulatory Halt, the Processor will calculate and disseminate Price Bands by applying triple the Percentage Parameters set forth in Appendix A for the first 30 seconds such Price Bands are disseminated.[12]

Seventh, the Participants propose to amend Section VII(B)(4) of the Plan, which currently provides that when trading begins after a Trading Pause, the Processor shall update the Price Bands as set forth in Section V(C)(1) of the Plan. Because, as described above, the Participants propose to amend the Plan to require that trading may not resume following a Trading Pause without Price Bands, the Participants propose to amend Section VII(B)(4) to provide the

[11] The Commission notes that the scenario where the Primary Listing Exchange is unable to reopen due to a systems or technology issue is discussed in the proposed amendment to Section VII(B)(2).

[12] The Participants have convened a working group to study how NMS Stocks are tiered under the Plan, and as a related matter, the Percentage Parameters assigned to a tier. The Participants are not proposing at this time to revise any of the Percentage Parameters or tier determinations.

requirement for the Processor to update such Price Bands. As proposed, this section would provide that the Processor would update the Price Bands as set forth in Section V(C)(1)–(2) of the Plan after receiving notification from the Primary Listing Exchange of a Reopening Price following a Trading Pause (or a resume message in the case of a reopening quote that has a zero bid or zero offer, or both), or that it is unable to reopen trading following a Trading Pause due to a systems or technology issue, provided that if the Primary Listing Exchange is unable to reopen due to a systems or technology issue, the update to the Price Bands would be no earlier than ten minutes after the beginning of the Trading Pause. This proposed amendment would make clear that the Participants will require the Processor to calculate and publish Price Bands in all potential scenarios following a Trading Pause. In addition, the proposed amendment would maintain the existing requirement that if a Primary Listing Exchange cannot reopen due to a systems or technology issue, trading would not resume until ten minutes after the beginning of the Trading Pause.

Eighth, the Participants propose to amend Section VII(C)(1) of the Plan, which currently provides that if a Trading Pause for an NMS Stock is declared in the last ten minutes of trading before the end of Regular Trading Hours, the Primary Listing Exchange shall not reopen trading and shall attempt to execute a closing transaction using its established closing procedures. The Participants propose to amend this text to provide that if an NMS Stock is in a Trading Pause during the last ten minutes of trading before the end of Regular Trading Hours, the Primary Listing Exchange shall attempt to execute a closing transaction using its established closing procedures. With the proposed change to require all trading centers to wait to resume trading in an NMS Stock subject to a Trading Pause until the Primary Listing Exchange has reported a Reopening Price, it is possible that a Trading Pause that was declared before the last ten minutes of trading before the end of Regular Trading Hours could be extended until after the last ten minutes of trading before the end of Regular Trading Hours. The Participants believe that in such case, trading in such NMS Stock should not resume, and instead the Primary Listing Exchange should attempt to execute a closing transaction using established closing procedures.

Ninth, the Participants propose to eliminate Trading Pauses following a Straddle State. Under Section VII(A)(2) of the Plan, a Primary Listing Exchange may declare a Trading Pause for an NMS Stock when an NMS Stock is in a Straddle State. A Straddle State is when the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band and the NMS Stock is not in a Limit State, and trading in that NMS Stock deviates from normal trading characteristics such that declaring a Trading Pause would support the Plan's goals to address extraordinary market volatility. Accordingly, under the Plan, declaring a Trading Pause is in the discretion of the Primary Listing Exchange for that NMS Stock. Since implementation of the Plan, there have not been any Trading Pauses declared following a Straddle State. The Participants therefore propose to eliminate Trading Pauses following a Straddle State as unnecessary.[13] In addition, the Participants believe that eliminating the ability for a Primary Listing Exchange to declare a Trading Pause following a Straddle State would promote transparency regarding the operation of the Plan as it would remove a discretionary circumstance for declaring a Trading Pause.

To effect this change, the Participants propose to (i) delete Section I(W), which defines the term ''Straddle State'' and renumber the definitions following that definition accordingly; (ii) delete section VII(A)(2) of the Plan, which describes how Trading Pauses following a Straddle State may be declared, and renumber current Section VII(A)(3) as new Section VII(A)(2); and (iii) delete the text relating to gathering raw data relating to Straddle States, as specified in Section II(A) of Appendix B.

Tenth, the Participants propose a non-substantive amendment to delete Sections VIII(A)–(C) of the Plan. These provisions currently set forth the schedule for implementing the Plan across all NMS Stocks. Because the Plan has been implemented across all NMS Stocks, the Participants believe it is no longer necessary to include this text in the Plan. As amended, Section VIII would state the initial date of Plan operations and the pilot end date.

Finally, the Participants propose non-substantive amendments to Section II(A) of the Plan (List of Parties) and Section X of the Plan (Counterparts and Signatures) to update the names of the exchanges owned by Bats Global Markets and to formally add the IEX to the list of signatories to the Plan.[14]

* * * * *

The Participants believe that the proposed amendments to the Plan would be necessary or appropriate in the public interest for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to and perfect the mechanisms of a national market system, or otherwise in furtherance of the purposes of the Act.

Specifically, these proposed amendments to the Plan are designed to address the issues experienced on August 24, 2015 by reducing the number of repeat Trading Pauses in a single NMS Stock. The proposed Plan amendments are an essential component to Participants' goal of more standardized processes across Primary Listing Exchanges in reopening trading following a Trading Pause, and facilitates the production of an equilibrium Reopening Price by centralizing the reopening process through the Primary Listing Exchange, which would also improve the accuracy of the reopening Price Bands. The proposed Plan amendments support this initiative by requiring trading centers to wait to resume trading following Trading Pause until there is a Reopening Price. The proposed Plan amendments also support this initiative by providing greater clarity regarding how the Reference Price and Price Bands following a Trading Pause would be determined in all circumstances, including if the Primary Listing Exchange is unable to conduct a reopening due to a systems or technology issue or if the reopening quote is a zero bid or a zero offer, or both.

B. Governing or Constituent Documents

The governing documents of the Processor, as defined in Section I(P) of the Plan, will not be affected by the Plan, but once the Plan is implemented, the Processor's obligations will change, as set forth in detail in the Plan.

[13] Straddle States were discussed in the ''Limit Up—Limit Down: National Market System Plan Assessment to Address Extraordinary Market Volatility,'' dated May 28, 2015, which was prepared for the Limit Up—Limit Down Operating Committee by James J. Angel, Associate Professor of Finance, Georgetown University and which was provided to the Commission (''Angel Report''). A copy of the Angel Report is available here: *https://www.sec.gov/comments/4-631/4631-39.pdf.* As noted in the Angel Report, the majority of Straddle States occurred in a limited number of low-liquidity NMS Stocks. They are often due to a lack of liquidity, and are resolved quickly. The Angel Report opined that a Trading Pause following the type of trading circumstances that leads to a Straddle State is unlikely to prevent any extreme trades or be followed by a re-opening cross. There have not been any Trading Pauses following a Straddle State since the publication of the Angel Report.

[14] As provided for in Section II(C) of the Plan, IEX became a Participant in the Plan effective August 11, 2016.

C. Implementation of Plan

The initial date of the Plan operations was April 8, 2013.

D. Development and Implementation Phases

The Plan was initially implemented as a one-year pilot program in two Phases, consistent with Section VIII of the Plan: Phase I of Plan implementation began on April 8, 2013 and was completed on May 3, 2013. Implementation of Phase II of the Plan began on August 5, 2013 and was completed on February 24, 2014. Pursuant to the Ninth Amendment, the Participants extended the Pilot until April 22, 2016.[15] Pursuant to the Tenth Amendment, the pilot period of the Plan was extended until April 21, 2017 and the proposed modifications described in the Tenth Amendment were implemented three months after SEC approval of Amendment No. 10.

The Participants propose to implement this amendment to the Plan no later than six months after approval of this amendment.

E. Analysis of Impact on Competition

The proposed Plan does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Participants do not believe that the proposed Plan introduces terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D) of the Exchange Act.

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

The Participants have no written understandings or agreements relating to interpretation of the Plan. Section II(C) of the Plan sets forth how any entity registered as a national securities exchange or national securities association may become a Participant.

G. Approval of Amendment of the Plan

Each of the Plan's Participants has executed a written amended Plan.

H. Terms and Conditions of Access

Section II(C) of the Plan provides that any entity registered as a national securities exchange or national securities association under the Exchange Act may become a Participant by: (1) Becoming a participant in the applicable Market Data Plans, as defined in Section I(F) of the Plan; (2) executing a copy of the Plan, as then in effect; (3) providing each then-current Participant with a copy of such executed Plan; and (4) effecting an amendment to the Plan as specified in Section III(B) of the Plan.

I. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

J. Method and Frequency of Processor Evaluation

Not applicable.

K. Dispute Resolution

Section III(C) of the Plan provides that each Participant shall designate an individual to represent the Participant as a member of an Operating Committee. No later than the initial date of the Plan, the Operating Committee shall designate one member of the Operating Committee to act as the Chair of the Operating Committee. Any recommendation for an amendment to the Plan from the Operating Committee that receives an affirmative vote of at least two-thirds of the Participants, but is less than unanimous, shall be submitted to the Commission as a request for an amendment to the Plan initiated by the Commission under Rule 608.

On September 13, 2016, the Operating Committee, duly constituted and chaired by Mr. Paul Roland, Nasdaq, met and voted unanimously to amend the Plan as set forth herein in accordance with Section III(C) of the Plan. The Plan Advisory Committee was notified in connection with the Twelfth Amendment.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment is consistent with the Exchange Act. The Commission encourages commenters to explain how data analysis, including prior Participant submitted data analysis on reopenings and Straddle States, informs their comments.

In addition, the Commission requests comment on the Participants' proposal to remove references to Straddle States in the Plan. To effect this change, the Participants propose to: (i) Delete the definition of the term ''Straddle State'' in Section I(A)(W) of the Plan; (ii) delete section VII(A)(2) of the Plan, which provides that the Primary Listing Exchanges may declare a Trading Pause following a Straddle State and requires the Primary Listing Exchanges to develop policies and procedures for declaring a Trading Pause and notify the Processor in such circumstances; and (iii) remove the requirement to gather and provide to the Commission raw data relating to Straddle States as specified in Section II(A) of Appendix B.

The Commission notes that the provisions related to Straddle States were added to the Plan in response to concerns that a stock could remain in a Straddle State for an indefinite period of time.[16] In the Plan Approval Order, the Commission observed that the ability of a Primary Listing Exchange to declare a Trading Pause in response to a Straddle State should help to ensure that the market for a stock would not remain impaired for an indefinite period of time, while also providing the Primary Listing Exchange with the discretion to determine whether such impairment is inconsistent with the stock's normal trading characteristics.[17]

In their letter to the Commission regarding Amendment 12, the Participants noted that, since implementation of the Plan, the Primary Listing Exchanges have not exercised discretion to declare a Trading Pause in response to a Straddle State.[18] The Participants further noted that Straddle State data reported in the Angel Report[19] showed that there were approximately 4.8 million Straddle States during the sample period and that over three quarters of Straddle States disappeared within one second. The Angel Report also showed that approximately 110,000 Straddle States lasted over fifteen seconds.

Commission staff has also conducted an analysis of Straddle States under the Plan, covering the period from May 12, 2014 to August 29, 2014, and found that most Straddle States occurred in Tier 2 securities.[20] Of the 2,073,497 Straddle States examined by Commission staff that occurred in Tier 2 securities, the vast majority of Straddle States lasted only five minutes.[21] However, more than 4,000 Straddle States lasted between five and 30 minutes, while more than 4,000 Straddle States lasted longer than 30 minutes.[22]

[15] *See supra* note 1.

[16] *See* Plan Approval Order, *supra* note 1, at 33503.

[17] *See id.,* at 33509.

[18] *See* Transmittal Letter, *supra* note 4.

[19] *See supra* note 13.

[20] The analysis found that over 99.9% of Straddle States occurred in Tier 2 securities.

[21] For this part of the analysis, the Commission staff used data on Straddle States, which was provided to the Commission by the Participants as described in Appendix B of the Plan, to examine 6711 Tier 2 securities over a period of 78 trading days.

[22] Notably, this analysis was performed on a time period before the adoption of Amendment 10, which changed how opening reference prices are calculated if there is no trading in the opening auction. As such, it is possible the longer Straddle States observed in the analysis resulted from an opening reference price that was based on an opening auction with no trades and in which the

Accordingly, the Commission requests comment on whether the concerns outlined in the Plan Approval Order about stocks remaining in Straddle States for indefinite periods of time continues to be a viable concern, and how the data analysis discussed above informs those concerns. In this regard, should the Plan continue to provide the discretion for Primary Listing Markets to declare a Trading Pause when an NMS Stock is in a Straddle State? Are there other alternatives to declaring a Trading Pause to address concerns about NMS Stocks remaining in Straddle States for indefinite periods of time? Should the Plan continue to provide for the collection of data related to Straddle States or should the Plan contain any mechanism to monitor Straddle States? Please explain.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number 4–631 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–631. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission, and all written communications relating to the amendment 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 Web site 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the Participants' offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–631 and should be submitted on or before December 23, 2016.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–28937 Filed 12–1–16; 8:45 am]

BILLING CODE 8011–01–P

midpoint of the opening bid and ask quotes significantly deviated from the previous day's closing price. However, information contained in the Angel Report suggests otherwise. *See* Angel Report *supra* note 13. Table 25 in the Angel Report shows that when all opening reference prices are included, 1.80% of all Straddle States last longer than 30 seconds. In contrast, when days with what Angel refers to as ''bad'' opening reference points are excluded, Table 27 in the Angel Report finds that 8.34% of the Straddle States last longer than 30 seconds. *Id.* If a ''bad'' opening reference price contributed to longer Straddle States, the percentage of Straddle States lasting longer than 30 seconds would likely decrease once ''bad'' opening reference prices are excluded, not increase.

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2015–0056]

Privacy Act of 1974; Proposed New System of Records

AGENCY: Social Security Administration (SSA).

ACTION: Proposed new system of records.

SUMMARY: In accordance with the Privacy Act we are issuing public notice of our intent to establish a new system of records entitled, *Anti-Harassment & Hostile Work Environment Case Tracking and Records System* (60–0380), hereinafter referred to as the Anti-Harassment System. The Equal Employment Opportunity Commission (EEOC) requires agencies to implement anti-harassment policies and procedures separate from the Equal Employment Opportunity process. As a result of implementing those policies and procedures, SSA is creating the Anti-Harassment System, which will capture and house information regarding allegations of workplace harassment filed by SSA employees, including SSA contractors, alleging harassment by another SSA employee or SSA contractor. The Anti-Harassment System supports our efforts to prevent harassment from occurring, to stop it before it becomes severe or pervasive, and to conduct prompt, thorough, and impartial investigations into allegations of harassment, thus supporting our obligation to maintain a work environment free from discrimination, including harassment.

DATES: We invite public comment on this new system of records. In accordance with 5 U.S.C. 552a(e)(4) and (e)(11), the public is given a 30-day period in which to submit comments. Therefore, please submit any comments by January 3, 2017.

ADDRESSES: The public, Office of Management and Budget (OMB), and Congress may comment on this publication by writing to the Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room 617 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, or through the Federal e-Rulemaking Portal at *http://www.regulations.gov*. All comments we receive will be available for public inspection at the above address and we will post them to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Pamela J. Carcirieri, Supervisory Government Information Specialist, Privacy Implementation Division, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room 617 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, telephone: (410) 965–0355, email: *Pamela.Carcirieri@ssa.gov* or Navdeep Sarai, Government Information Specialist, Privacy Implementation Division, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room 617 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, telephone: (410) 965–2997, email: *Navdeep.Sarai@ssa.gov*.

In accordance with 5 U.S.C. 552a(r), we have provided a report to OMB and Congress on this new system of records.

DATED: November 28, 2016.

Glenn Sklar,

Acting Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Social Security Administration (SSA)

System Number: 60–0380

SYSTEM NAME:

Anti-Harassment & Hostile Work Environment Case Tracking and Records System

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Social Security Administration, Office of Human Resources, Office of Labor Management and Employee Relations, 6401 Security Boulevard, Baltimore, Maryland 21235.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

SSA employees and SSA contractors who report allegations of workplace harassment to the Office of Civil Rights and Equal Opportunity (OCREO) or to management; SSA employees and SSA contractors against whom allegations of workplace harassment have been reported to OCREO or to management; and SSA Harassment Prevention Officers (HPOs), investigators, and independent reviewers who conduct program business or inquiries relative to reports of alleged workplace harassment.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system maintains information collected or generated in response to an allegation of workplace harassment, which may include: Allegations of workplace harassment; information generated during fact-finding investigations; and other records related to the investigation and/or response taken as a result of the allegation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.;* Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.;* The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, *et seq.;* The ADA Amendments Act of 2008; The Rehabilitation Act of 1973 (Section 501), 29 U.S.C. 791; The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Public Law 107–174; Genetic Information Nondiscrimination Act of 2008 (GINA), Public Law 110–233; Executive Order 13087, Executive Order 13152, and further amendments to Executive Order 11478 and Executive Order 11246; and EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002, V.C.1 (June 18, 1999).

PURPOSE:

The SSA takes seriously its obligation to maintain a work environment free from discrimination, including harassment. Managers and employees are responsible for preventing harassment from occurring and stopping harassment before it becomes severe or pervasive. The agency will take seriously all allegations of workplace harassment, and will conduct prompt, thorough, and impartial investigations into allegations of harassment. The Anti-Harassment System will capture and house information regarding allegations of workplace harassment filed by SSA employees and SSA contractors alleging harassment by another SSA employee and any investigation and/or response taken as a result of the allegation. The Anti-Harassment System will also capture and house information regarding allegations of workplace harassment filed by SSA employees alleging harassment by an SSA contractor and any investigation and/or response taken as a result of the allegation.

ROUTINE USES OF RECORDS COVERED BY THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

We will disclose records pursuant to the following routine uses, however, we will not disclose any information defined as ''return or return information'' under 26 U.S.C. 6103 of the Internal Revenue Service Code (IRC), unless authorized by statute, the Internal Revenue Service (IRS), or IRS regulations.

1. To a congressional office in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or a third party acting on the subject's behalf.

2. To the Department of Justice (DOJ), a court or other tribunal, or another party before such court or tribunal, when

(a) SSA, or any component thereof; or

(b) any SSA employee in his/her official capacity; or

(c) any SSA employee in his/her individual capacity where DOJ (or SSA, where it is authorized to do so) has agreed to represent the employee; or

(d) the United States or any agency thereof where SSA determines that the litigation is likely to affect SSA or any of its components, is a party to the litigation or has an interest in such litigation, and SSA determines that the use of such records by DOJ, a court or other tribunal, or another party before the tribunal is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the DOJ, court or other tribunal, or another party is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

3. To the National Archives and Records Administration under 44 U.S.C. 2904 and 2906.

4. To appropriate Federal, State, and local agencies, entities, and persons when:

(a) We suspect or confirm that the security or confidentiality of information in this system of records has been compromised;

(b) we determine that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs that rely upon the compromised information; and

(c) we determine that disclosing the information to such agencies, entities, and persons is necessary to assist in our efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

5. To the Office of the President in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or a third party acting on the subject's behalf.

6. To contractors and other Federal agencies, as necessary, for the purpose of assisting the SSA in the efficient administration of its programs. We will disclose information under this routine use only in situations in which SSA may enter into a contractual or similar agreement with a third party to assist in accomplishing an agency function relating to this system of records.

7. To student volunteers, individuals working under a personal services contract, and other workers who technically do not have the status of Federal employees, when they are performing work for SSA, as authorized by law, and they need access to personally identifiable information in SSA records in order to perform their assigned Agency functions.

8. To any agency, person, or entity in the course of an investigation to the extent necessary to obtain information pertinent to the investigation.

9. To the alleged victim or harasser, or their representatives, the minimal information necessary to provide the status or the results of the investigation or case involving them.

10. To the Office of Personnel Management or the Merit Systems Protection Board (including the Office of Special Counsel) when information is requested in connection with appeals, special studies of the civil service and other merit systems, review of those agencies' rules and regulations, investigation of alleged or possible prohibited personnel practices, and for such other functions of these agencies as may be authorized by law, *e.g.,* 5 U.S.C. 1205 and 1206.

11. To the Equal Employment Opportunity Commission when requested in connection with investigations into alleged or possible discriminatory practices in the Federal sector, examination of Federal affirmative employment programs, compliance by Federal agencies with Uniformed Guidelines on Employee

Selection Procedures, or other functions vested in the Commission.

12. To officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting conditions of employment.

13. To Federal, State, and local law enforcement agencies and private security contractors, as appropriate, information necessary:

(a) To enable them to protect the safety of SSA employees and customers, the security of the SSA workplace, the operation of SSA facilities, or

(b) To assist investigations or prosecutions with respect to activities that affect such safety and security or activities that disrupt the operations of SSA facilities.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE: We will store records in this system in paper and electronic form.

RETRIEVABILITY: We will retrieve records by the name of the alleging employee, the name of the alleged harasser, and unique case identifiers.

SAFEGUARDS:

We retain paper and electronic records with personal identifiers in secure storage areas accessible only by our authorized employees who have a need for the information when performing their official duties. Security measures include the use of access codes (personal identification number (PIN) and password) to initially enter our computer systems that house the data. We further restrict the electronic records by the use of the PIN for only those employees who are authorized to access the system. We keep paper records in locked cabinets within secure areas.

We annually provide our employees and contractors with appropriate security awareness training that includes reminders about the need to protect personally identifiable information (PII) and the criminal penalties that apply to unauthorized access to, or disclosure of, PII (5 U.S.C. 552a(i)(1)). Furthermore, employees and contractors with access to databases maintaining PII must sign a sanctions document annually, acknowledging their accountability for inappropriately accessing or disclosing such information.

RETENTION AND DISPOSAL:

These records are currently unscheduled and will not be deleted or destroyed.

SYSTEM MANAGER AND ADDRESS:

Social Security Administration, Office of Human Resources, Office of Labor Management and Employee Relations, 6401 Security Boulevard, Baltimore, MD 21235.

NOTIFICATION PROCEDURES:

This system of records has been exempted from the Privacy Act's notification, access, and amendment provisions as stated below. However, individuals may request information about whether this system contains a record about them by submitting a written request to the system manager at the above address, which includes their name, SSN, or other information that may be in this system of records that will identify them. Individuals requesting notification by mail must include a notarized statement to us to verify their identity or must certify in the request that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense. A determination of whether notification will be provided, or a record may be accessed or amended, will be made after a request is received.

Individuals requesting notification of records in person must provide their name, SSN, or other information that may be in this system of records that will identify them, as well as provide an identity document, preferably with a photograph, such as a driver's license. Individuals lacking identification documents sufficient to establish their identity must certify in writing that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

Individuals requesting notification by telephone must verify their identity by providing identifying information that parallels the information in the record about which notification is sought. If we determine that the identifying information the individual provides by telephone is insufficient, we will require the individual to submit a request in writing or in person. If an individual requests information by telephone on behalf of another individual, the subject individual must be on the telephone with the requesting individual and with us in the same phone call. We will establish the subject individual's identity (his or her name, SSN, address, date of birth, and place of birth, along with one other piece of information such as mother's maiden name), and ask for his or her consent to provide information to the requesting individual. These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

RECORD ACCESS PROCEDURES:

Same as notification procedures. Individuals must also reasonably specify the record contents they are seeking. These procedures are in accordance with our regulations at 20 CFR 401.40(c).

CONTESTING RECORD PROCEDURES:

Same as notification procedures. Individuals should also reasonably identify the record, specify the information they are contesting, and state the corrective action sought and the reasons for the correction with supporting justification showing how the record is incomplete, untimely, inaccurate, or irrelevant. These procedures are in accordance with our regulations at 20 CFR 401.65(a).

RECORD SOURCE CATEGORIES:

We obtain information in this system from employees and witnesses, SSA contractors, members of the public, law enforcement officers of other Federal agencies, and other individuals involved with the allegation. Some information, such as the employee's name, PIN, employee identification number, employee's position, and employee's job location is pre-populated in the system by using information contained in our Human Resource Operational Data Store system.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE PRIVACY ACT:

This system of records has been exempted from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c), and (e) and have been published in today's **Federal Register**.

[FR Doc. 2016–29035 Filed 12–1–16; 8:45 am]

BILLING CODE 4191–02–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36071]

Delmarva Central Railroad Company—Lease and Operation Exemption With Interchange Commitment—Norfolk Southern Railway Company

Delmarva Central Railroad Company (DCR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease and operate approximately 161.59 miles of track (the Line) currently owned and operated by Norfolk Southern Railway Company (NSR) consisting of (1) a line of railroad extending between Porter, Del., at milepost DM 14.4 and Pocomoke, Md., at milepost DM 128.19; (2) a line of railroad extending between Harrington, Del., at milepost IR 0.0 and Frankford, Del., at milepost IR 39.0; and (3) various industrial tracks.[1]

This transaction is related to a concurrently filed verified notice of exemption in *Carload Express, Inc.—Continuance in Control Exemption—Delmarva Central Railroad,* Docket No. FD 36072, in which Carload Express, Inc., seeks to continue in control of DCR upon DCR's becoming a Class III rail carrier.

DCR states that is has reached an agreement in principle with NSR to lease and operate the Line upon the effective date established by the Board and that a final version of the agreement is expected to be executed shortly. As required by 49 CFR 1150.33(h), DCR has disclosed in its verified notice that the agreement contains interchange commitments, including lease credits, and that the agreement affects interchange at Tasker, Del. (near New Castle, Del.) and Clay, Del. (near Clayton, Del.). In addition, DCR has provided additional information regarding the interchange commitments as required by § 1150.33(h).[2]

DCR certifies that its projected annual revenues resulting from the transaction will not exceed those that would qualify it as a Class III rail carrier. DCR notes, however, that its annual operating revenues will exceed $5 million. Accordingly, in compliance with 49 CFR 1150.32(e), DCR/NSR posted the required 60-day labor notice of this transaction at the workplaces of NSR employees on the Line on October 18, 2016, and has served that notice on the national offices of the labor unions for those employees' unions as of that same date. On October 18, 2016, DCR also filed a letter with the Board certifying its compliance with the advance notice requirements.

The transaction may be consummated on or after December 17, 2016, the effective date of the exemption (30 days after the verified notice of exemption was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 9, 2016 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36071, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on William A. Mullins, Baker & Miller, PLLC, 2401 Pennsylvania Ave. NW., Suite 300, Washington, DC 20037.

According to DCR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our website at *WWW.STB.GOV.*

Decided: November 28, 2016.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–28950 Filed 12–1–16; 8:45 am]

BILLING CODE 4915–01–P

[1] These segments include the Oxford Industrial Track between mileposts VQ 0 and VQ 0.4, the Cambridge Industrial Track between mileposts QT 0.0 and QT 2.3, the Willards Industrial Track between mileposts MW 42.05 and MW 45.7, the Mardella Industrial Track between mileposts MW 41.4 and MW 42.05, the Mill Street Industrial Track between mileposts MR 0.0 and MR 0.6, and the Chrisfield Industrial Track between mileposts KK 0.0 and KK 1.2. DCR notes that the parties do not intend to convey common carrier authority over such industrial tracks or convert such industrial tracks into 49 U.S.C. 10901 lines.

[2] DCR states that, for it to conduct operations, it will enter into various interchange agreements, some of which will include limited trackage rights to be used solely for interchange purposes. DCR notes, for example, to interchange at Tasker, DCR crews will need to operate over NSR and to interchange at Clay, NSR crews will need to operate over DCR.

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36070]

Kokomo Rail, LLC—Acquisition and Operation Exemption—Rail Line of Indian Creek Railroad Company

Kokomo Rail, LLC (KR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire and operate approximately 4.55 miles of rail line (the Line), from Indian Creek Railroad Company (ICRK).[1] According to KR's notice, the Line extends between a point of connection to Norfolk Southern Railway Company at or near Florida Station and the end of track northwest of Anderson, Ind., a distance of 4.55 miles in Madison County, Ind. The Line does not have milepost designations.

KR states that in *Kokomo Rail Co., Inc.—Acquisition and Operation Exemption—Rail Line of Indian Creek Railroad Company,* FD 36054 (STB served Aug. 18, 2016), Kokomo Rail Co., Inc. (KRC) was authorized to acquire and operate ICRK's rail line. However, according to KR, KRC's corporate identity had been dissolved before that notice was filed. KR further states that KRC's authority to acquire and operate ICRK's rail was not consummated.

KR certifies that its projected annual revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier, that its projected annual revenue will not exceed $5 million, and that the transaction does not involve any interchange commitments.

The earliest this transaction may be consummated is December 17, 2016, the effective date of the exemption (30 days after the amended verified notice of exemption was filed).

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Petitions for stay must be filed no later than December 9, 2016 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36070, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1666, Chicago, IL 60604.

According to KR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our Web site at *WWW.STB.GOV.*

Decided: November 25, 2016.

[1] KR filed the verified notice of exemption on October 27, 2016, a letter supplementing the record on November 7, 2016, and an amended verified notice on November 17, 2016.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–28943 Filed 12–1–16; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36072]

Carload Express, Inc.—Continuance in Control Exemption—Delmarva Central Railroad Company

Carload Express, Inc. (CEI), has filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(2) to continue in control of Delmarva Central Railroad Company (DCR) upon DCR's becoming a Class III rail carrier. CEI is a Class III non-operating rail holding company currently with subsidiary companies operating rail line in Pennsylvania and Ohio.

This transaction is related to a concurrently filed verified notice of exemption in *Delmarva Central Railroad—Lease & Operation Exemption with Interchange Commitment—Norfolk Southern Railway,* FD 36071, in which DCR has filed for authority under 49 CFR 1150.31 to lease and operate approximately 161.59 miles of track (the Line) currently owned and operated by Norfolk Southern Railway Company (NSR) consisting of (1) a line of railroad extending between Porter, Del., at milepost DM 14.4 and Pocomoke, Md., at milepost DM 128.19; (2) a line of railroad extending between Harrington, Del., at milepost IR 0.0 and Frankford, Del., at milepost IR 39.0; and (3) various industrial tracks.[1]

The transaction may be consummated on or after December 17, 2016, the effective date of the exemption.

CEI currently controls three Class III carriers: Allegheny Valley Railroad Company and Southwest Pennsylvania Railroad Company, which operate in Pennsylvania, and Ohio Terminal Railway Company, which operates in Ohio.

CEI certifies that (1) the rail lines to be operated by DCR do not connect with any other railroads in the CEI corporate family; (2) the proposed continuance in control is not part of a series of anticipated transactions that would connect the carriers with each other or any railroad in their corporate family; and (3) the transaction does not involve a Class I carrier. Therefore, pursuant to 49 CFR 1180.2(d)(2), the proposed transaction is exempt from the prior approval requirements of 49 U.S.C. 11323.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than December 9, 2016 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36072, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on William A. Mullins, Baker & Miller, PLLC, 2401 Pennsylvania Ave. NW., Suite 300, Washington, DC 20037.

Board decisions and notices are available on our website at *WWW.STB.GOV.*

Decided: November 28, 2016.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–28949 Filed 12–1–16; 8:45 am]

BILLING CODE 4915–01–P

[1] DCR states in its verified notice that these segments include the Oxford Industrial Track between mileposts VQ 0 and VQ 0.4, the Cambridge Industrial Track between mileposts QT 0.0 and QT 2.3, the Willards Industrial Track between mileposts MW 42.05 and MW 45.7, the Mardella Industrial Track between mileposts MW 41.4 and MW 42.05, the Mill Street Industrial Track between mileposts MR 0.0 and MR 0.6, and the Chrisfield Industrial Track between mileposts KK 0.0 and KK 1.2. DCR notes that the parties do not intend to convey common carrier authority over such industrial tracks or convert such industrial tracks into 49 U.S.C. 10901 lines.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Sixth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary

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

ACTION: Sixth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of Sixth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary.

DATES: The meeting will be held January 25, 2017 09:00 a.m.–05:00 p.m.

ADDRESSES: The meeting will be held Virtually at *https://rtca.webex.com/rtca/j.php?MTID=mbbd6ff9a890bf402c705cc80485a74f1,* Join by phone, 1–877–668–4493 Call-in toll-free number (U.S./Canada), 1–650–479–3208 Call-in toll number (U.S./Canada), Access code: 636 752 137.

FOR FURTHER INFORMATION CONTACT: Karan Hofmann at *khofmann@rtca.org* or 202–330–0680, or The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of the Sixth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary. The agenda will include the following:

Wednesday, January 25, 2017—9:00 a.m.–5:00 p.m.

1. Welcome and Administrative Remarks
2. Introductions
3. Agenda Review
4. Meeting-Minutes Review
5. Final Review and Comment (FRAC) Process Presentation
6. Final Review of Document
7. Approve Document for FRAC
8. Review of Program Schedule
9. Action Item Review
10. Any Other Business
11. Date and Place of Next Meeting
12. Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on November 29, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17, NextGen, Procurement Services Division,

Federal Aviation Administration.

[FR Doc. 2016–28992 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic steel components of Airport Transit System (ATS) vehicles, ATS guideway switches, and ATS rails to be incorporated into the Chicago O'Hare International Airport Transit System Expansion & Modernization Project.

DATES: The effective date of the waiver is December 5, 2016.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. William Winne, FHWA Office of the Chief Counsel, 202–366–1397, or via email at *William.Winne@dot.gov.* Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for use of non-domestic steel components of ATS vehicles, ATS guideway switches, and ATS rails to be incorporated into the Chicago O'Hare International Airport ATS Expansion & Modernization Project.

In accordance with Division K, section 122 of the ''Consolidated and Further Continuing Appropriations Act, 2015'' (Pub. L. 113–235), FHWA published a notice of intent to issue a waiver on its Web site; *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=125* on April 26th. The FHWA received two comments in response to the publication. Frank Johnson opposed granting a waiver and suggested that all products should be made in the United States. Brian Abbott of Voestalpine Nortrak claimed that Nortrack has the capability of manufacturing guideway switches domestically. The City of Chicago consulted with Nortrak and explored the possibility for domestic procurement of guideway switches. The City of Chicago determined that the guideway switches manufactured by Voestalpine Nortrak were not compatible with Chicago O'Hare Airport Transit System ATS. Chicago's June 28th response indicates that they coordinated with Voestalpine Nortrak regarding compatibility issues and provided a reasonable explanation of why a waiver is appropriate considering their project circumstances. Based on all the information available to the agency, FHWA concludes that there are no domestic manufacturers of ATS vehicles, ATS guideway switches, and ATS rails for the Chicago O'Hare International Airport ATS Expansion & Modernization Project.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: November 23, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–28975 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic galvanized strands consisting of HDPE or HDPP sheath filled corrosion inhibitor meeting FDOT specification 938, ASTM and PTI requirements for SR–836/I–395 from West of I–95 to MacArthur Causeway Bridge in the State of Florida.

DATES: The effective date of the waiver is December 5, 2016.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *Gerald.Yakowenko@dot.gov.* For legal questions, please contact Mr. William Winne, FHWA Office of the Chief Counsel, (202) 366–1397, or via email at *William.Winne@dot.gov.* Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Publishing Office's database at: *https://www.gpo.gov/fdsys/.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding

FHWA's finding that a Buy America waiver is appropriate for use of non-domestic galvanized strands consisting of HDPE or HDPP sheath filled corrosion inhibitor meeting FDOT specification 938, ASTM and PTI requirements for SR–836/I–395 from West of I–95 to MacArthur Causeway Bridge in the State of Florida.

In accordance with the Consolidated Appropriations Act, 2016 (Pub. L. 114–113) and the Continuing Appropriations Act, 2017 (Pub. L. 114–223), FHWA published a notice of intent to issue a waiver on its Web site: *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=136* on September 28th. The FHWA received no comments in response to the publication. Based on all the information available to the agency, FHWA concludes that there are no domestic manufacturers of galvanized strands consisting of HDPE or HDPP sheath filled corrosion inhibitor meeting FDOT specification 938, ASTM and PTI requirements for SR–836/I–395 from West of I–95 to MacArthur Causeway Bridge in the State of Florida.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: November 23, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–28970 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for procurement of two non-domestic Ship-to-Shore Container Gantry Cranes to accommodate Ultra Large Container Vessels at the Port of Newark Container Terminal in the State of New Jersey.

DATES: The effective date of the waiver is December 5, 2016.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *Gerald.Yakowenko@dot.gov*. For legal questions, please contact Mr. William Winne, FHWA Office of the Chief Counsel, (202) 366–1397, or via email at *William.Winne@dot.gov*. Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Publishing Office's database at: *https://www.gpo.gov/fdsys/*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for use of non-domestic Ship-to-Shore Container Gantry Cranes to accommodate Ultra Large Container Vessels at the Port of Newark Container Terminal in the State of New Jersey.

In accordance with the Consolidated Appropriations Act, 2016 (Pub. L. 114–113) and the Continuing Appropriations Act, 2017 (Pub. L. 114–223), FHWA published a notice of intent to issue a waiver on its Web site: *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=134* on September 20th. The FHWA received three comments in response to the publication. The commenters provided general comments on Buy America with no specific information regarding domestic sources for Ship-to-Shore Container Gantry Cranes. Based on all the information available to the agency, FHWA concludes that there are no domestic manufacturers of Ship-to-Shore Container Gantry Cranes to accommodate Ultra Large Container Vessels at the Port of Newark Container Terminal.

The New Jersey State DOT, contractors, and subcontractors involved in the procurement of ship-to-shore container gantry cranes, are reminded of the need to comply with the Cargo Preference Act in 46 CFR part 38, if applicable.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: November 23, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–28973 Filed 12–1–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. DOT–MARAD 2016–0120]

Request for Comments of a Previously Approved Information Collection

AGENCY: Maritime Administration (MARAD), DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on August 12, 2016 (81 FR 53540).

DATES: Comments must be submitted on or before January 3, 2017.

FOR FURTHER INFORMATION CONTACT: Deveeda Midgette, 202–366–2354, Office of Sealift Support, Maritime Administration, Department of Transportation, 1200 New Jersey Avenue SE., W26–494, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Title: Merchant Marine Medals and Awards.

OMB Control Number: 2133–0506.

Type of Request: Renewal of a Previously Approved Information Collection.

Abstract: This information collection of information provides a method of awarding merchant marine medals and decorations to masters, officers, and crew members of U.S. ships in recognition of their service in areas of danger during the operations by the Armed Forces of the United States in World War II, Korea, Vietnam, and Operation Desert Storm and Operations Restore Hope and United Shield.

Affected Public: Master, officers and crew members of U.S. ships.

Estimated Number of Respondents: 550.

Estimated Number of Responses: 550.

Annual Estimated Total Annual Burden Hours: 550.

Frequency of Response: Annually.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street NW., Washington, DC 20503. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93.

By order of the Maritime Administrator.

Dated: November 21, 2016.

Gabriel Chavez,

Acting Secretary, Maritime Administration.

[FR Doc. 2016–29001 Filed 12–1–16; 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; Guidance on Sound Incentive Compensation Practices

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 the general public and other Federal agencies to comment on the renewal of an information collection as required by the Paperwork Reduction Act of 1995 (PRA).

An agency may not conduct or sponsor, and a 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 renewal of an information collection titled, ''Guidance on Sound Incentive Compensation Practices.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Written comments should be submitted by January 3, 2017.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email, if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0245, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *prainfo@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

All 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.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0245, U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503 or by email to: *oira submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC requests that OMB extend its approval of the following information collection:

Title: Guidance on Sound Incentive Compensation Policies.

OMB Number: 1557–0245.

Abstract: Under the guidance, each national bank and Federal savings association is required to: (i) For a large national bank or Federal savings association, have policies and procedures that identify and describe the role(s) of the personnel and units authorized to be involved in developing and administering incentive compensation arrangements, identify the source of significant risk-related factors, establish appropriate controls governing these factors to help ensure their reliability, and identify the individual(s) and unit(s) whose approval is necessary for the establishment or modification of incentive compensation arrangements; (ii) create and maintain sufficient documentation to permit an audit of the organization's processes for developing and administering incentive compensation arrangements; (iii) have any material exceptions or adjustments to the incentive compensation arrangements established for senior executives approved and documented by its board of directors; and (iv) for a large national bank or Federal savings association, have its board of directors receive and review, on an annual or more frequent basis, an assessment by management of the effectiveness of the design and operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 41 large banks; 1,381 small banks.

Estimated Burden per Respondent: 520 hours (480 for setup; 40 for yearly

maintenance) for large banks; 120 hours (80 for setup; 40 for yearly maintenance) for small banks.

Frequency of Response: Annually.

Total Annual Burden: 187,040 hours.

On July 27, 2016, the OCC issued a 60-day notice soliciting comment on the information collection, 81 FR 49356. One comment was received from an individual.

The commenter stated that the burden estimates are low, unrealistic, and unsupported by empirical evidence. The commenter requested that the next notice explain how the burden estimates were calculated and the empirical evidence used in the calculation.

The commenter believes that the requirements in the guidance requiring institutions to have policies, procedures, appropriate controls, and sufficient documentation to permit an audit of the incentive compensation arrangements and for the board of directors to review, at least annually, an assessment of the effectiveness of the design and operation of the bank's incentive compensation system to ensure safety and soundness would likely be met by having the internal audit department examine incentive compensation systems and provide reports to the board audit committee. The commenter estimates that, in institutions with $20 billion or more in total assets, a minimum of four internal auditors customarily spend three or four weeks auditing the effectiveness of the design and operation of incentive compensation systems, resulting in an annual assessment of the effectiveness of the design and operation of the bank's incentive compensation system at large banks taking a minimum of 640 hours to complete. The commenter also stated that this estimate would not include additional hours needed every year to: (i) Update policies; (ii) revise procedures; (iii) adjust controls; and (iv) document annual incentive payments and document approvals. The commenter believes that, in large, systemically important institutions, internal auditors can spend one to two thousand hours auditing the many incentive compensation plans for compliance with OCC requirements.

The commenter also believes that the estimate for ''small banks'' is also grossly underestimated and that, in a small bank ($50 million in total assets), it would take one person at least one week to assess the effectiveness of the design and operation of the compensation systems and format the results to be submitted to the board of directors. This would be in addition to the 40 hours needed to update written policies and procedures, document annual incentive payments, and document approvals.

The OCC uses the legal standard for estimating burden hours under the PRA (44 U.S.C. 3502(2)). The term ''burden'' means time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency, including the resources expended for: (a) Reviewing instructions; (b) acquiring, installing, and utilizing technology and systems; (c) adjusting the existing ways to comply with any previously applicable instructions and requirements; (d) searching data sources; (e) completing and reviewing the collection of information; and (f) transmitting, or otherwise disclosing the information. The OCC believes that its burden estimates are accurate, given that institutions already have the required arrangements in place, including any required systems and procedures.

The banking agencies [1] estimated in their original notice [2] that large institutions would spend 480 hours to modify their policies and procedures to monitor incentive compensation. Small institutions would spend 80 hours to establish or modify policies and procedures to monitor incentive compensation. Forty hours would be required to maintain an incentive compensation program.

In the experience of the banking agencies, two months is typically required for a large institution to set up a program of this complexity and one business week is required for yearly maintenance. The banking agencies generated these estimates based on their experience with other information collections.

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 information collection burden;

(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 startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: November 28, 2016.

Karen Solomon,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2016–28903 Filed 12–1–16; 8:45 am]

BILLING CODE 4810–33–P

[1] OCC, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation.

[2] 75 FR 36395 (June 25, 2010).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8974

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8974, Qualified Small Business Payroll Tax Credit for Increasing Research Activities.

DATES: Written comments should be received on or before January 31, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Qualified Small Business Payroll Tax Credit for Increasing Research Activities.

OMB Number: 1545–XXXX.

Form Number: 8974.

Abstract: The law allows a qualified small business to elect a portion (up to $250,000) of the research credit against payroll taxes. Section 3111(f) allows the elected amount as a credit for the quarter up to the total amount of the employer's share of social security tax. Any unused credit can be carried forward to the next quarter. Form 8974 is used by businesses and individuals

engaged in a trade or business to determine the portion of the elected research credit amount, as reported on Form 6765, that can be claimed for the quarter on Form 941.

Current Actions: There are no changes being made to the form at this time.

Type of Review: New Form.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 5,000.

Estimated Time per Respondent: 2 hours, 45 minutes.

Estimated Total Annual Burden Hours: 20,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 15, 2016.

Tuawana Pinkston,

IRS Supervisory Tax Analyst.

[FR Doc. 2016–28915 Filed 12–1–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In accordance with section 999(a)(3) of the Internal Revenue Code of 1986, the Department of the Treasury is publishing a current list of countries which require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Iraq
Kuwait
Lebanon
Libya
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen

Dated: November 28, 2016.

Danielle Rolfes,

International Tax Counsel, (Tax Policy).

[FR Doc. 2016–29008 Filed 12–1–16; 8:45 am]

BILLING CODE 4810–25–P

FEDERAL REGISTER

Vol. 81 Friday,

No. 232 December 2, 2016

Part II

Department of Labor

29 CFR Part 38

Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 38

RIN 1291–AA36

Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act

AGENCY: Office of the Secretary, Labor.

ACTION: Final rule.

SUMMARY: This final rule revises the U.S. Department of Labor (Department) regulations implementing the nondiscrimination and equal opportunity provisions of Section 188 of the Workforce Innovation and Opportunity Act (WIOA). Signed by President Obama on July 22, 2014, WIOA superseded the Workforce Investment Act of 1998 (WIA) as the Department's primary mechanism for providing financial assistance for a comprehensive system of job training and placement services for adults and eligible youth. Section 188 of WIOA prohibits the exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. This final rule updates Department regulations consistent with current law and addresses its application to current workforce development and workplace practices and issues.

DATES: *Effective Date:* These regulations are effective December 2, 2016.

FOR FURTHER INFORMATION CONTACT: Naomi Barry-Perez, Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–4123, Washington, DC 20210. *CRC-WIOA@dol.gov*, telephone (202) 693–6500 (VOICE) or (202) 877–8339 (Federal Relay Service—for TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

Regulatory History

WIOA contains the identical provisions of Section 188 as appeared in WIA, and these WIOA provisions took effect on July 1, 2015. To ensure no regulatory gap while this rule was prepared, the Department's Civil Rights Center (CRC) issued a final rule in July 2015 (''2015 rule''), codified at 29 CFR part 38, which applies until this rule takes effect. The 2015 rule retained the provisions in 29 CFR part 37 (''1999 rule'') but simply substituted all references to WIA with WIOA to reflect the proper statutory authority. This final rule revises the 2015 rule and generally carries over the policies and procedures found in the 1999 and 2015 rules, which implemented the equal opportunity and nondiscrimination provisions of WIA and WIOA, respectively. Like the 1999 and 2015 rules, this final rule is organized into subparts A through E.

Purpose of the Regulatory Action

CRC enforces Section 188 of WIOA, which prohibits exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. Section 188 of WIOA incorporates the prohibitions against discrimination in programs and activities that receive federal financial assistance under certain civil rights laws, including Title VI of the Civil Rights Act of 1964 (Title VI) (prohibiting discrimination based on race, color, or national origin in programs and activities receiving federal financial assistance),[1] Title IX of the Education Amendments of 1972 (Title IX) (prohibiting discrimination based on sex in education and training programs receiving federal financial assistance),[2] the Age Discrimination Act of 1975 (prohibiting discrimination based on age),[3] and Section 504 of the Rehabilitation Act (Section 504) (prohibiting discrimination based on disability).[4] CRC interprets the nondiscrimination provisions of WIOA consistent with the principles of Title VII of the Civil Rights Act (Title VII),[5] the Americans with Disabilities Act (ADA),[6] as amended by the Americans with Disabilities Act Amendments Act (ADAAA),[7] and Section 501 of the Rehabilitation Act,[8] which are enforced by the Equal Employment Opportunity Commission (EEOC); Executive Order 11246[9] and Section 503 of the Rehabilitation Act,[10] which are enforced by the Department's Office of Federal Contract Compliance Programs (OFCCP); Title VI of the Civil Rights Act, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act, which are enforced by each federal funding agency; and Title IX, which is enforced by each federal funding agency that assists an education or training program.

CRC issued a notice of proposed rulemaking (NPRM) on January 26, 2016, to implement the nondiscrimination and equal opportunity provisions of WIOA, informed by CRC's experience under the 1999 rule implementing WIA. CRC maintains regular contact with the regulated community, and this contact resulted in some of the changes to the 2015 rule that were proposed in the NPRM. During the 60-day public comment period, CRC received 360 comments[11] on the proposed rule. Comments came from a wide variety of stakeholders, including State and local agencies; civil rights and advocacy groups, such as language access organizations, disability rights organizations, and organizations serving lesbian, gay, bisexual, and transgender (LGBT) individuals; religious organizations; and labor organizations. After a full review of the comments, CRC adopts this final rule incorporating many of the provisions proposed in the NPRM, with some modifications that are discussed in the Section-by-Section analysis below.

This rule sets forth the WIOA Section 188 nondiscrimination and equal opportunity requirements and obligations for ''recipients'' as that term is defined in § 38.4(zz). These requirements and obligations arise in

[1] 42 U.S.C. 2000d *et seq.*

[2] 20 U.S.C. 1681 *et seq.*

[3] 42 U.S.C. 6101 *et seq.*

[4] 29 U.S.C. 794.

[5] 42 U.S.C. 2000e *et seq.*

[6] 42 U.S.C. 12101 *et seq.*

[7] 42 U.S.C. 12101 *et seq.,* Public Law 110–325, 122 Stat. 3553 (2008).

[8] 29 U.S.C. 791.

[9] Executive Order 11246, 30 FR 12319, Sept. 24, 1965, as amended by Executive Order 11375, 32 FR 14303, Oct. 17, 1967; Executive Order 12086, 43 FR 46501, Oct. 10, 1978; Executive Order 13279, 67 FR 77141, Dec. 12, 2002; Executive Order 13665, 79 FR 20749, Apr. 8, 2014; and Executive Order 13672, 79 FR 42971, July 21, 2014.

[10] 29 U.S.C. 793.

[11] This includes one comment that was withdrawn and reissued without personally identifiable information and one comment documenting contact with an outside party during the comment period.

connection with programs or activities financially assisted under WIOA Title I as explained further below. The final rule describes the enforcement procedures for implementing the nondiscrimination and equal opportunity provisions of WIOA. Although WIOA did not change the nondiscrimination and equal opportunity provisions in Section 188, Congress mandated that the Department issue regulations to implement the section, including standards for determining discrimination and enforcement procedures, as well as procedures to process complaints.[12]

To best understand the application of this regulation, readers are encouraged to review the ''applicability'' language at § 38.2, the definition of ''financial assistance'' under Title I of WIOA at § 38.4(x) and (y), and the definition of ''recipient'' at § 38.4(zz). Entities connected to the workforce development system may be recipients for purposes of Section 188 and this rule even if they do not receive assistance in the form of money. For example, recipients subject to these regulations include entities with agreements, arrangements, contracts, subcontracts, or other instruments for the provision of assistance or benefits under WIOA Title I.[13] Thus, entities that are selected and/or certified as eligible training providers are considered to receive financial assistance for the purpose of this regulation and Section 188.[14] Additionally, programs and activities operated by one-stop partners (both required partners and additional partners) also receive financial assistance for purposes of this regulation to the extent that these programs and activities are being conducted as part of the one-stop delivery system.[15] We note, however, that whether an entity is an additional one-stop partner subject to Section 188 is based on whether that entity has signed a Memorandum of Understanding as an additional partner per the requirements of Section 121 of WIOA [16] and not merely whether that entity is working with or contributing something to a WIOA Title I program.[17]

Since their promulgation in 1999, the regulations implementing Section 188 of WIA or WIOA had not undergone substantial revision. The 2015 rule made only technical revisions to the 1999 rule, changing references from ''WIA'' to ''WIOA.'' Thus, the 2015 rule did not reflect recent developments in equal opportunity and nondiscrimination jurisprudence. Moreover, procedures and processes for enforcement of the nondiscrimination and equal opportunity provisions of Section 188 had not been revised to reflect changes in the practices of recipients since 1999, including the use of computer-based and internet-based systems to provide aid, benefits, services, or training through WIOA Title I-financially assisted programs and activities.

For these reasons, this final rule revises 29 CFR part 38 to set forth recipients' nondiscrimination and equal opportunity obligations under WIOA Section 188 in accordance with existing law and policy. This rule updates the regulations to address current compliance issues in the workforce system and to reflect existing law under Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the ADA, and the Rehabilitation Act as related to WIOA Title I-financially assisted programs and activities. This rule also incorporates developments and interpretations of existing law by the Department of Justice (DOJ), the EEOC, the Department of Education, and this Department's corresponding interpretations of Title VII and the Rehabilitation Act into the workforce development system. The final rule reflects current law and legal principles applicable to a recipient's obligation to refrain from discrimination and to ensure equal opportunity.

Major Revisions

First, this final rule improves the overall readability of the 2015 rule through revisions, limited reorganization of sections, and more explicit descriptions of recipient obligations. The final rule revises the current question-and-answer format in the title of each section to make it more straightforward and to more closely mirror other nondiscrimination and equal opportunity regulations issued by the Department. The plain language of the regulations is retained for ease of comprehension and application.

Second, this rule updates the nondiscrimination and equal opportunity provisions of the 2015 rule to align them with current law and legal principles. As discussed above, in enforcing the nondiscrimination obligations of recipients set forth in this part, CRC follows the case law principles developed under, among other statutes, Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act, as amended by the ADAAA. Since the issuance of the WIA Section 188 regulations in 1999, the principles of nondiscrimination and equal opportunity law under these statutes have evolved significantly, and the ADA has been amended. Agencies enforcing these statutes have issued regulations and guidance impacting WIOA Title I-financially assisted programs and activities to reflect these legal developments.[18] During that time, the Department has issued final rules under Section 503 of the Rehabilitation Act and Executive Order 11246.[19]

Third, this final rule improves the effectiveness of CRC's enforcement program to support compliance with the rule. The compliance review and complaint procedures sections are updated and the changes are intended to increase compliance through clearer descriptions of recipient responsibilities, more effective Equal Opportunity (''EO'') Officers, enhanced data collection, and consistent

[12] 29 U.S.C. 3248(e).

[13] *See* § 38.4(x)(5), (y)(5).

[14] Section 38.4(zz)(6) (service providers, including eligible training providers, are recipients); *see also* § 38.4(ggg) (defining ''service provider'').

[15] Section 38.2(a)(2).

[16] *See* 29 U.S.C. 3151.

[17] Please note that this sentence is limited in scope as to whether an entity is a one-stop additional partner subject to this regulation. Even if an entity does not qualify as a one-stop additional partner, that entity might still be subject to the requirements of this regulation if it is otherwise a recipient of financial assistance under Title I of WIOA.

[18] *See* U.S. Dep't of Justice, Office of the Att'y Gen., Amendment of Americans with Disabilities Act Title II and III Regulations to Implement ADA Amendments Act of 2008; Final Rule, 81 FR 53204, Aug. 11, 2016 (revising 28 CFR parts 35 and 36) (hereinafter ''DOJ Final Rule to Implement ADAAA''); U.S. Equal Emp't Opportunity Comm'n, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended; Final Rule, 76 FR 16978, Mar. 25, 2011 (29 CFR part 1630) (hereinafter ''EEOC Final Rule to Implement ADAAA''); *see also* U.S. Dep't of Health & Human Servs., Office for Civil Rights, Nondiscrimination in Health Programs and Activities; Final Rule, 81 FR 31376, May 18, 2016 (implementing Section 1557 of the Affordable Care Act, which prohibits discrimination on the grounds prohibited by Title VI, Title IX, the Age Act, and Section 504) (hereinafter ''HHS Nondiscrimination Final Rule'').

[19] U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Discrimination on the Basis of Sex; Final Rule, 81 FR 39108, June 15, 2016 (revising 41 CFR part 60–20) (hereinafter ''OFCCP Sex Discrimination Final Rule''); U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors; Final Rule, 79 FR 72985, Dec. 9, 2014 (revising 41 CFR parts 60–1, 60–2, 60–4, and 60–50) (hereinafter ''OFCCP Executive Order 13672 Final Rule''); U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities; Final Rule, 78 FR 58862, Sept. 24, 2013 (revising 41 CFR part 60–741).

monitoring and oversight by Governors. These changes help identify the scope of the nondiscrimination and equal opportunity requirements and obligations with more specificity and inform those who may not otherwise be aware of the developments in the law.

Statement of Legal Authority

Statutory Authority

The statutory authorities for this final rule are: The Workforce Innovation and Opportunity Act, Public Law 113–128, 128 Stat. 1425, including Section 188 of such Act. Section 188 incorporates the prohibitions against discrimination under Title VI of the Civil Rights Act of 1964, as amended, Public Law 88–352, 78 Stat. 252 (42 U.S.C. 2000d *et seq.*); Section 504 of the Rehabilitation Act of 1973, as amended, Public Law 93–112, 87 Stat. 390 (29 U.S.C. 794); the Age Discrimination Act of 1975, as amended, Public Law 94–135, 89 Stat. 728 (42 U.S.C. 6101 *et seq.*); and Title IX of the Education Amendments of 1972, as amended, Public Law 92–318, 86 Stat. 373 (20 U.S.C. 1681 *et seq.*).

Departmental Authorization

Secretary's Order 04–2000 delegates authority and responsibility to CRC for developing, implementing, and monitoring the Department's civil rights enforcement program under all equal opportunity and nondiscrimination requirements applicable to programs and activities financially assisted and conducted by the Department, including Section 188 of WIA. Section 5 of the Secretary's Order also authorizes the Assistant Secretary for Administration and Management, working through the CRC Director, to establish and formulate all policies, standards, and procedures for, as well as to issue rules and regulations governing, the enforcement of statutes applying nondiscrimination and equal opportunity requirements to programs and activities receiving financial assistance from the Department.[20] Section 5(A)(1)(j) of the Order also delegates authority and assigns responsibility to CRC for ''other similarly related laws, executive orders and statutes.'' Thus, this delegation also covers CRC's enforcement of Section 188 of WIOA, and no new delegation is necessary.

Interagency Coordination

The DOJ, under Section 1–201 of Executive Order 12250,[21] is responsible for coordinating federal enforcement of most nondiscrimination laws that apply to federally assisted programs and activities. Executive Order 12067[22] requires federal departments and agencies to consult with the EEOC about regulations involving equal employment opportunity. The Age Discrimination Act of 1975, as amended, assigns the Secretary of the U.S. Department of Health and Human Services (HHS) the responsibility for coordinating the federal enforcement effort of that Act. Accordingly, the final rule has been developed in coordination with the DOJ, the EEOC, and HHS. In addition, as appropriate, this rule has been developed in coordination with other federal grantmaking agencies, including the U.S. Departments of Education and Housing and Urban Development.

I. Overview of the Final Rule

This final rule retains the organization of 29 CFR part 38 as well as the majority of the provisions in part 38.

Subpart A—General Provisions. This subpart outlines the purpose and application of part 38, provides definitions, outlines prohibited bases and forms of discrimination, and establishes CRC's enforcement authority and recipients' nondiscrimination obligations.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients. This subpart sets forth the affirmative obligations of recipients and grant applicants, including the role of EO Officers, notice and communication requirements, and the data and information collection and maintenance obligations of recipients.

Subpart C—Governor's Responsibilities to Implement the Nondiscrimination and Equal Opportunity Requirements of the Workforce Innovation and Opportunity Act (WIOA). This subpart describes a Governor's responsibilities to implement the nondiscrimination and equal opportunity provisions of WIOA and this part, including oversight and monitoring of WIOA Title I-financially assisted State Programs and development of a Nondiscrimination Plan.

Subpart D—Compliance Procedures. This subpart describes procedures for conducting compliance reviews, processing complaints, issuing determinations, and handling breaches of conciliation agreements.

Subpart E—Federal Procedures for Effecting Compliance. This subpart describes the procedures for effecting compliance, including actions CRC is authorized to take upon finding noncompliance when voluntary compliance cannot be achieved, the rights of parties upon such a finding, and hearing procedures, sanctions, and post-termination procedures.

Reasons for Revisions Generally

The final rule incorporates current jurisprudence under Title VII and other employment nondiscrimination laws, as well as EEOC guidance interpreting those nondiscrimination obligations. We rely on this guidance in the employment context because WIOA Section 188 also applies to employment in the administration of, or in connection with, Title I-financially assisted programs and activities. Pursuant to Executive Order 12067, the EEOC is the lead federal agency responsible for defining the nature of employment discrimination on the basis of race, color, religion, sex, national origin, age, or disability under all federal statutes, executive orders, regulations, and policies that require equal employment opportunity. CRC thus generally defers to the EEOC's interpretations of Title VII and other relevant employment laws as they apply to job applicants to and employees of recipients.

Pursuant to Executive Order 12250 and Title VI, the DOJ is the lead federal agency responsible for defining the nature and scope of the nondiscrimination prohibitions based on, among other grounds, race, color, and national origin in programs and activities receiving federal financial assistance. Thus, CRC defers to the DOJ's interpretations of Title VI regarding discrimination based on race, color, and national origin in programs and activities receiving federal financial assistance. Further, pursuant to ADA Title II, the DOJ is the lead federal agency responsible for defining the parameters of the nondiscrimination and equal opportunity provisions of Title II of the ADA regarding State and local government entities.

Developments in National Origin and Language Access Discrimination Jurisprudence

Consistent with Title VI case law and the DOJ's 2002 guidance on ensuring equal opportunity and nondiscrimination for individuals who are limited English proficient (LEP),[23] this final rule provides that recipients must not discriminate on the basis of national origin against individuals who are LEP.

[20] 65 FR 69184, Nov. 15, 2000.

[21] 45 FR 72995, Nov. 4, 1980.

[22] 43 FR 28967, July 5, 1978.

[23] U.S. Dep't of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 FR 41455, June 18, 2002 (hereinafter ''DOJ 2002 LEP Guidance'').

Title VI provides that ''[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'' [24] Interpreting Title VI, the Supreme Court in *Lau* v. *Nichols* held that excluding LEP children from effective participation in an educational program because of their inability to speak and understand English constitutes national origin discrimination.[25] Courts have consistently found that a recipient's failure to provide meaningful access to LEP individuals violates Title VI's prohibition of national origin discrimination.[26] Consequently, this final rule provides that the definition of national origin discrimination includes discrimination based on limited English proficiency. The final rule sets forth recipients' compliance obligations for ensuring that LEP individuals have meaningful access to WIOA programs and services.

The final rule is also consistent with CRC guidance issued in 2003, advising all recipients [27] of federal financial assistance from the Department of Labor of the Title VI prohibition against national origin discrimination affecting LEP individuals.[28] This 2003 U.S. Department of Labor (DOL) LEP Guidance was issued pursuant to Executive Order 13166, which directed each federal agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients clarifying that obligation.[29] Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in LEP Guidance issued by the DOJ.[30] The LEP provisions of this final rule are drawn from Title VI and its implementing regulations, and thus are consistent with, the DOJ 2000 and 2002 LEP Guidance.

Developments in Disability Discrimination Jurisprudence

The Americans with Disabilities Act Amendments Act of 2008 amended the ADA and the Rehabilitation Act, both of which apply, in distinct ways, to different groups of recipients under this rule. Consistent with Executive Order 13563's instruction to federal agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, the final rule adopts language consistent with the ADAAA and corresponding revisions to the EEOC regulations implementing the ADAAA provisions in Title I of the ADA [31] and the DOJ regulations implementing the ADAAA provisions in Title II and Title III of the ADA.[32] The final rule will promote consistent application of nondiscrimination obligations across federal enforcement programs and accordingly enhance compliance among entities subject to WIOA Section 188 and the various titles of the ADA. The NPRM stated that, if the DOJ changed its proposal in its final rule implementing ADA Titles II and III, CRC would review those changes to determine their impact on this rule and take appropriate action. After the NPRM was published, DOJ issued its final rule implementing ADA Titles II and III and accordingly, CRC has reviewed the DOJ rule. The resulting changes are described below in the appropriate portions of the Section-by-Section Analysis.

Title I of the ADA prohibits private employers with fifteen or more employees, State and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.[33] WIOA Section 188 applies to some of these entities in the employment context because it prohibits discrimination in employment in the administration of or in connection with WIOA Title I-financially assisted programs and activities. The EEOC issued final regulations implementing the amendments to Title I of the ADA in March 2011.[34]

Title II of the ADA applies to State and local government entities, many of which may also be recipients for purposes of this rule, and, like subtitle A of this part, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities.[35] Title II extends the prohibition against discrimination established by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive federal financial assistance [36] and requires compliance with the ADA Standards for Accessible Design.[37] The Department shares responsibility with the Department of Justice for implementing the compliance procedures of Title II of the ADA for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities ''relating to labor and the work force.'' [38]

Title III of the ADA, enforced by the DOJ, prohibits discrimination on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by a person who owns, leases, or operates that place of public accommodation.[39] Title III applies to businesses that are generally open to the public and that fall into one of twelve categories listed in the ADA, such as restaurants, day care facilities, and doctors' offices,[40] and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards for Accessible Design.[41] Many recipients are places of public accommodation and thus are subject to

[24] 42 U.S.C. 2000d.

[25] 414 U.S. 563, 568–69 (1974).

[26] *See, e.g., Colwell* v. *Dep't of Health & Human Servs.,* 558 F.3d 1112, 1116–17 (9th Cir. 2009) (noting that *Lau* concluded ''discrimination against LEP individuals was discrimination based on national origin in violation of Title VI''); *United States* v. *Maricopa Cnty.,* 915 F. Supp. 2d 1073, 1079–80 (D. Ariz. 2012) (discussing *Lau*); *Faith Action for Cmty. Equity* v. *Hawaii,* No. 13–00450 SOM/RLP, 2014 WL 1691622, at *14 (D. Haw. Apr. 28, 2014) (Title VI intent claim was properly alleged by LEP plaintiffs when it was based on the ''foreseeable disparate impact of the English-only policy,'' allegedly pretextual justifications for the policy, and potentially derogatory comments by a State agency).

[27] In this instance, the term ''recipient'' is broader than the definition at § 38.4(zz). See notes 13–17 and accompanying text for an explanation of the term ''recipient'' with respect to WIOA Title I programs and activities.

[28] U.S. Dep't of Labor, Civil Rights Center, Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 FR 32290, May 29, 2003 (hereinafter ''DOL LEP Guidance'').

[29] 65 FR 50121, Aug. 11, 2000.

[30] *Id.; see* U.S. Dep't of Justice, Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency, 65 FR 50123, Aug. 16, 2000.

[31] *See* EEOC Final Rule to Implement ADAAA, *supra* note 18.

[32] *See* DOJ Final Rule to Implement ADAAA, *supra* note 18.

[33] 42 U.S.C. 12101 *et seq.*

[34] *See* EEOC Final Rule to Implement ADAAA, *supra* note 18.

[35] *See* 42 U.S.C. 12131–12165.

[36] *See* 42 U.S.C. 12132.

[37] 42 U.S.C. 12134; *see* 28 CFR part 35.

[38] 28 CFR 35.190(b)(7).

[39] 42 U.S.C. 12182.

[40] 42 U.S.C. 12181(7).

[41] 42 U.S.C. 12186; *see* 28 CFR part 36.

Title III of the ADA and its accessible design standards. The DOJ issued regulations in August 2016 which incorporated amendments to its ADA Title II and Title III regulations, consistent with the ADAAA.[42]

This final rule revises the 2015 rule consistent with the ADAAA and the regulations issued by the EEOC, and those proposed by the DOJ. The ADAAA and its implementing and proposed regulations make it easier for an individual seeking protection under the ADA to establish that the individual has a disability within the meaning of the statute.[43] This final rule incorporates the rules of construction set out in the ADAAA that specify that the definition of ''disability'' is to be interpreted broadly, that the primary inquiry should be whether recipients have complied with their statutory obligations, and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. This final rule also revises the definition of ''disability'' and its component parts, including ''qualified individual,'' ''reasonable accommodation,'' ''major life activity,'' ''regarded as having a disability,'' and ''physical or mental impairment'' based on specific provisions in the ADAAA, as well as the EEOC's regulations and the DOJ's regulations. For example, consistent with the ADAAA, the final rule expands the definition of ''major life activities'' by providing a non-exhaustive list of major life activities, which specifically includes the operation of major bodily functions. The final rule also includes rules of construction that should be applied when determining whether an impairment substantially limits a major life activity.

Developments in Sex Discrimination Jurisprudence

Pregnancy Discrimination

The final rule includes a section that clarifies recipients' existing obligation to avoid discrimination based on pregnancy, childbirth, and related medical conditions as a form of sex discrimination. Title IX's prohibition of discrimination on the bases of pregnancy and actual or potential parental status applies to recipients under Title I of WIOA and this part. In addition, the Pregnancy Discrimination Act (PDA),[44] enacted in 1978, governs the nondiscrimination obligations of a program or activity receiving federal financial assistance in the context of covered employment. Nevertheless, the earlier WIA Section 188 regulations did not refer specifically to pregnancy discrimination as a form of sex discrimination. This final rule corrects that omission and sets out the standards that CRC will apply in enforcing the prohibition against pregnancy discrimination, consistent with Title IX and with Title VII as amended by the PDA, in WIOA Title I-financially assisted programs, activities, training, and services.

Pregnancy discrimination remains a significant issue. Between fiscal year 2001 and fiscal year 2013, charges of pregnancy discrimination filed with the EEOC and State and local agencies increased from 4,287 to 5,797.[45] In addition, a 2011 review of reported ''family responsibility discrimination'' cases (brought by men as well as women) found that low-income workers face ''extreme hostility to pregnancy.''[46] The EEOC's findings and related research are relevant to this rule because the workforce development system is the pipeline through which many women find employment opportunities in the public and private sectors.

Discrimination Based on Sex Stereotyping, Transgender Status, or Gender Identity

Sex stereotyping is one of the most significant barriers to women's ability to access services, benefits, training, programs, and employment in and through the workforce development system. Decades of social science research have documented the extent to which sex stereotypes about the roles of women and men and their respective capabilities in the workplace can influence decisions about hiring, training, promotions, pay raises, and other terms and conditions of employment.[47] This final rule adopts the well-recognized principle that employment decisions made on the basis of stereotypes about how males and females are expected to look, speak, and act are forms of sex-based employment discrimination, and it applies that principle to the provision of any aid, benefit, service, or training through WIOA Title I programs and activities. The Supreme Court recognized in 1989 that an employer violates Title VII if its employees' chances of promotion depend on whether they fit their managers' preconceived notions of how men or women should dress or act.[48] As the Supreme Court stated in *Price Waterhouse* v. *Hopkins,* ''we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.''[49] In *Price Waterhouse,* the Court held that an employer's failure to promote a female senior manager to partner because of the decision-maker's sex-stereotyped perceptions that she was too aggressive and did not ''walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'' was unlawful sex-based employment discrimination.[50] The principle that sex stereotyping is a form of sex discrimination has been applied consistently in subsequent Supreme Court and lower-court decisions.[51] Research demonstrates that widely held social attitudes and biases can lead to discriminatory decisions, even where

[42] *See* DOJ Final Rule to Implement ADAAA, *supra* note 18.

[43] *See* 42 U.S.C. 12102(1).

[44] 42 U.S.C. 2000e(k).

[45] U.S. Equal Emp't Opportunity Comm'n, Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1997–FY 2011, *available at http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm*; *see* U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.*

[46] Stephanie Bornstein, Center for WorkLifeLaw, UC Hastings College of the Law, *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers* 2 (2011), *available at http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf.*

[47] *See, e.g.,* Susan Fiske et al., *Controlling Other People: The Impact of Power on Stereotyping,* 48 a.m. Psychol. 621 (1993); Marzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes,* 102 Psychol. Rev. 4 (1995); Brian Welle & Madeline Heilman, *Formal and Informal Discrimination Against Women at Work in Managing Social and Ethical Issues in Organizations* 23 (Stephen Gilliland, Dirk Douglas Steiner & Daniel Skarlicki eds., 2007); Susan Bruckmüller et al., *Beyond the Glass Ceiling: The Glass Cliff and Its Lessons for Organizational Policy,* 8 Soc. Issues & Pol. Rev. 202 (2014) (describing the role of sex stereotypes in the workplace).

[48] *Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989).

[49] *Id.* at 251 (plurality op.).

[50] *Id.* at 235.

[51] *See, e.g., Nev. Dep't of Human Res.* v. *Hibbs,* 538 U.S. 721 (2003) (stereotype-based beliefs about the allocation of family duties on which state employers relied in establishing discriminatory leave policies held to be sex discrimination under the Constitution); *Prowel* v. *Wise Bus. Forms, Inc.,* 579 F.3d 285 (3d Cir. 2009) (harassment based on a man's effeminacy); *Chadwick* v. *Wellpoint, Inc.,* 561 F.3d 38 (1st Cir. 2009) (making employment decision based on the belief that women with young children neglect their job responsibilities is unlawful sex discrimination); *Terveer* v. *Billington,* 34 F. Supp. 3d 100 (D.D.C. 2014) (hostile work environment based on stereotyped beliefs about the appropriate gender with which an individual should form an intimate relationship). *Cf. United States* v. *Virginia,* 518 U.S. 515, 533 (1996) (in making classifications based on sex, State governments ''must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females'').

there is no formal sex-based (or race-based) policy or practice in place.[52]

Transgender applicants and employees, the vast majority of whom report that they have experienced discrimination in the workplace, are particularly vulnerable to sex discrimination, including sex stereotyping and its consequences.[53] The EEOC has recognized that claims of gender identity discrimination, including discrimination grounded in stereotypes about how individuals express their gender, are claims of sex discrimination under Title VII.[54] Courts have also held that disparate treatment of a transgender employee may constitute discrimination because of the individual's non-conformity to sex stereotypes.[55] Indeed, there has ''been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex.'' [56] Further, some courts have held that discrimination on the basis of gender identity constitutes discrimination ''because of'' sex independent of a showing of discrimination on the basis of failure to comport with sex stereotypes.[57]

As the NPRM noted, federal contractors that operate Job Corps centers, which are covered by Section 188 and this part,[58] may also be covered by the requirements of Executive Order 11246, which expressly requires that contractors meeting certain dollar threshold requirements refrain from discrimination in employment based on sexual orientation and gender identity, as well as race, color, religion, national origin, and sex, and take affirmative action to ensure equal employment opportunity.[59]

Consistent with the above jurisprudence, the final rule provides that complaints of discrimination based on sex stereotyping, transgender status, or gender identity will be recognized and treated as complaints of sex discrimination.

The NPRM further noted the growing number of federal courts recognizing that sexual orientation discrimination constitutes discrimination on the basis of sex when the discrimination is rooted in fundamental sex-based norms and stereotypes.[60] The EEOC has also concluded that ''[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.'' [61] As explained more fully below in the Section-by-Section Analysis of § 38.7(a) and new § 38.7(d)(10), which we now add to the rule, CRC concludes that Section 188's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

Harassment

This final rule includes a section to provide direction as to a recipient's existing obligations regarding unlawful harassment. Courts have recognized for many years that harassment based on protected categories may give rise to violations of Title VI, Title VII, Section 504, and Title IX and that unlawful harassment may take many forms.[62] The

[52] *See, e.g.,* Kevin Lang & Jee-Yeon K. Lehmann, *Racial Discrimination in the Labor Market: Theory and Empirics* (NBER Working Paper No. 17450, 2011), *available at http://www.nber.org/papers/w17450*; Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,* 94(4) Am. Econ. Rev. 991 (2004); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car,* 85(3) Am. Econ. Rev. 304 (1995); Marc Bendick, Charles Jackson & Victor Reinoso, *Measuring Employment Discrimination Through Controlled Experiments,* 23 Rev. of Black Pol. Econ. 25 (1994).

[53] Jaime M. Grant, Lisa M. Mottet & Justin Tanis, National Center for Transgender Equality & National Gay & Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey (2011), *available at http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf* (hereinafter ''Injustice at Every Turn'').

[54] *See Macy* v. *Dep't of Justice,* Appeal No. 0120120821, 2012 WL 1435995, at *10 (EEOC Apr. 20, 2012), *available at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt* (''Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. . . . Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.''). Other federal agencies have issued guidance stating that Title VII's or Title IX's prohibition against discrimination on the basis of sex includes claims of sex discrimination related to a person's gender identity or transgender status. *See* U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016), *available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf*; Memorandum from Eric Holder, Attorney General, to U.S. Attorneys and Heads of Department Components, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), *available at https://www.justice.gov/file/188671/download*; U.S. Dep't of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014) (*available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf*. However, as of the date of publication of this rule, these guidance documents are among the ''Guidelines'' subject to a preliminary injunction order that prohibits the federal government from ''using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order.'' *Texas* v. *United States,* No. 7:16–cv–00054–O, slip op. at 37 (N.D. Tex. Aug. 21, 2016), ECF No. 58; *see id.* at 3 n.4 (identifying the documents referred to in the order as the ''Guidelines'').

[55] *Barnes* v. *City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005) (holding that transgender woman was a member of a protected class based on her failure to conform to sex stereotypes and thus her Title VII claim was actionable); *Smith* v. *City of Salem,* 378 F.3d 566, 575 (6th Cir. 2004) (''discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a woman''); *see also Glenn* v. *Brumby,* 663 F.3d 1312 (11th Cir. 2011) (termination of a transgender employee constituted discrimination on the basis of gender non-conformity and sex-stereotyping discrimination under Equal Protection Clause).

[56] *Macy,* 2012 WL 1435995, at *9; *see Michaels* v. *Akal Security, Inc.,* No. 09–cv–1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); *Lopez* v. *River Oaks Imaging & Diagnostic Group, Inc.,* 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Mitchell* v. *Axcan Scandipharm, Inc.,* No. Civ. A. 05–243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti* v. *TLC HealthNet Lakeshore Hosp.,* No. 03–CV–0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Doe* v. *United Consumer Fin. Servs.,* No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

[57] *See Schroer* v. *Billington,* 577 F. Supp. 2d 293, 305–07 (D.D.C. 2008) (withdrawal of a job offer from a transgender applicant constituted discrimination ''because of sex'' in violation of Title VII, analogizing to cases involving discrimination based on an employee's religious conversion, which undeniably constitutes discrimination because of religion under Title VII); *see also Rumble* v. *Fairview Heath Servs.,* No. 14–cv–2037, 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015) (Section 1557 of the Affordable Care Act).

[58] *See* § 38.2(b)(4).

[59] Executive Order 13672, issued on July 21, 2014, amended Executive Order 11246 to add sexual orientation and gender identity as expressly protected bases, and applies to government contracts entered into or modified on or after April 8, 2015, the effective date of OFCCP's implementing regulations promulgated thereunder. *See* OFCCP Executive Order 13672 Final Rule, *supra* note 19.

[60] *See, e.g., Isaacs* v. *Felder Servs.,* No. 2:13cv693–MHT, 2015 WL 6560655, at *3–4 (M.D. Ala. Oct. 29, 2015); *Terveer* v. *Billington,* 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Koren* v. *Ohio Bell Tel. Co.,* 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Centola* v. *Potter,* 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Heller* v. *Columbia Edgewater Country Club,* 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Videckis* v. *Pepperdine Univ.,* No. CV 15–00298, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

[61] *Baldwin* v. *Dep't of Transp.,* Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 16, 2015); *see also Complainant* v. *Dep't of Homeland Sec.,* Appeal No. 0120110576, 2014 WL 4407422 (EEOC Aug. 20, 2014); *Veretto* v. *U.S. Postal Serv.,* Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011); *Castello* v. *U.S. Postal Serv.,* Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011).

[62] *See, e.g., Harris* v. *Forklift Sys.,* 510 U.S. 17 (1993) (sex); *Meritor Sav. Bank* v. *Vinson,* 477 U.S. 57 (1986) (sex); *Zeno* v. *Pine Plains Cent. Sch. Dist.,* 702 F.3d 655 (2d Cir. 2012) (race); *Daniels* v. *Essex Grp., Inc.,* 937 F.2d 1264, 1274 (7th Cir. 1991) (race); *Rogers* v. *W.-S. Life Ins. Co.,* 792 F. Supp. 628 (E.D. Wis. 1992) (race); *Booth* v. *Houston,* 58 F. Supp. 3d 1277 (M.D. Ala. 2014) (disability); *Gebser* v. *Lago Vista Indep. Sch. Dist.,* 524 U.S. 274 (1998) (school can be held liable if a teacher sexually harasses a student); *Davis* v. *Monroe Cnty. Bd. of Educ.,* 526 U.S. 629 (1999) (school can be

Continued

rule adds a section that sets out the prohibition against these various forms of unlawful harassment.

The U.S. Department of Education has issued guidance interpreting the scope of prohibitions against sexual harassment, including acts of sexual violence, under Title IX that apply to WIOA Title I-financially assisted educational and training programs.[63] Title IX protects individuals from discrimination based on sex in education programs and activities that receive federal financial assistance, including WIOA Title I programs and activities that are education and training programs.[64] The final rule incorporates language in Subpart A that reflects the U.S. Department of Education's interpretation of the scope of Title IX's prohibition against harassment based on sex. In doing so, this rule makes the Department's enforcement of current legal standards consistent with those of another agency that regulates the same recipient community.

Increased Provision of Services Using Technology, Including the Internet

The increased integration of, and in some instances complete shift to, online service delivery models in the workforce development system since 1999 required that the 1999 and 2015 rules be updated to address the nondiscrimination and equal opportunity implications raised by these changes. As of 2015, approximately 16 percent of American adults did not use the Internet.[65] Moreover, research suggests that a larger percentage of older individuals may not possess sufficient knowledge and understanding of computers and Web-based programs to be able to access information via a Web site or file for benefits through an online system.[66] Additionally, as of 2015, 19 percent of Hispanic individuals (including those who are proficient in English) and 22 percent of Black, non-Hispanic individuals were not using the Internet.[67] Similarly, adults with disabilities were significantly less likely to use the Internet than adults without disabilities.[68]

Subparts B Through E

Subpart B, Recordkeeping and Other Affirmative Obligations, includes revisions to the written assurance language that grant applicants are required to include in their grant applications, as well as revisions to the sections regarding the role of EO Officers and recipients' responsibilities to ensure that they designate recipient-level EO Officers with sufficient expertise, authority, staff, and resources to carry out their responsibilities, as well as Governors' additional responsibility to ensure that they designate State-level EO Officers with sufficient expertise, authority, staff and resources to carry out their obligations. The final rule also changes the requirements regarding data, and information collection and maintenance, and revises the section on outreach responsibilities of recipients.

Changes to Subpart C, regarding Governors' responsibilities to implement the nondiscrimination and equal opportunity requirements of WIOA, include changing the title of the Methods of Administration, the tool used by Governors to implement their monitoring and oversight responsibilities, to ''Nondiscrimination Plan.'' In addition, the final rule provides more direction about Governors' responsibilities and CRC's procedures for enforcing those responsibilities, thus addressing an inadvertent gap in the existing regulations.

Changes to Subpart D regarding compliance procedures include language to strengthen the preapproval compliance review process by requiring Departmental grantmaking agencies to consult with the Director of CRC to review whether CRC has issued a Notice to Show Cause or a Final Determination against an applicant that has been identified as a probable awardee. This final rule also expands the situations under which CRC may issue a Notice to Show Cause, merges some of the existing sections about the complaint processing procedures for better readability, and adds language to clarify that any person or their representative may file a complaint based on discrimination and retaliation under WIOA and this part.

Subpart E, Federal Procedures for Effecting Compliance, substitutes the Administrative Review Board for the Secretary as the entity that issues final agency decisions, and makes several other technical revisions.

Benefits of the Final Rule

The final rule will benefit both recipients and beneficiaries in several ways. First, by updating and clearly and accurately stating the existing principles of applicable law, the rule will facilitate recipient understanding and compliance, thereby reducing incidents of noncompliance and associated costs incurred when noncompliant. Second, the rule will benefit recipients' beneficiaries, employees, and job applicants by allowing them to participate in programs and activities or work free from discrimination. Importantly, recipients are already subject to the federal nondiscrimination laws that these updated regulations incorporate, so many of the new substantive nondiscrimination provisions do not impose new obligations.

Third, this final rule will increase equality of opportunity in the workforce development system, which encompasses thousands of applicants, participants, beneficiaries, and employees of recipients. For example, regarding discrimination on the basis of sex, the final rule clarifies that adverse treatment of applicants to, beneficiaries of, and participants in recipients' WIOA Title I programs and activities and their employees or applicants for employment because of gender identity or gender-based stereotypes constitutes sex discrimination. By expressly recognizing that discrimination against an individual on the basis of gender identity or transgender status is unlawful sex discrimination, the final rule provides much-needed regulatory protection to transgender individuals, the majority of whom report they have experienced discrimination in the workplace.[69] In addition, by providing that pregnant individuals may be entitled to accommodations when such accommodations or modifications are provided to similarly situated individuals, this rule will protect pregnant employees, beneficiaries, applicants, and participants from losing jobs or access to educational and training opportunities.

Regarding discrimination on the basis of national origin affecting LEP individuals, the rule will improve LEP individuals' participation in the workforce development system by

held liable for failing to address a student's sexual harassment of another student).

[63] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), *available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf*; U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FR 5512 (Jan. 19, 2001) (available at *http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf*) (hereinafter ''Revised Sexual Harassment Guidance'').

[64] 20 U.S.C. 1681 *et seq.*

[65] Pew Research Center, Americans' Internet Access: 2000–2015 (June 26, 2015), *available at http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/*.

[66] *Id.*

[67] *Id.*

[68] Pew Research Center, Digital Differences (Apr. 13, 2012), *available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf*.

[69] Injustice at Every Turn, *supra* note 53.

making the LEP requirements easier to understand and thus easier to implement. Recipients will find complying with the rule easier using suggestions provided in the new appendix to the LEP regulation.

Finally, the rule will benefit public understanding of the law. This focus on increasing public understanding is consistent with section 6 of Executive Order 13563, which requires agencies to engage in retrospective analyses of their rules ''and to modify, streamline, expand, or repeal [such rules] in accordance with what has been learned.''

Minor Technical Corrections Made Throughout the Rule

Throughout the final rule, CRC has made the following technical corrections for the sake of accuracy, clarity, and consistency. First, CRC corrects internal numbering and references to other rules, and standardizes the form of internal cross-references. Second, CRC avoids introducing and using abbreviations unnecessarily. Third, CRC uses the serial comma in lists of three or more items. Fourth, CRC adds headings for consistency and standardizes capitalization in text and headings, including lowercasing ''one-stop'' for consistency with WIOA and capitalizing ''State'' and ''State Program.'' Fifth, CRC uses hyphens and en dashes as appropriate to clarify multiword modifiers (for example, ''senior-level employee,'' ''WIOA Title I-financially assisted''). Sixth, where multiple bases are listed in an inclusive context, CRC uses ''and'' rather than ''or'' to clarify that all of the listed bases are included (for example, ''including pregnancy, childbirth, and related medical conditions'').

Finally, in the proposed rule, CRC at times used the word ''any'' prior to the list of singular terms ''aid, benefit, service, or training'' and at other times did not use the word ''any,'' even though the list of terms was not intended to be specific. In the final rule, where the singular terms ''aid, benefit, service, or training'' are used in a nonspecific context, CRC adds the word ''any.'' CRC has made these changes only for correctness and consistency and intends no substantive changes by making them.

These changes are not further addressed in the section-by-section analysis.

Comments on Gender-Neutral Language Usage Throughout the Rule

The preamble to the proposed rule explained that replaced ''he or she'' with ''the individual,'' ''person,'' or other appropriate identifier wherever possible.[70] The discussion in the preamble to the proposed rule referred only to the language that CRC used in the NPRM, not to any requirement imposed on recipients. CRC received comments supporting and opposing this language usage.

Comments: Eight commenters—a group of ten advocacy organizations and a union, five individual advocacy organizations, and two health organizations—supported CRC's use of gender-neutral language. Several of these commenters stated that individuals who do not identify as male or female ''face pervasive bias and misunderstanding, and often are unable to access benefits and services, including those of WIOA [Title I]-funded programs.'' All eight organizational commenters applauded CRC's decision to avoid gender-specific terminology in the language of the rule to signal that protection from discrimination under WIOA applies to individuals regardless of gender. CRC also received comments from multiple individuals opposing CRC's decision to avoid using gender-specific language. Many of these commenters' objections to gender-neutral language focused on the English language's traditional use of gendered pronouns; some individual commenters also expressed doubt regarding the existence of individuals who do not identify as male or female. The majority of the individual commenters who opposed CRC's decision to avoid gender-specific terminology interpreted CRC's decision to be imposing a requirement on recipients to do the same, at a high cost.

Response: CRC retains the use of gender-neutral language in the final rule because it agrees with the organizational commenters on this issue that it is appropriate for the final rule to signal that protection from discrimination under WIOA applies to individuals of all genders. CRC clarifies that this rule does not impose any obligation (or cost) on recipients to use gender-neutral language.

Comments: In addition to the supportive comments they submitted as described above, five individual advocacy organizations and two health organizations suggested that CRC remove any remaining instances of ''he or she,'' ''him or her,'' and ''his or her'' throughout the rule.

Response: For the same reasons as described above, and for the sake of consistency in avoiding gender-specific terminology throughout the final rule, CRC removes gender-specific terminology from the following provisions: §§ 38.4(q)(5)(iii)(C) (replacing ''he or she'' with ''the individual''), 38.4(ff)(3)(ii)(A) (replacing ''him or her'' with ''the individual''), 38.15(a)(4)(ii) (replacing ''his or her'' with ''the individual's''), 38.16(h) (replacing each instance of ''his or her'' with ''the individual's''), 38.30 (replacing ''he or she'' with ''the EO Officer''), 38.55(c)(2) (replacing ''s/he'' with ''the Governor''), 38.64(a) (replacing ''he or she'' with ''the Director''), 38.69(a) (replacing ''his/her'' with ''the person's''), 38.81(d) (replacing ''he or she'' with ''the Director''), 38.83 (replacing ''he or she'' with ''the Director''), 38.91(b)(3) (replacing ''he or she'' with ''the Governor''), and 38.115(c)(1) (replacing ''he or she'' with ''the Director''). These changes are not further addressed in the section-by-section analysis.

II. Section-by-Section Analysis

This Section-by-Section Analysis describes each section in the proposed rule and identifies and discusses the significant comments received and any changes made.

Subpart A—General Provisions

General Comments

Comment: A professional association applauded the Department's recognition of implicit prejudice and stereotyping and encouraged the Department to provide training for WIOA staff to ensure that there is an understanding of these issues when designing vocational training programs.

Response: CRC agrees that training WIOA staff to understand implicit prejudice and stereotyping is a best practice, but declines to explicitly mandate a specific level of training in the final rule. Each recipient is responsible for ensuring compliance with its obligations under WIOA and this part, including determining the appropriate types and frequency of staff training.

Comment: An advocacy organization encouraged the Department to focus attention on older workers in the workforce development system. The commenter stressed that older workers face significant barriers including skill and technological deficits compared to their younger counterparts.

Response: Under WIOA and this part, recipients are required to comply with their equal opportunity and

[70] U.S. Dep't of Labor, Office of the Sec'y, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Proposed Rule, 81 FR 4494, 4495, Jan. 26, 2016 (hereinafter ''CRC WIOA NPRM'').

nondiscrimination obligations on a variety of bases, including age. We understand the commenter's concerns, but decline to emphasize compliance in any one area over other areas.

Comment: In a joint comment, two individuals objected to the NPRM's proposal to replace ''on the grounds of'' with ''on the basis of'' before listing the protected categories in the rule, such as race, color, religion, or sex. The commenters asserted that ''on the grounds of'' is a legal term and that use of ''on the basis of'' is deceptive.

Response: CRC disagrees that the term ''on the basis of'' is deceptive. That phrase is a legal term of art that signals for which categories discrimination is prohibited. It is widely used in regulations and cases addressing antidiscrimination laws, and it is specifically used in WIOA Section 188(a). Therefore, it is appropriate to use in this rule.

Purpose § 38.1

Proposed § 38.1 retained the purpose of the 1999 and 2015 rules: ''to implement the nondiscrimination and equal opportunity provisions'' of WIOA Section 188.[71] CRC made minor revisions, such as replacing ''on the grounds of'' with ''on the basis of'' to be consistent with nondiscrimination language in other Department civil rights regulations.

Comment: An individual commenter opposed the rule, reasoning that the broad scope of prohibited discrimination would lead to divisions in our society.

Response: It is beyond the scope of CRC's authority to refuse to implement Section 188 of WIOA.[72]

CRC finalizes § 38.1 as proposed, with the following technical edits: correcting the statutory reference in footnote 1 and making minor technical modifications to clarify the list of protected bases, as discussed below in connection with § 38.5.

Applicability § 38.2

Proposed § 38.2 explained to which entities part 38 applies, including recipients[73] and programs and activities operated by one-stop[74] partners that are part of the one-stop delivery system. Proposed § 38.2(a)(3) revised the 2015 rule to limit covered employment practices to those ''of a recipient and/or One-Stop partner, to the extent that the employment is in the administration of or in connection with programs and activities that are being conducted as a part of WIOA Title I or the One-Stop delivery system.'' That limitation tracked the statutory provision in Section 188(a)(2) of WIOA.[75] CRC also proposed deleting § 38.2(b)(5) of the 2015 rule, so that federally operated Job Corps Centers would be included within the requirements of this part. CRC received several comments on this section.

Comment: A union asked for clarification of the duties for which it is individually responsible, as a national training contractor, and for which it is jointly responsible with other parties, including Job Corps Outreach and Admissions contractors, Center Directors, and others. The commenter stated that its responsibilities are not clear in light of the oversight and direction by Job Corps Centers, regional offices, and the National office, as well as the responsibilities contractually assigned to other contractors.

Response: Each recipient, as defined in § 38.4(zz), is individually responsible for complying with WIOA Section 188 and these implementing regulations. Job Corps national training contractors are recipients, which must designate a recipient-level Equal Opportunity Officer who will ensure that the training contractor and its subrecipients (if any) are not in violation of their equal opportunity and nondiscrimination obligations.[76] Those obligations include outreach and admissions under § 38.5 generally and § 38.40 specifically. While recipients may work cooperatively to ensure equal opportunity and nondiscrimination, each recipient must continue to individually evaluate whether such collaborative efforts are sufficient. All recipients, including Job Corps national training contractors, are ultimately responsible for equal opportunity and nondiscrimination compliance under WIOA regarding all aspects of their own programs, activities, and covered employment.

Comment: A State agency asked about partner agencies in the one-stop system, specifically if all sections of the regulations apply to every partner, and whether the partner agencies will be monitored by the Equal Opportunity Officer for compliance with WIOA Section 188. The commenter recommended against requiring all partner agencies to comply with the regulations unless colocated within a one-stop center.

Response: Under WIOA and this part, these regulations apply to each recipient. The term ''recipient'' includes every one-stop partner listed in WIOA section 121(b)[77] whenever the partner operates or conducts programs or activities that are part of the one-stop delivery system.[78] As discussed below,[79] in most cases required and additional partners will be monitored by the State-level EO Officer in addition to their own recipient-level EO Officers for compliance with WIOA and this part.[80]

Regarding the question of colocation, this final rule covers all one-stop partners (both required partners and additional partners) regardless of whether a partner is colocated within a one-stop center. Section 188(b) of WIOA requires the Secretary to enforce the equal opportunity and nondiscrimination provisions of WIOA with respect to all States and other recipients. One-stop partners, other than one-stop partners that are National Programs, are a part of State Programs to which WIOA Section 188 applies.[81] Accordingly, these regulations include one-stop partners as recipients that are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the one-stop delivery system. This result does not change because a partner is not colocated with a one-stop center. One-stop centers are not just a physical location, but may also include a larger electronic network. Regardless of location, recipients, including one-stop partners that operate programs and activities that are part of the one-stop delivery system, are subject to these regulations.

Comment: Several advocacy organizations supported deletion of the

[71] Previously WIA Section 188.

[72] *See* 29 U.S.C. 3248(e).

[73] *See* § 38.4(zz).

[74] One-stop career centers are designed to provide a full range of assistance to job seekers under one roof. The centers offer training referrals, career counseling, job listings, and similar employment-related services.

[75] 29 U.S.C. 3248(a)(2).

[76] *See* §§ 38.4(zz)(9), 38.28(b), and 38.31.

[77] Section 38.4(zz) (''for purposes of this part, one-stop partners, as defined in section 121(b) of WIOA, are treated as 'recipients,' and are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the one-stop delivery system'').

[78] *See* § 38.2(a)(2) (part 38 applies to ''[p]rograms and activities that are part of the one-stop delivery system and that are operated by one-stop partners . . . to the extent that the programs and activities are being conducted as part of the one-stop delivery system'').

[79] *See infra* discussion of §§ 38.28 and 38.29.

[80] One-stop partners are not required to designate a separate EO Officer if the partner is a service provider under § 38.4(ggg) (in which case the State-level EO Officer and/or the LWDA's grant recipient's EO Officer has this responsibility under § 38.33); if the partner is a small recipient (in which case the partner designates a responsible individual under § 38.32); or if, under the structure of the Governor's § 38.54 Nondiscrimination Plan, the State-Level EO Officer is the partner's EO Officer.

[81] National Programs are otherwise covered by WIOA Section 188 and this part. *See* §§ 38.4(jj) (defining ''National Programs'') and 38.4(zz)(12) (defining ''recipients'' to include National Programs).

current exclusion of federally operated Job Corps Centers from the application of the provisions of part 38. The commenters stated that this change is important to ensure the uniform applicability of nondiscrimination and equal opportunity requirements throughout the Job Corps system and to provide a mechanism to address complaints that arise in federally operated Job Corps Centers.

Response: CRC agrees with the commenter and believes that adopting the NPRM's proposed change from the 1999 and 2015 rules will ensure equal opportunity and nondiscrimination in the entire Job Corps program. As explained in the NPRM, this change is consistent with WIOA Section 188(d), which does not distinguish between federally operated and privately operated Job Corps centers, as well as with the Department of Agriculture's approach for a number of years to nondiscrimination and equal opportunity in the Job Corps centers it operates.[82] The change also makes our rule consistent with another of the Department's final rules implementing WIOA, which requires that, when the Secretary of Labor enters into an agreement with the Secretary of Agriculture for the funding, establishment, and operation of federally operated Job Corps centers, provisions are included to ensure that the Department of Agriculture complies with the regulations under 20 CFR 686, including nondiscrination obligations under Section 188 of WIOA.[83]

In § 38.2(b)(1), CRC clarifies that ''Department'' means the U.S. Department of Labor. Effect on Other Obligations § 38.3

Proposed § 38.3 described the relationship between this rule and other laws that may apply to recipients. To establish parity with parallel provisions in other federal nondiscrimination regulations,[84] proposed § 38.3 added a proviso that ''This part does not invalidate or limit the obligations, remedies, rights and procedures under any Federal law, or the law of any State or political subdivision, that provides equal or greater protection for the rights of persons as compared to this part.'' In addition, § 38.3 proposed adding Executive Order 13160[85] to the additional obligations that compliance with this part does not affect.

Several advocacy organizations supported the clarification that these regulations do not limit the remedies, rights, and procedures under federal, State, or local law that provide equal or greater protection than the regulations. The commenters appreciated federal recognition of States' and localities' interests in promoting nondiscrimination and equal employment opportunity.

CRC finalizes the provisions in § 38.3 as proposed, with the exception of one technical change, replacing ''incorporated into this part by reference'' with ''adopted by this part'' in paragraph (b).

Definitions § 38.4

The proposed rule retained the majority of the definitions contained in the 1999 and 2015 rules. Revisions in proposed § 38.4 included updating existing definitions consistent with applicable law and adding new definitions, as discussed in the preamble to the proposed rule. The discussion below addresses only those proposed definitions on which CRC received substantive comments. For the reasons discussed in the NPRM, CRC adopts without modification all of the proposed definitions not addressed below.

Aid, Benefit, Service, or Training

CRC received no comments on the definition of ''aid, benefit, service, or training'' in § 38.4(b) but is reorganizing the definition to clarify its parts. No substantive changes are intended by the reorganization.

Auxiliary Aids or Services

Proposed § 38.4(h) revised the definition of ''auxiliary aids or services'' to include new technology alternatives that have become available since the 1999 rule, such as video remote interpreting (VRI) services and real-time computer-aided transcription services. This provision mirrors the definition of ''auxiliary aids and services'' in the DOJ regulations implementing Title II of the ADA.[86] CRC received three comments supporting the new definition, with one commenter noting that the rule provides guidance for personnel not familiar in working with individuals with sensory disabilities. Accordingly, CRC adopts § 38.4(h) as proposed.

Babel Notice

The proposed rule added a definition for ''Babel notice'' in § 38.4(i). A Babel notice is a short notice in multiple languages informing the reader that the document (*e.g.,* application form, consent form, notice of rights and responsibilities) or electronic media (*e.g.,* Web site, ''app,'' email) contains vital information, and explaining how to access language services to have the contents of the document or electronic media provided in other languages. CRC proposed adding this definition because Babel notices are an integral tool for ensuring that recipients meet their nondiscrimination and equal opportunity obligations under WIOA and this part regarding LEP individuals. In the proposed rule, CRC sought comment on this definition.

Several advocacy organizations expressed support for the inclusion of a definition for ''Babel notice'' to codify and clarify the intention of these notices, specifically with respect to individuals who are limited English proficient.

Comment: An advocacy organization recommended that the definition of ''Babel notice'' be revised to specify that alternate formats are available as an accommodation through the recipient at no cost to the beneficiary.

Response: We appreciate the commenter's concern; however, the Babel notice is a safeguard against national origin discrimination against LEP individuals. Alternate formats are addressed in § 38.15 regarding communications with individuals with disabilities. Nevertheless, we agree with the commenter that it is important to notify individuals with disabilities of their right to request materials in accessible formats, and of their right to equally effective communication with recipients. For this reason, CRC amends the equal opportunity notice in § 38.35 to add two sentences alerting individuals with disabilities of their right to request auxiliary aids and services at no cost.

For the reasons described in the proposed rule and considering the comments received, we are finalizing the definition proposed in § 38.4(i) without modification, except for minor technical corrections to capitalization.

Disability

Proposed § 38.4(q) updated the definition of ''disability'' to reflect the changes made by the ADA Amendments Act of 2008[87] and to make the

[82] U.S. Dep't of Agric., Forest Service, WO/Civil Rights Staff, Reference Guide, Key EEO and Civil Rights Laws, Statutes, and Regulations (April 2010).

[83] U.S. Dep't of Labor, Emp't & Training Admin., Workforce Innovation and Opportunity Act; Final Rule, 81 FR 56072, Aug. 19, 2016.

[84] *See, e.g.,* 41 CFR 60–741.1(c)(3).

[85] 65 FR 39775, June 27, 2000. Executive Order 13160 prohibits discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent in federally conducted education and training programs and activities.

[86] *See* 28 CFR 35.104.

[87] 42 U.S.C. 12101 *et seq.,* Public Law 110–325, 122 Stat. 3553 (2008).

definition consistent with subsequent EEOC regulations [88] and proposed DOJ regulations [89] to implement the ADAAA. CRC received two general comments supporting these changes and adopts them as proposed, with minor technical revisions. In addition, as we proposed to do in the NPRM,[90] the final rule makes numbering and minor editing and wording changes to § 38.4(q) to conform in most instances to DOJ's August 2016 regulations to implement the ADAAA.[91] We address the changes the final rule makes to each proposed paragraph of § 38.4(q) in turn.

Consistent with the ADAAA, the EEOC regulations implementing the ADAAA, and now with DOJ's ADA Title II regulations implementing the ADAAA, proposed § 38.4(q)(1)(ii) (renumbered § 38.4(q)(2) in the final rule) set forth rules of construction that provided the standards for application of the definition of disability. CRC received a comment from a State agency under a related definition, § 38.4(yy) (reasonable accommodation), that using the term ''covered entity'' rather than ''recipient'' was confusing. CRC agrees and, as discussed below, replaces ''covered entity'' with ''recipient'' throughout the final rule.[92] Since the term ''covered entity'' appeared here in proposed § 38.4(q)(1)(ii)(B) (renumbered § 38.4(q)(2)(iii) in the final rule) and § 38.4(q)(5)(i)(C) (renumbered § 38.4(q)(5)(i)(B) in the final rule), CRC is replacing that term with ''recipient'' to ensure consistency.

Consistent with the ADAAA, the EEOC regulations implementing the ADAAA, and now with DOJ's ADA Title II regulations to implement the ADAAA, proposed § 38.4(q)(2) (renumbered § 38.4(q)(2)(i) in the final rule) required that the definition of disability be construed in favor of broad coverage of individuals with disabilities. CRC received no comments on this provision and adopts it without change in the final rule, except for minor technical changes to conform with DOJ's ADA Title II regulations to implement the ADAAA.

Proposed § 38.4(q)(3) revised the definition of ''physical or mental impairment,'' in the definition of disability, to add ''immune, circulatory'' to the body systems listed in proposed § 38.4(q)(3)(A) (renumbered § 38.4(q)(3)(i)(A) in the final rule); to add ''pregnancy-related medical conditions'' to § 38.4(q)(3)(ii); [93] to add ''intellectual disability'' (formerly termed ''mental retardation'' in the 1999 and 2015 rules) to § 38.4(q)(3)(i)(B); and to add dyslexia to ''specific learning disabilities'' in § 38.4(q)(3)(ii). In addition, this final rule adds ''Attention Deficit Hyperactivity Disorder'' (ADHD) in § 38.4(q)(3)(ii). This update to the definition of ''physical or mental impairment'' substantially conforms to the definition in DOJ's ADA Title II regulations to implement the ADAAA.[94] CRC received one comment from a coalition of disability advocacy organizations supporting this provision and adopts it without change in the final rule, except for the addition of ADHD and minor technical changes to conform with DOJ's ADA Title II regulations to implement the ADAAA.

Proposed § 38.4(q)(4) added to the definition of disability a new definition for ''major life activities'' that is consistent with the provisions in the ADAAA,[95] and regulations promulgated by the EEOC [96] and now with the DOJ regulations to implement the ADAAA.[97] CRC received two comments supporting this provision and adopts it without change in the final rule, except to add ''writing'' to the list of major life activities to conform with DOJ's ADA Title II regulations to implement the ADAAA, and to make minor technical changes consistent with those DOJ regulations.

Proposed § 38.4(q)(5) added rules of construction when determining whether an impairment ''substantially limits'' an individual in a major life activity. CRC received two supportive comments from disability advocacy organizations supporting this provision and adopts it without change in the final rule, with the exception of replacing ''covered entity'' with ''recipient'' in proposed § 38.4(q)(5)(i)(C) (renumbered § 38.4(q)(5)(i)(B) in the final rule), replacing ''entities'' with ''recipients'' in § 38.4(q)(5)(ii), and making minor technical changes to conform with DOJ's ADA Title II regulations to implement the ADAAA. The order of the paragraphs within § 38.4(q)(5) in the final rule was changed to be consistent with the paragraph order in DOJ's ADA Title II regulations to implement the ADAAA, and to minimize any confusion.

Proposed § 38.4(q)(6) updated the definition of an individual with ''[a] record of such an impairment'' to include an individual that has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. This is the same language used by the EEOC in its implementing regulations.[98] The DOJ regulations have identical language.[99] CRC received no comments on this provision and adopts it without change in the final rule, except for minor technical changes to conform with DOJ's ADA Title II regulations to implement the ADAAA.

Proposed § 38.4(q)(7) revised the term ''is regarded as having such an impairment'' to conform to the ADAAA.[100] The new definition clarifies that illegal disability discrimination includes discrimination ''because of an actual or perceived physical or mental impairment.'' CRC received one comment from a coalition of disability advocacy groups supporting this provision. In accordance with the other changes noted earlier, the term ''covered entity'' is replaced with ''recipient'' in § 38.4(q)(7)(ii) and (iii). The final rule also makes minor technical changes in the text to conform with DOJ's ADA Title II regulations to implement the ADAAA. Additionally, the final rule makes substantive conforming changes to § 38.4(q)(7)(i) (adding the qualifier ''even if the recipient asserts, or may or ultimately does establish, a defense to the action prohibited by WIOA Section 188 and this part''), and to § 38.4(q)(7)(ii) (adding an explanatory sentence regarding the ''transitory and minor'' exception). This new language in the final rule is modeled on the language in DOJ's ADA Title II

[88] 29 CFR part 1630.

[89] U.S. Dep't of Justice, Office of the Attorney General, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008; Proposed Rule, 79 FR 4839, Jan. 30, 2014. The Department of Justice has since issued its final rule. *See* DOJ Final Rule to Implement ADAAA, *supra* note 18.

[90] CRC WIOA NPRM, supra note 70, at 4497.

[91] *See* DOJ Final Rule to Implement ADAAA, *supra* note 18, at 53223–53225.

[92] CRC is replacing ''covered entity'' with ''recipient'' in two sections: In the definition of ''disability'' in § 38.4(q) and in the definition of ''reasonable accommodation'' in § 38.4(yy). CRC is also replacing ''entities'' with ''recipients'' in § 38.4(q)(5)(ii).

[93] *See* DOJ Final Rule to Implement ADAAA, *supra* note 18, at 53227.

[94] 28 CFR 35.108(b). Although DOJ did not include the example ''pregnancy-related medical conditions'' in its regulatory definition of ''physical or mental impairment,'' its inclusion in this final rule is consistent with DOJ's explanation that pregnancy-related medical impairments may be disabilities. *See* DOJ Final Rule to Implement ADAAA, *supra* note 18, at 53227 (while pregnancy itself is not an impairment, a pregnancy-related impairment may meet the definition of ''disability'' under any prong—''actual,'' ''record of,'' or ''regarded as''). CRC notes that no example on this list will be a disability unless it meets all the definitional criteria.

[95] 42 U.S.C. 12102(2).

[96] 29 CFR 1630.2(i).

[97] 28 CFR 35.108(c).

[98] 29 CFR 1630.2(k)(1).

[99] 28 CFR 35.108(e)(1).

[100] 42 U.S.C.12102(3).

regulations to implement the ADAAA.[101]

Employment Practices

The NPRM made no substantive changes to the definition of ''employment practices'' in § 38.4(s).

Comment: A coalition of eighty-six women's, workers', and civil rights organizations commended CRC for recognizing, in proposed § 38.4(s)(6), that covered employment practices include ''deciding rates of pay or other forms of compensation.'' Focusing on discrimination based on sex, the organizations observed that ''women are still paid less than men in nearly every occupation.'' The organizations recommended that CRC adopt provisions similar to those in the section devoted to compensation in OFCCP's proposed rule Discrimination on the Basis of Sex.[102] In addition, the organizations asked CRC to explain that ''factors other than sex relied upon in determining compensation must be job-related, consistent with business necessity, and account for the entire pay differential''; to ''advise that prior pay matching should be a rare occurrence''; and to ''clarify that punitive pay secrecy policies that interfere with enforcement of wage discrimination protections violate antidiscrimination law.'' Finally, they suggested that the rule state that nondiscrimination in compensation based on sex is required with regard not only to employees employed in the administration of WIOA programs but also to any participants and applicants who receive remuneration.

Response: CRC believes that the organizations' suggestions do not comport with the structure of this rule. Proposed § 38.4(s) is intended only to define ''employment practices'' for the purposes of this rule, not to impose substantive nondiscrimination obligations. Accordingly, § 38.4(s) is a nonexhaustive list of employment practices defining the term as it is used elsewhere in the rule, for example, in the enunciation of the employment nondiscrimination principle in § 38.18. None of the eight employment practices listed in § 38.4(s) are elaborated on in the way the organizations suggested CRC do with regard to paragraph (s)(6). Moreover, to the extent that the organizations' suggestions are specific to sex discrimination, CRC notes that the definition of ''employment practices'' proposed in § 38.4(s) is intended to apply throughout the rule and is not limited to any particular basis of discrimination. Furthermore, where appropriate, the section that focuses on discrimination based on sex encompasses the organizations' suggestions in the WIOA context, such as § 38.7(c)'s prohibition against policies and practices that have a discriminatory effect. Finally, CRC reiterates that the scope of this rule regarding employment practices is limited to any program or activity that is operated by a recipient, including a one-stop partner, to the extent that the employment is in the administration of or in connection with programs and activities that are financially assisted under WIOA Title I, including those that are part of the one-stop delivery system.[103] For these reasons, CRC declines to make the suggested changes to proposed § 38.4(s)(6).

Governor

Proposed § 38.4(aa) defined the term ''Governor'' as ''the chief elected official of any State, or the Governor's designee.'' CRC received one comment on this definition.

Comment: A State employment agency commented that the proposed definition of ''Governor'' is in direct conflict with the WIOA statutory definition and therefore in violation of Section 5 of Title 5 of the United States Code. The commenter recommended that the proposed definition be revised to match the statutory definition.

Response: In response to that comment, CRC revises the regulatory definition of Governor to more closely track the parallel portion of the statutory definition. This modification is also consistent with ETA's definition of ''Governor'' in its final rule implementing WIOA.[104]

CRC, however, retains the language from its definition in the 1999 and 2015 rules that the term ''Governor'' includes ''the Governor's designee.'' This departure from the statutory definition is appropriate as the term relates to the nondiscrimination and equal opportunity provisions found at 29 CFR part 38. Governors should continue to have flexibility to designate an individual to carry out the Governor's obligations to ensure all State Programs' compliance with the nondiscrimination and equal opportunity obligations of WIOA and this part. Accordingly, CRC adopts the definition proposed in § 38.4(aa) with the modification noted above.

Individual With a Disability

Proposed § 38.4(ff) made minor changes to the definition of ''individual with a disability.'' That provision, consistent with the 1999 and 2015 rules, mostly defined the term by listing examples of conditions that the ADA excludes from the definition of ''individual with a disability.'' CRC proposed changes to be consistent with the ADAAA and the implementing regulations issued by the EEOC[105] and now with regulations issued by the DOJ.[106]

Comment: Two commenters expressed general support for the proposed rule's definition of an ''individual with a disability.'' However, several commenters, in nearly identical comments, encouraged CRC to remove the explicit proposed exclusion of ''transvestism, transsexualism, or gender dysphoria not resulting from physical impairments.'' Their comments were particularly focused on the gender dysphoria exclusion. One professional association reasoned that current, mental health nomenclature includes these conditions as part of the spectrum of valid mental health conditions and their exclusion is a legacy of misunderstanding of gender-related concerns. Several advocacy organizations recognized the language as consistent with the ADA but nonetheless recommended the deletion of this language to reflect the evolving scientific evidence suggesting that gender dysphoria may have a physical basis and that the terms ''disability'' and ''physical impairment'' should be read broadly.

Response: The exclusion of transvestism and transsexualism from the definition of disability is a statutory exclusion under the ADA[107] and Section 504,[108] and it is beyond CRC's scope of authority to remove this exclusion.[109] With respect to gender dysphoria, CRC notes that it proposed to use that term because the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders replaced the diagnostic term ''gender identity disorder'' with the term ''gender dysphoria.'' However, CRC notes that the precise term used in the ADA and Section 504 is ''gender identity

[101] 28 CFR 35.108(f).

[102] U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Discrimination on the Basis of Sex; Proposed Rule, 80 FR 5246, 5278, Jan. 30, 2015 (hereinafter ''OFCCP Sex Discrimination NPRM''); *see* 41 CFR 60–20.4.

[103] This limitation is spelled out in § 38.18 of this final rule and tracks the provision in Section 188(a)(2) of WIOA, 29 U.S.C. 3248(a)(2).

[104] 29 CFR 651.10.

[105] 29 CFR 1630.3.

[106] 28 CFR 35.108(g).

[107] 42 U.S.C. 12211(b)(1).

[108] 29 U.S.C. 705(20)(F)(i).

[109] However, as discussed in other sections of this rule, Section 188's prohibition of discrimination on the basis of sex includes discrimination because of transgender status or gender identity. *See* § 38.7(a).

disorders not resulting from physical impairments.'' [110] The commenters' reasoning for objecting to the exclusion of gender dysphoria was that modern medical consensus considers gender dysphoria as resulting from physical impairments. In response to these comments and in accordance with the ADA and Section 504, CRC revises § 38.4(ff) in the final rule to use the exact statutory term [111] rather than ''gender dysphoria.'' Individuals with gender identity disorders resulting from physical impairments may be covered under the definition of an individual with a disability (assuming they meet the other definitional criteria).

Limited English Proficient (LEP) Individual

In § 38.4(hh), the final rule includes a definition for ''limited English proficient (LEP) individual.'' The proposed definition of ''limited English proficient (LEP) individual'' was ''an individual whose primary language for communication is not English and who has a limited ability to read, speak, write and/or understand English.'' As set forth in the proposed rule, this definition was added because failure to provide language assistance to limited English proficient individuals may be a form of unlawful national origin discrimination.[112] The term is used elsewhere in the final rule, in § 38.9 defining national origin discrimination as including discrimination based on limited English proficiency. This definition is consistent with decisions interpreting the scope of national origin discrimination under Title VI [113] and regulations interpreting national origin-based discrimination,[114] and has been adopted from those DOJ regulations implementing Title VI to ensure consistency.

Several advocacy organizations expressed support for the proposed definition of ''limited English proficient (LEP) individual'' to ensure that it is consistent with legal decisions interpreting the scope of national origin discrimination under Title VI of the Civil Rights Act of 1964 and the DOJ regulations implementing Title VI. Further, the commenters stated that the proposed definition will help maximize access to WIOA Title I employment and training programs for job seekers and workers that are LEP. CRC's response to one comment is addressed below.

Comment: One advocacy organization commented that it is not clear from the definition of LEP whether this includes individuals with sensory impairments, who are Deaf or hard of hearing and communicate using American Sign Language, have speech impairments, or who are blind or have visual impairments.

Response: Proposed § 38.4(hh) was not intended to apply to individuals with sensory impairments, who are Deaf or hard of hearing and communicate using American Sign Language, have speech impairments, or who are blind or have visual impairments, and such individuals are not included in the definition of an LEP individual. The requirements for ensuring effective communication with individuals with disabilities are explained in § 38.15.

On-the-Job Training (OJT)

Proposed § 38.4(mm) retained the language from the 1999 and 2015 rules, which defined ''on-the-job training'' and received no comments regarding its definition. In the definition of OJT in § 38.4(mm), CRC makes a technical correction to match the maximum wage rate reimbursement specified by WIOA.

Other Power-Driven Mobility Device

Proposed § 38.4(nn) added a definition for ''other power-driven mobility device.'' This definition mirrors the definition in the DOJ ADA Title II regulations [115] and encompasses additional mobility devices, such as self-balancing scooters, which are increasingly used by individuals with mobility impairments.

Comment: CRC received two comments regarding this new definition. One comment was from a coalition of disability advocacy groups that expressed general support for the definition. The second comment was from a state-based disability organization that recommended a revision in the proposed definition to accommodate future technology advances. Specifically, the commenter suggested that CRC add ''motors, or methods of propulsion,'' so that the first part of the definition reads: ''Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines, *motors, or methods of propulsion . . . .*''

Response: CRC agrees with the second commenter that the definition should be revised to allow for future technology advances, but believes that the language suggested by the commenter may be too limiting. Therefore, CRC has revised the proposed definition in the final rule to add ''or by other similar means'' after the list of power sources for the devices.

Programmatic Accessibility

Since WIOA requires recipients to comply with this rule and the applicable provisions of the ADA regarding the physical and programmatic accessibility of facilities, programs, services, technology, and materials, proposed § 38.4(tt) added a definition for ''programmatic accessibility.''

Comment: A local workforce agency commented that the distinction between physical and programmatic accessibility is well-defined and specific, providing a clear foundation that will strengthen recipients' ability to guarantee that their programs and services are both physically and programmatically accessible for individuals with disabilities. CRC received a comment from a coalition of disability advocacy organizations that requested adding the words ''fully'' and ''equally'' in the proposed definition of ''programmatic accessibility'' to emphasize that the requirement should direct recipients to ''put program beneficiaries and participants with disabilities in the position they would be in if they did not have disabilities,'' rather than just being ''helpful.''

Response: The definition of ''programmatic accessibility'' in § 38.4(tt) is sufficient as proposed. It is taken from the 2005 Senate Health, Education, Labor, and Pensions Committee Report on WIA reauthorization.[116] It is not necessary to add ''equally'' or ''fully,'' because § 38.12(a) explains the opportunities recipients must provide to individuals with disabilities, including any aid, benefit, service, or training that is equal to, or as effective as, that provided to others (*e.g.,* the opportunity to obtain the same result, benefit, or level of

[110] 42 U.S.C. 12211(b)(1) (ADA); 29 U.S.C. 705(20)(F)(i) (Section 504).

[111] *See* 42 U.S.C. 12211(b)(1) (ADA); 29 U.S.C. 705(20)(F)(i) (Section 504).

[112] *Lau* v. *Nichols,* 414 U.S. 563 (1974) (Supreme Court found recipient's denial of equal education opportunities to a group of non-English speakers was national origin discrimination in violation of Title VI and its regulations); *see also* sources cited *supra* note 26.

[113] *Sandoval* v. *Hagan,* 197 F.3d 484, 510–11 (11th Cir. 1999) (holding that English-only policy for driver's license applications constituted national origin discrimination under Title VI), *rev'd on other grounds,* 532 U.S. 275 (2001); *Almendares* v. *Palmer,* 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (holding that failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI); *Pabon* v. *Levine,* 70 FRD. 674, 677 (S.D.N.Y. 1976) (citing *Lau,* denying summary judgment when LEP unemployment benefits claimaints alleged a state labor agency failed to provide language assistance services in violation of Title VI and its implementing regulations).

[114] 28 CFR 42.104 (discrimination prohibited by DOJ Title VI regulations); 10 CFR 1040.1 (Department of Energy regulations mirroring DOJ Title VI regulations).

[115] 28 CFR 35.104.

[116] S. Rep. No. 109–134, 2005 WL 2250857, at *11 (2005).

achievement). For these reasons, CRC declines to make the suggested changes to proposed § 38.4(tt).

Qualified Individual With a Disability

Proposed § 38.4(ww) revised a portion of the definition of ''qualified individual with a disability'' to match the definition in the EEOC regulations implementing the ADAAA.[117] CRC received one comment from a coalition of disability organizations supporting the proposed definition, and § 38.4(ww) is adopted as proposed.

Qualified Interpreter

Proposed § 38.4(xx) amended the existing definition of ''qualified interpreter'' to reflect the availability of new technologies, stating that interpreting services may be provided ''either in-person, through a telephone, a video remote interpreting (VRI) service or via internet, video, or other technological methods.'' The revision also delineated the skills and abilities that an individual must possess in order to provide interpreter services for an individual with a disability.

Comment: CRC received one comment from a coalition of disability advocacy organizations concerned that interpreters should ''have a particular level of expertise in the specific jargon being used.'' The commenter requested that the definition of qualified interpreter take into consideration both ''applicable state law governing licensure of interpreters,'' as well as ''the qualification of the interpreter for the particular field of employment in any given situation.''

Response: A qualified interpreter is defined as an interpreter who is able to interpret ''effectively, accurately, and impartially.'' The interpreter must also be able to interpret ''both receptively and expressively, using any necessary specialized vocabulary.'' Accordingly, § 38.4(xx) already addresses the commenters' concern about an interpreter's ability to use relevant jargon or to otherwise effectively and accurately understand and interpret communications regarding a particular field of employment. On the other hand, possessing State certification may or may not indicate that an individual meets the regulatory criteria. We therefore decline to incorporate State standards into the regulation. The most important factor is whether the interpreter can facilitate effective, accurate, and impartial communication and therefore meets the requirements outlined in the regulation. For these reasons, CRC declines to make the suggested changes.

In § 38.4(xx)(2), CRC proposed a definition of ''qualified interpreter for an individual who is limited English proficient.'' The proposed § 38.4(xx)(2) was taken from the DOL LEP Guidance and refers to an individual who demonstrates expertise in and ability to communicate information accurately in both English and in the other language (into which English is being interpreted) and to identify and employ the appropriate mode of interpreting, such as consecutive, simultaneous, or sight translation.[118]

Several advocacy organizations expressed support for the proposed definition of ''qualified interpreter'' and the definition of ''qualified interpreter for an individual who is LEP'' within § 38.4(xx)(2). The commenters stated that the proposed definitions properly acknowledge that new technology has expanded the availability of interpretation services, providing a range of methods for regulated entities to use to meet their responsibilities under the regulations. Furthermore, the commenters noted that the definitions help ensure that job seekers and workers who are LEP have access to quality interpretation by describing the quality of the interpreter as effective, accurate, impartial, expressive, and using necessary vocabulary. The commenters stated that this characterization of quality was necessary to disallow the use of Web sites or services that only provide online translation services (which may be inaccurate), and to discourage the use of children or family members or other untrained individuals as interpreters.

Reasonable Accommodation

Proposed § 38.4(yy) revised the definition of ''reasonable accommodation'' to add a new paragraph stating that the provision of reasonable accommodations is not required for individuals who are only ''regarded as'' having a disability. This provision is consistent with the ADAAA[119] and regulations issued by the EEOC[120] and by the DOJ[121] implementing the ADAAA.

Comment: CRC received a few comments generally supporting this provision from a coalition of disability advocacy organizations. CRC received one comment from a State agency asking that the term ''regarded as having a disability'' be defined or that examples be provided to add clarification to the meaning of the phrase. The commenter requested that the term ''covered entity'' be defined. The commenter also suggested that the term ''covered entity'' be replaced with the term ''recipient.''

Response: We agree that it is preferable to use the term ''recipient,'' defined in § 38.4(zz), instead of ''covered entity,'' for which there is no definition in this part, and have adopted that change throughout the rule.[122] Regarding the commenter's request that we define ''regarded as having a disability,'' or provide examples, we note that the definition of the term ''disability'' includes ''being regarded as having such an impairment,'' and that the phrase ''is regarded as having such an impairment'' is defined in § 38.4(q)(7). CRC revises § 38.4(yy)(4) of the rule consistent with that wording to refer to the applicable definitions for the ''actual disability,'' ''record of,'' and ''regarded as'' prongs. Therefore, examples are unnecessary.

For the sake of consistency, CRC places quotation marks around the term ''reasonable accommodation'' in § 38.4(yy)(2).

Recipient

Proposed § 38.4(zz) defined the term ''recipient'' as any one-stop partner listed in section 121(b) of WIOA and any ''entity to which financial assistance under Title I of WIOA is extended, directly from the Department or through the Governor or another recipient (including any successor, assignee, or transferee of a recipient).'' Section 38.4(zz) also proposed a non-exhaustive list of examples of recipients.

Comment: A State labor agency commented that the proposed definition of ''recipient'' significantly expands the existing definition and will cause confusion because it is not in accordance with current OMB guidance. The commenter recommended that the Department continue to rely on the Office of Management and Budget (OMB) definition.

Response: Although the definition of ''recipient'' in this rule differs from the definition of ''recipient'' in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR part 200 (''Uniform Guidance''), the definition of recipient in this rule does not expand upon or adopt the definition of ''recipient'' in the Uniform Guidance

[117] 29 CFR 1630.2(m).

[118] DOL LEP Guidance, *supra* note 28, at 32296.

[119] 42 U.S.C. 12101 *et seq.*

[120] 29 CFR 1630.9(e).

[121] 28 CFR 35.108(f)(7)(ii).

[122] CRC is replacing ''covered entity'' with ''recipient'' in two sections: in the definition of ''disability'' in § 38.4(q) and in the definition of ''reasonable accommodation'' in § 38.4(yy).

because this rule and the Uniform Guidance are two different rules with different applicability and different purposes. CRC chooses to retain its definition of ''recipient'' because CRC has a statutory duty to enforce WIOA Section 188 with respect to ''programs and activities financially assisted in whole or in part under'' WIOA. Coverage under Section 188 and this regulation is not dependent on whether an entity is a ''pass-through entity'' as defined in 2 CFR 200.74, a ''recipient'' as defined in 2 CFR 200.86, or a ''subrecipient'' as defined in 2 CFR 200.93. Instead, coverage under Section 188 and this regulation depends on whether an entity is a ''recipient,'' as defined in § 38.4(zz), that receives financial assistance under Title I of WIOA, as defined in § 38.4(x) and (y). Moreover, the definition of ''recipient'' in § 38.4(zz) is consistent with the definition of ''recipient'' in the 1999 and 2015 rules. Therefore we decline to amend the definition of ''recipient'' as suggested.

Service Animal

Proposed § 38.4(fff) added a definition for ''service animal.'' This provision is based on the DOJ ADA Title II regulations.[123]

Comment: Two disability advocacy organizations expressed support for the proposed definition of ''service animal,'' reasoning that it is consistent with ADA definitions that exclude exotic animals from protected coverage. The commenter noted that the organization has received complaints about individuals who identify exotic animals as service animals, which the commenters believe draws unnecessary attention to the individual rather than performing an actual service.

However, a few commenters requested revisions to the definition. An advocacy organization recommended that the definition of ''service animal'' be expanded to include emotional support animals to be consistent with language in the Pennsylvania Human Relations Act and the Federal Fair Housing Act. Another advocacy organization suggested that CRC eliminate or explain the differences between CRC's and DOJ's language regarding emotional support and the exclusion of miniature horses as service animals. Similarly, a state-based organization serving individuals with developmental disabilities recommended that the definition of ''service animal'' be revised to include miniature horses. The commenter noted that, even though current ADA requirements recognize dogs only as service animals, it also permits the use of a miniature horse as a service animal in certain circumstances.

Response: In the interest of uniformity, our definition of a service animal under § 38.4(fff) is limited to dogs, consistent with the Department of Justice's 2010 ADA Title II regulations.[124] While another section of the DOJ Title II regulations sets out standards for the reasonable modification of policies, practices, and procedures to permit miniature horses to be utilized in certain circumstances and under specific criteria, this is different from including miniature horses in the definition of a ''service animal.''

Our definition of a service animal, consistent with the DOJ 2010 ADA Title II regulations, excludes animals that are only used to provide emotional support, well-being, comfort, or companionship, but does include dogs that can perform work or tasks that are directly related to an individual's disability, including helping persons with psychiatric and neurological disabilities. We believe that it is appropriate to follow the DOJ Title II regulations in restricting service animals to dogs that can perform specific assistive tasks; many of the same entities subject to this rule are also subject to the DOJ regulations. However, not all of those entities are subject to the Pennsylvania Human Relations Act or the federal Fair Housing Act. We believe permitting emotional support animals under a single State statute,[125] or under the Fair Housing Act as a reasonable accommodation,[126] is fundamentally different than classifying such animals as service animals. Accordingly, those laws are not used as the basis for the definition of ''service animal'' in the final rule.

Video Remote Interpreting (VRI) Service

Proposed § 38.4(sss) added a definition for ''video remote interpreting (VRI) service'' that mirrors the definition used by DOJ in its regulations implementing Title II of the ADA.[127]

Comment: A coalition of organizations representing the interests of individuals with disabilities commented that the proposed definition of ''video remote interpreting'' (VRI) is inadequate and vague because it could ostensibly allow for a smartphone to be used to Skype the interpreter, reasoning that such a scenario is problematic as the effectiveness of video remote interpreting depends greatly on the deaf individual's ability to view the VRI interpreter on a sufficient size screen and the clarity of the signing on the screen being affected by signal strength. The coalition recommended that all covered entities prioritize the use of on-site interpreters, and that use of VRI be limited to brief interactions or where a qualified interpreter is not available.

Response: The current language, which mirrors the DOJ ADA Title II regulations, is sufficient. As stated in § 38.15, which parallels the language of the ADA, a recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. In addition, with respect to video remote interpreting, there are particular requirements under § 38.15(a)(4) that address the speed, size, and quality of the service, which would in many cases limit the use of a smart phone for VRI. For these reasons, CRC declines to make the suggested changes to proposed § 38.4(sss).

Vital Information

In § 38.4(ttt), the proposed rule included a definition for ''vital information.'' The proposed rule used the term ''vital information'' to describe the type of information that recipients must: (1) Translate in advance of encountering any specific LEP individual, pursuant to § 38.9(g)(1); or (2) translate (in writing) or interpret (verbally) when specific LEP

[123] *See* 28 CFR 35.104. The EEOC has not addressed whether this definition applies to employers and employment agencies covered under Title I of the ADA or Section 501 of the Rehabilitation Act.

[124] *See* 28 CFR 35.104.

[125] The Pennsylvania Human Relations Act does not use the term ''service animal'' but uses the term ''guide or support animals,'' without further definition. *See* 43 Pa. Cons. Stat. sections 952, 955.

[126] *See* U.S. Dep't of Housing & Urban Dev., Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (FHEO–2013–01, Apr. 25, 2013), *available at http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf* (classifying requests for emotional support animals as reasonable accommodation requests, rather than a service animal).

[127] *See* 28 CFR 35.104.

individuals are encountered, pursuant to § 38.9(g) and (h). The proposed rule gave a nonexhaustive list of examples of documents containing vital information. CRC sought comments on this definition. The comments and our responses regarding the definition of ''vital information'' are set forth below:

Comment: Several advocacy organizations supported the proposed definition of ''vital information'' specifically because the increased usage of Web sites or other virtual services to provide employment and training information should not preclude job seekers or workers who are LEP from accessing those services. A local workforce agency supported the proposed definition of ''vital information,'' reasoning that it ''is precise [and] provides a clear description of the importance of providing program information in various formats thereby enabling recipients to comply with WIOA regulations.'' A State labor agency did not support including this definition. The commenter stated that it would increase the burden of one-stop centers and partners to translate materials into multiple languages and would constitute an unfunded mandate.

Response: We acknowledge that compliance with § 38.9 may impose some limited burdens on recipients. Moreover, these burdens are outweighed by the benefits that § 38.9 will generate for individuals with limited English proficiency by making them aware, in their preferred languages, of information they need to understand in order to obtain, and to understand how to obtain, the aid, benefits, services, and training offered by WIOA Title I programs and activities.[128] We believe including the definition of vital information provides clear direction for recipients so that they can determine what information must be translated or orally interpreted for LEP individuals in order to meet their obligations under this part and WIOA Section 188. The definition builds upon and is consistent with the discussion of vital written materials and documents contained in the DOL LEP Guidance.[129] For these reasons, CRC declines to make any modifications to the definition of vital information.

Wheelchair

In § 38.4(uuu), the proposed rule added a definition for ''wheelchair'' to distinguish it from other power driven mobility devices. The new definition mirrors the definition in the DOJ ADA Title II regulations.[130] CRC received one comment in support of this provision from a coalition of disability advocacy organizations and adopts it as proposed.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC adopts the definitions proposed in § 38.4 with the following modifications: reorganizing paragraph (b); numerous edits in paragraph (q) to conform with DOJ's ADA Title II regulations to implement the ADAAA; in paragraphs (q) and (yy), changing all instances of ''covered entity'' (or ''covered entities'') to ''recipient'' (or ''recipients''); in paragraph (aa), revising the definition of ''Governor'' to track the statutory definition more closely; in paragraph (hh), revising the definition of ''limited English proficient (LEP) individual'' to clarify its connection to national origin discrimination; in paragraph (mm), revising the maximum wage rate reimbursement to match that in WIOA; in paragraph (nn), adding ''by other similar means''; and in paragraph (yy)(4), adding references to the applicable definitions for the ''actual disability,'' ''record of,'' and ''regarded as'' prongs.

General Prohibitions on Discrimination § 38.5

Proposed § 38.5 set forth generally the discrimination prohibited by WIOA Section 188 and this part: ''No individual in the United States may, on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries, applicants, and participants only, citizenship or participation in any WIOA Title I-financially assisted program or activity, be [subjected to certain adverse actions].''

Comment: An individual commenter cited the regulatory language ''because of race, color, religion, sex, national origin, age, disability, political affiliation or belief . . . '' and recommended that the word ''belief'' be removed because it can be misunderstood in context with the other words.

Response: CRC appreciates the commenter's concern that the regulation text be clearly understood. We believe the word ''and'' after the word ''belief'' is inconsistent with the intended meaning of the text, and may have made it unclear that the word ''belief'' is not an independent protected category, such as race, but is part of the protected basis of ''political affiliation or belief.'' CRC declines the commenter's suggestion to delete the word ''belief'' from § 38.5, because the language ''political affiliation or belief'' is derived directly from WIOA Section 188. However, to clarify that ''belief'' is not an independent basis, and to more clearly and consistently identify all of the bases on which discrimination is prohibited, CRC makes the following technical changes as appropriate in this section and in §§ 38.1, 38.4(uu), 38.6, 38.10, 38.25(a)(1)(i)(A), and 38.42(a): Adding both a comma and the words ''applicants, and participants'' following ''beneficiaries''; repeating ''on the basis of'' or ''based on'' before ''citizenship''; and making minor technical changes to the punctuation and conjunctions in the list of bases. For the same reasons, CRC intends no substantive changes by making these revisions.

Specific Discriminatory Actions Prohibited on Bases Other Than Disability § 38.6

Proposed § 38.6 discussed the types of discriminatory actions prohibited by WIOA and this part whenever those actions are taken because of the protected bases listed in Section 188, with the exception of disability. In addition, this section replaced the term ''ground'' with the term ''basis.''

Comment: An advocacy organization pointed out that the proposed prohibitions on sex discrimination include a prohibition on job postings that seek individuals of a particular sex. The commenter urged a similar prohibition on job postings that seek individuals of a particular age, or contain age-related parameters such as ''recent graduates.'' The commenter also expressed concern that older workers have been systematically shortchanged in the workforce development system. The commenter warned that older workers are often diverted or referred to other programs, relegated to self-service because of understaffing, not served because the performance criteria discourage helping the hard-to-serve, or otherwise denied equal access to meaningful engagement that would qualify them to be ''participants.'' The commenter concluded that disparate impact discrimination based on age is a ''new'' legal development that should be considered as bolstering the case for increased attention to disparate impact based on age in the delivery of career services to older jobseekers.

Response: As discussed below in connection with § 38.7(b)(5), CRC is

[128] *Cf.* HHS Nondiscrimination Final Rule, *supra* note 18, at 31401 (recognizing that in the health context the benefits of translating information for LEP individuals outweigh the burdens on covered entities).

[129] DOL LEP Guidance, *supra* note 28, at 32298.

[130] 28 CFR 35.104.

removing the across-the-board prohibition on ''the use of gender-specific terms for jobs (such as 'waitress')'' because the EEOC permits gender-specific job titles in advertisements in the rare instance in which sex is a bona fide occupational qualification. The use of such language in employment opportunity advertisements and other recruitment practices is suspect, but is not a per se violation, and no violation should be found when it is accompanied by prominent language that clearly indicates the intent to include applicants or prospective applicants of both sexes. Age discrimination cases are also fact specific. Language that is age referential, or that would discourage older workers, can be legal if based on a bona fide occupational qualification or a reasonable factor other than age. Accordingly, CRC declines to prohibit outright the use of all potentially age-related parameters.

While the rule does not have a separate section devoted to addressing age discrimination only, age is a covered basis for prohibited discrimination. For example, the provisions of § 38.6 would prohibit, on a case-by-case basis, job postings shown to be discriminatory due to age, as well as the other scenarios raised by the commenter, whenever they are the result of age discrimination. We disagree with the commenter's suggestion that CRC should give increased attention to any particular type of discrimination. Therefore CRC declines to adopt the commenter's recommendation.

Comment: An advocacy organization suggested that there should be ''[n]o discrimination or preference on the basis of race, ethnicity, sex, etc.,'' including ''any use of goals and timetables to remedy underrepresentation and the like.'' The commenter also opposed the disparate impact approach to civil rights enforcement and favored only prohibition of disparate treatment.

Response: With respect to the issue of ''goals and timetables to remedy underrepresentation and the like,'' CRC believes that the commenter is requesting that the final rule include neither specific numerical goals for hiring persons because of protected categories, nor specific numerical goals for offering any aid, benefit, service, or training on the basis of protected categories. The rule contains no such requirements. Instead, the final rule addresses underrepresentation by requiring, among other things, recipients to designate an Equal Opportunity Officer,[131] collect and monitor equal opportunity data to ensure compliance with this part,[132] and conduct affirmative outreach to certain targeted groups.[133]

Regarding the question of disparate impact discrimination, CRC disagrees that the final rule should only prohibit intentional discrimination—that is, disparate treatment discrimination. WIOA authorizes the Secretary to promulgate nondiscrimination regulations ''that are consistent with the Acts referred to in subsection (a)(1)'' of Section 188.[134] Under federal statutes that prohibit discrimination, federal agencies have the authority to issue and enforce regulations prohibiting policies and practices that have disparate impacts on protected classes.[135] It is particularly important that federal agencies such as CRC enforce prohibitions against disparate impact discrimination because victims themselves may be unable to enforce agencies' disparate impact regulations.[136] CRC emphasizes that it will not deem unlawful a neutral policy or practice that has a disparate impact on a protected class if the recipient demonstrates that the policy or practice has a substantial legitimate justification and CRC cannot identify an alternative policy or practice that may be comparably effective with less disparate impact.[137]

Discrimination Prohibited Based on Sex § 38.7

Proposed § 38.7(a) stated that discrimination in WIOA Title I-financially assisted programs and activities based on pregnancy, childbirth, and related medical conditions is a form of unlawful sex discrimination. CRC received only supportive comments on this inclusion and adopts it as proposed in the final rule.

Proposed § 38.7(a) further stated that discrimination based on transgender status or gender identity[138] is a form of unlawful sex discrimination. CRC received comments supporting and opposing this inclusion.

Comments: CRC received eleven comments in support of the express inclusion of transgender status and gender identity in the definition of ''sex.'' The commenters were one coalition of eighty-six women's, workers', and civil rights organizations; a group of ten advocacy organizations and a union; six individual advocacy organizations; two health organizations; and one individual. The organizational commenters emphasized that the principle that discrimination on the basis of gender identity or transgender status constitutes discrimination on the basis of sex is well supported by Title VII and Title IX case law.

CRC also received comments opposing the recognition of discrimination based on transgender status or gender identity as a form of unlawful sex discrimination. These comments were submitted by one group of nine religious organizations, one employer, one State department of labor, and numerous individuals.

The religious organizations asserted that ''the inclusion of transgender status and gender identity in the proposed regulations is an erroneous interpretation of the law.'' They stated that Section 188 does not provide a textual basis for including transgender status and gender identity in CRC's rule because the statute uses the term ''sex,'' which they stated is ordinarily defined as ''being male or female.'' They further asserted that most courts have held that discrimination on the basis of transgender status or gender identity is not covered by federal statutes prohibiting sex discrimination. The religious organizations also pointed to congressional efforts to enact legislation that would prohibit federally financially assisted programs and activities from discriminating on the basis of gender identity, portraying such efforts as

[131] *See* §§ 38.28 and 38.29.

[132] *See* §§ 38.31 and 38.41.

[133] *See* § 38.40.

[134] 29 U.S.C. 3248(e).

[135] *See, e.g., Alexander* v. *Choate,* 469 U.S. 287, 293–94 (1985) (explaining that the Court had previously held, in *Guardians Ass'n* v. *Civil Serv. Comm'n,* 463 U.S. 582 (1983), ''that Title VI [which does not itself contain a disparate impact provision] had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts'').

[136] *Alexander* v. *Sandoval,* 532 U.S. 275, 293 (2001) (Title VI); *see* Memorandum from Loretta King, Acting Assistant Attorney General, U.S. Dep't of Justice, Civil Rights Div., to Federal Agency Civil Rights Directors and General Counsels, Strengthening of Enforcement of Title VI of the Civil Rights Act of 1964 (July 10, 2009), *available at http://www.lep.gov/titlevi_enforcement_memo.pdf.*

[137] *N.Y. Urban League, Inc.* v. *New York,* 71 F.3d 1031, 1036 (2d Cir. 1995); *Ga. State Conf. of Branches of NAACP* v. *Georgia,* 775 F.2d 1403, 1417 (11th Cir. 1985); *see generally Texas Dep't of Housing & Cmty. Affairs* v. *Inclusive Communities Project,* 135 S. Ct. 2507, 2522–23 (2015).

[138] A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth. Throughout this final rule, the term ''transgender status'' does not exclude gender identity, and the term ''gender identity'' does not exclude transgender status.

evidence that federal law does not already forbid such discrimination.[139]

The State department of labor that opposed this portion of proposed § 38.7(a) asserted that ''there is no clear legal consensus as to whether Title VII's prohibition against sex discrimination applies to discrimination on the basis of gender orientation or gender identity.'' The employer and numerous individual commenters asserted that this provision of CRC's rule would undermine traditional values and grant special protections to LGBT people. Many individual commenters further expressed skepticism or derision regarding the existence of transgender individuals and individuals who do not identify as male or female.

Response: As discussed above in the main preamble and as supported by numerous commenters, CRC finds the prohibition of discrimination on the basis of gender identity or transgender status as a form of sex discrimination to be consistent with case law under Title VII and Title IX.[140]

Likewise, CRC does not find the rule's inclusion of gender identity or transgender status to be inconsistent with congressional efforts to ban gender identity discrimination in programs and activities receiving federal financial assistance. Enactment of subsequent legislation may simply codify and clarify interpretations of existing laws to provide additional guidance. In addition, as the Supreme Court has held, several equally tenable inferences may be drawn from congressional inaction, including the inference that existing legislation already incorporates a proposed change, and therefore congressional inaction lacks persuasive significance in the interpretation of existing statutes.[141]

Therefore, CRC retains the terms ''transgender status'' and ''gender identity'' in the definition of ''sex'' in § 38.7(a) in the final rule.

Comment: The religious organizations further asserted that Section 188's prohibition on sex discrimination is subject to the exception for religious organizations contained in Title IX.[142] They asserted that Title IX's religious exception applies to CRC's rule because WIOA Section 188 forbids sex discrimination ''except as otherwise permitted under title IX'' and requires the Secretary to promulgate nondiscrimination regulations that are ''consistent with the Acts referred to in subsection (a)(1)'' of Section 188, including Title IX.[143] The religious organizations further asserted that, even if WIOA did not incorporate Title IX's religious exception, the Religious Freedom Restoration Act (RFRA) could support a religious exemption from any nondiscrimination obligation the final rule imposed with regard to gender identity, transgender status, or sexual orientation. The religious organizations stated that they were not suggesting that any person eligible to participate in job training and placement programs should be excluded from the programs. They asserted that RFRA would support an exemption from any interference ''with the ability of a religious organization to require adherence to religiously-grounded employee conduct standards'' or ''to hire and retain staff whose beliefs and practices are consistent with those of the organization.''

Response: CRC agrees that WIOA incorporates the exceptions contained in Title IX. As the religious organizations noted, WIOA Section 188 forbids sex discrimination ''except as otherwise permitted under title IX.''[144] Title IX's prohibition on sex discrimination applies, with certain exceptions, to ''any education program or activity receiving Federal financial assistance.''[145] In addition to the exception provision cited by the religious organizations, Title IX provides that the term ''program or activity'' ''does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.''[146] Accordingly, the Department's Title IX regulation already contains an exemption provision and a mechanism for receiving exemption claims at 29 CFR 36.205.

The Title IX religious exception is available to recipients if they meet the criteria for the exception. The exception applies to any recipient that is an educational institution controlled by a religious organization if the application of this part's prohibition against sex discrimination would not be consistent with the organization's religious tenets.[147] It also applies to the educational operation of any recipient that is an entity controlled by a religious organization if the application of this part's prohibition against sex discrimination to that operation would not be consistent with the organization's religious tenets.[148] Recipients that meet either set of criteria may follow the process established by the Department's Title IX regulation at 29 CFR 36.205(b) to submit exemption claims.[149] The Department of Education has published information that CRC finds instructive in determining whether a recipient is ''controlled by a religious organization.''[150] If a recipient has

[139] In the 114th Congress (2015–2016), identical ''Equality Act'' bills were introduced in the Senate (S. 1858) and House (H.R. 3185) on July 23, 2015. The bills would, *inter alia,* prohibit programs and activities receiving federal financial assistance from discriminating against persons based on sex, sexual orientation, or gender identity. U.S. Library of Congress, Congress.gov, *available at https://www.congress.gov/bill/114th-congress/senate-bill/1858*, *https://www.congress.gov/bill/114th-congress/house-bill/3185*.

[140] *See, e.g., Barnes* v. *Cincinnati,* 401 F.3d 729, 739 (6th Cir. 2005); *Smith* v. *Salem,* 378 F.3d 566, 574 (6th Cir. 2004); *Doe* v. *Univ. of Mass.-Amherst,* No. CV 14–30143–MGM, 2015 WL 4306521, at *6 n.2 (D. Mass. July 14, 2015); *Schroer* v. *Billington,* 577 F. Supp. 2d 293 (D.D.C. 2008); *Miles* v. *N.Y. Univ.,* 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997); *see also Macy* v. *Dep't of Justice,* Appeal No. 0120120821, 2012 WL 1435995, at *7 (EEOC Apr. 20, 2012), *available at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.* The contrary approach taken in the older cases cited by opposing commenters ''has been eviscerated by *Price Waterhouse.*'' *Smith,* 378 F.3d at 573; *see also Schwenk* v. *Hartford,* 204 F.3d 1187, 1201 (9th Cir. 2000).

[141] *Pension Benefit Guar. Corp.* v. *LTV Corp.,* 496 U.S. 633, 650 (1990).

[142] The religious organizations referred to the exception that provides that the prohibition on sex discrimination ''shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.'' 20 U.S.C. 1681(a)(3).

[143] 29 U.S.C. 3248(a)(2), (e).

[144] 29 U.S.C. 3248(a)(2).

[145] 20 U.S.C. 1681(a).

[146] 20 U.S.C. 1687.

[147] *See* 20 U.S.C. 1681(a)(3).

[148] *See* 20 U.S.C. 1687.

[149] The Department's Title IX exemption provision and process are as follows:

Educational institutions and other entities controlled by religious organizations.

- *Exemption:* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.
- *Exemption claims:* An educational institution or other entity that wishes to claim the exemption set forth in the paragraph above shall do so by submitting in writing to the Director, Civil Rights Center, a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

See 29 CFR 36.205.

[150] The Department of Education normally considers an institution to be controlled by a religious organization if it falls into one of the following categories:

(1) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or

(2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or

(3) Its charter and catalog, or other official publication, contains explicit statement that it is

Continued

already obtained a Title IX religious exemption from the Department of Education, such exemption may be submitted to CRC as a basis for an exemption from the Department of Labor.[151]

CRC also acknowledges that RFRA applies to all federal laws, including WIOA. CRC declines, however, to implement a blanket RFRA exemption from the final rule's nondiscrimination obligations because claims under RFRA are inherently individualized and fact specific.[152] Insofar as the application of any requirement under this part would violate RFRA, such application shall not be required.

The preamble to the proposed rule asked for public comment on the question of whether the final rule should add sexual orientation discrimination to § 38.7(a) as a form of unlawful sex discrimination. CRC received numerous responsive comments.

Comments: Many commenters requested that CRC explicitly state in the rule that Section 188's prohibition of discrimination on the basis of sex includes discrimination on the basis of sexual orientation. They cited EEOC decisions and recent case law supporting this interpretation under Title VII, Title IX, and other laws. Some commenters supporting the inclusion of sexual orientation in this rule described the Department's policy as deferring to the EEOC's interpretation of Title VII law and pointed out that the Department has failed to defer to the EEOC's clear interpretation that sexual orientation discrimination is a form of sex discrimination. Many of these commenters urged CRC to incorporate the ''modern legal standard rather than adopting an outmoded interpretation based on decades-old precedent.''

Other commenters asserted that Section 188 was not intended to protect against sexual orientation discrimination, that no federal appellate court has interpreted Title IX's or Title VII's ban on sex discrimination to prohibit sexual orientation discrimination, and that CRC therefore does not have authority to include this basis.

Response: As noted above, as well as in the preamble to the proposed rule, as a matter of policy, CRC supports banning discrimination on the basis of sexual orientation. Ensuring equal access to aid, benefit, service, and training opportunities is critical to meeting the objectives of Section 188 and, more broadly, WIOA. This policy goal is reflected in executive actions such as Executive Order 13672, issued on July 21, 2014, adding sexual orientation and gender identity to the expressly protected bases under Executive Order 11246, which applies to the employment practices of covered federal contractors, including covered Job Corps contractors.[153] Supreme Court decisions have, moreover, repeatedly made clear that individuals and couples deserve equal rights regardless of their sexual orientation.[154] The preamble to the proposed rule acknowledged, however, that ''[c]urrent law is mixed on whether existing Federal nondiscrimination laws prohibit discrimination on the basis of sexual orientation as a part of their prohibitions on sex discrimination.''[155] The preamble stated CRC's policy position, noted that ''[t]he final rule should reflect the current state of nondiscrimination law, including with respect to prohibited bases of discrimination,'' and sought comment on the issue.[156]

In *Price Waterhouse* v. *Hopkins,* the Supreme Court held that an employer's failure to promote a female senior manager to partner because of the sex-stereotyped perceptions that she was too aggressive and did not ''walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'' was unlawful sex-based employment discrimination.[157] Though *Price Waterhouse* did not involve an allegation of discrimination based on an individual's sexual orientation, the Supreme Court recognized in that case that unlawful sex discrimination occurs when an individual is treated differently based on a failure to conform to gender-based stereotypes about how individuals should present themselves or behave.[158] The Department of Justice has therefore taken the position that a well-pled complaint alleging discrimination against a gay employee because of failure to conform to sex stereotypes states a viable sex discrimination claim under Title VII.[159] When a recipient discriminates against an individual based on sexual orientation, the entity may well rely on stereotypical notions or expectations of how members of a certain sex should act or behave. These stereotypes are precisely the types of gender-based assumptions prohibited by *Price Waterhouse.*[160]

Based on this understanding, some courts have recognized in the wake of *Price Waterhouse* that discrimination ''because of sex'' includes discrimination based on sex stereotypes about sexual attraction and sexual behavior[161] or about deviations from ''heterosexually defined gender norms.''[162] For example, a recent district court decision in the Ninth Circuit held that the distinction between discrimination based on gender stereotyping and discrimination based on sexual orientation is artificial and that claims based on sexual orientation are covered by Title VII and Title IX as a form of sex discrimination.[163]

---

controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

U.S. Dep't of Educ., Office for Civil Rights, Religious Exemption (2016), *http://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/rel-exempt-pr.html.*

[151] *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance; Proposed Common Rule, 64 FR 58568, 58570, Oct. 29, 1999.

[152] The RFRA analysis evaluates whether a legal requirement imposed by the federal government substantially burdens a person's exercise of religion; if it does, the government must demonstrate that application of the legal requirement to the person furthers a compelling governmental interest and is the least restrictive means to further that interest. *See* 42 U.S.C. 2000bb–1(b).

[153] *See* OFCCP Executive Order 13672 Final Rule, *supra* note 19.

[154] For example, in 1996, the Supreme Court struck down an amendment to the Colorado constitution that prohibited the State government from providing any legal protections to gay, lesbian, and bisexual individuals. *Romer* v. *Evans,* 517 U.S. 620 (1996). In 2015, the Supreme Court ruled that states may not prohibit same-sex couples from marrying and must recognize the validity of same-sex couples' marriages. *Obergefell* v. *Hodges,* 135 S. Ct. 2584 (2015). *See also United States* v. *Windsor,* 133 S. Ct. 2675 (2013) (declaring unconstitutional the federal Defense of Marriage Act's definition of ''marriage'' as only a legal union between a man and a woman); *Lawrence* v. *Texas,* 539 U.S. 558 (2003) (declaring unconstitutional a state statute criminalizing consensual same-sex sexual conduct).

[155] CRC WIOA NPRM, *supra* note 70, at 4509.

[156] *Id.* at 4509–10.

[157] 490 U.S. 228, 235 (1989) (plurality op.).

[158] *Id.* at 250–51.

[159] *See* Def.'s Renewed Mot. to Dismiss at 17–18, *Terveer* v. *Billington,* No. 1:12–cv–1290 (D.D.C. Mar. 21, 2013), ECF No. 27.

[160] *Price Waterhouse,* 490 U.S. at 288; *see, e.g., Deneffe* v. *SkyWest, Inc.,* No. 14–cv–00348, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015); *Terveer* v. *Billington,* 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Boutillier* v. *Hartford Pub. Schs.,* 2014 WL 4794527 (D. Conn. 2014); *Koren* v. *Ohio Bell Tel. Co.,* 894 F. Supp. 2d 1032, 1037–38 (N.D. Ohio 2012); *Heller* v. *Columbia Edgewater Country Club,* 195 F. Supp. 2d 1212, 1224, *adopted,* 195 F. Supp. 2d 1216 (D. Or. 2002); *Centola* v. *Potter,* 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

[161] *See Videckis* v. *Pepperdine Univ.,* No. CV 15–00298, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

[162] *Isaacs* v. *Felder Servs.,* No. 2:13cv693–MHT, 2015 WL 6560655, at *4 (M.D. Ala. Oct. 29, 2015).

[163] *Videckis,* 2015 WL 8916764, at *5–6; *see also U.S. Equal Emp't Opportunity Comm'n* v. *Scott Med. Health Ctr.,* No. 16–225, 2016 WL 6569233, at *6 (W.D. Pa. Nov. 4, 2016). Prior circuit court

In addition, in *Baldwin* v. *Department of Transportation,* the EEOC concluded that Title VII's prohibition of discrimination ''because of sex'' includes sexual orientation discrimination because discrimination on the basis of sexual orientation necessarily involves sex-based considerations.[164] The EEOC relied on several theories to reach this conclusion: A plain reading of the term ''sex''' in the statutory language, an associational theory of discrimination based on ''sex,'' and the gender stereotype theory announced in *Price Waterhouse.*[165]

For all of these reasons, CRC concludes that Section 188's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. Accordingly, CRC will evaluate complaints alleging sex discrimination related to an individual's sexual orientation to determine whether they can be addressed under § 38.7(d) of the final rule as discrimination on the basis of sex stereotypes.[166]

CRC has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation alone is a form of sex discrimination under Section 188. CRC anticipates that the law will continue to evolve on this issue, and CRC will continue to monitor legal developments in this area. CRC will enforce Section 188 in light of those developments and will consider issuing further guidance on this subject as appropriate.

Proposed § 38.7(b) stated that recipients may not make any distinction based on sex in providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity and provided a nonexhaustive list of such distinctions to assist recipients in meeting their nondiscrimination and equal opportunity responsibilities under this section. CRC addresses each example below.

Proposed § 38.7(b)(1) addressed making a distinction between married and unmarried persons that is not applied equally to individuals of both sexes. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.7(b)(2) addressed denying individuals of one sex who have children access to aid, benefit, service, or training opportunities that are available to individuals of another sex who have children.

Proposed § 38.7(b)(3) addressed adversely treating unmarried individuals of one sex, but not unmarried individuals of another sex, who become parents. CRC received only supportive comments on these provisions and adopts both as proposed.

Proposed § 38.7(b)(4) addressed distinctions on the basis of sex in formal or informal job training programs, educational programs, or other opportunities such as networking, mentoring, individual development plans, or on the job training opportunities. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.7(b)(5) addressed posting job announcements that recruit or advertise for individuals for certain jobs on the basis of sex, including through the use of gender-specific terms for jobs, such as ''waitress.'' CRC received no comments on this provision of its proposed rule. However, on the nearly identical provision in the proposed Discrimination on the Basis of Sex rule, OFCCP received a comment stating that the EEOC permits gender-specific job titles in advertisements if they are clearly used as terms of art rather than as a means for deterring applicants on the basis of sex.[167] In response to that comment and comments asserting that removal of gender-specific job titles would impose costs on federal contractors, including those associated with negotiating new job titles with unions, OFCCP amended its proposed rule by deleting the clause ''including through use of gender-specific terms for jobs (such as 'lineman').'' OFCCP stated that it would follow EEOC's policy guidance on Use of Sex-Referent Language in Employment Opportunity Advertising and Recruitment, which provides that use of sex-referent language in employment opportunity advertisements and other recruitment practices ''is suspect but is not a *per se* violation of Title VII'' and that ''[w]here sex-referent language is used in conjunction with prominent language that clearly indicates the employer's intent to include applicants or prospective applicants of both sexes, no violation of Title VII will be found.''[168]

For the sake of consistency across the Department's regulations, CRC removes the proposed phrase ''including through the use of gender-specific terms for jobs (such as 'waitress')'' from § 38.7(b)(5) in the final rule. Like OFCCP, CRC will follow EEOC's policy guidance on Use of Sex-Referent Language in Employment Opportunity Advertising and Recruitment. CRC similarly recommends as a best practice incorporating the use of gender-neutral terms where such alternatives exist.

Proposed § 38.7(b)(6) addressed treating an individual adversely because the individual identifies with a gender different from the sex assigned at birth or the individual has undergone, is undergoing, or is planning to undergo processes or procedures designed to facilitate the individual's transition to a sex other than the individual's assigned sex at birth. In addition to the comments CRC received supporting and opposing the inclusion of transgender status and gender identity, already discussed in connection with § 38.7(a), CRC also received supportive comments suggesting modifications of § 38.7(b)(6).

Comments: Six individual advocacy organizations, the coalition of eighty-six organizations, and a health organization submitted similar comments on this provision. They commended CRC for including this example of an unlawful sex-based discriminatory practice but urged CRC to elaborate that refusing to treat an individual according to the individual's gender identity constitutes sex discrimination. Citing EEOC federal sector decisions,[169] these commenters

decisions have drawn such a distinction. *See, e.g., Dawson* v. *Bumble & Bumble,* 398 F.3d 211, 218 (2d Cir. 2005); *Vickers* v. *Fairfield Med. Ctr.,* 453 F.3d 757, 764 (6th Cir. 2006).

[164] *Baldwin* v. *Dep't of Transp.,* Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 16, 2015).

[165] *Id.* at *4–8.

[166] As discussed at the end of the section-by-section analysis of § 38.7(d), CRC adds to that section of the final rule an example addressing adverse treatment of an individual based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

[167] OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39121.

[168] EEOC Notice No. 915–051, at 2 (Apr. 16, 1990). While this document is not available on EEOC's Web site, a hard copy of it is available for public viewing in EEOC's library. A copy of the notice is also available for public viewing in CRC's office.

[169] *See, e.g., Lusardi* v. *Dep't of the Army,* Appeal No. 0120133395, 2015 WL 1607756, at *11 (EEOC Apr. 1, 2015) (''Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when 'judged from the perspective of a reasonable person in the [individual's] position.' '' (quoting *Oncale* v. *Sundowner Offshore Servs.,* 523 U.S. 75, 81 (1998))); *Eric S.* v. *Dep't of Veterans Affairs,* Appeal No. 0120133123, 2014 WL 1653484, at *2 (EEOC Apr. 16, 2014) (recognizing a claim of sex-based harassment in violation of Title VII where ''Complainant has explained how he was harmed by the ongoing refusal to change his name in the [the employer's computer] system, as well as the alleged hostility and threats from the Information Security Officer . . . because he changed his gender identity from female to male''); *Jameson* v. *U.S.*

Continued

suggested adding one or more examples to § 38.7(b) addressing deliberate and repeated use of names and pronouns that are inconsistent with an individual's gender identity; refusing to process a name change for a transgender individual; and prohibiting transgender individuals from dressing in a manner consistent with their gender.

Response: CRC agrees that refusing to treat an individual according to the individual's gender identity may constitute unlawful sex discrimination if the underlying facts establish a hostile environment or other adverse treatment on the basis of transgender status or gender identity, consistent with the EEOC federal sector cases cited by the commenters. However, CRC declines to insert the specific examples suggested by the commenters because the determination of whether any such action constitutes unlawful sex discrimination is highly fact specific, making a categorical prohibition in regulatory text inappropriate. With respect to the principle itself—that refusing to treat an individual according to the individual's gender identity may constitute unlawful sex discrimination—CRC believes that the principle is adequately expressed in the rule as proposed, not only here in § 38.7(b)(6) but also in § 38.7(a), prohibiting discrimination on the basis of transgender status or gender identity; in § 38.7(d)(3), prohibiting adverse treatment because of an individual's actual or perceived gender identity; and in § 38.10(b), prohibiting harassment based on gender identity and failure to comport with sex stereotypes.

For these reasons, and for the reasons discussed above in the main preamble and in connection with the inclusion of transgender status and gender identity in § 38.7(a), CRC adopts § 38.7(b)(6) as proposed.

Proposed § 38.7(b)(7) addressed denying individuals who are pregnant, who become pregnant, or who plan to become pregnant opportunities for or access to any aid, benefit, service, or training on the basis of pregnancy. CRC received two supportive comments suggesting modifications of § 38.7(b)(7).

Comments: The coalition of eighty-six organizations, as well as an individual advocacy organization, commended CRC for including this example but asserted that the example is incomplete. They recommended that it be revised to expressly include individuals who are of childbearing capacity and to refer not only to pregnancy but also to childbirth and related medical conditions, including childbearing capacity. Both commenters further recommended that an example be added to § 38.7(b) to require that pregnant individuals be provided reasonable accommodations related to pregnancy or pregnancy-related medical conditions where such accommodations are provided, or required to be provided, to other program participants similar in their ability or inability to work.

Response: CRC does not find it necessary to alter the proposed example in § 38.7(b)(7) or to add the suggested example to the final rule. The list of examples provided in § 38.7(b) is not exhaustive. Moreover, the proposed regulatory text encompasses the commenters' suggestions. Specifically, the principle of nondiscrimination based on pregnancy established in § 38.8 includes the references to childbirth, related medical conditions, and childbearing capacity that the commenters requested be added to § 38.7. Furthermore, the example of discrimination in § 38.8(a) encompasses the commenters' first suggestion (regarding denying any aid, benefit, service, or training to individuals of childbearing capacity), and the example of discrimination in § 38.8(d) encompasses the commenters' second suggestion (regarding denying reasonable accommodations to pregnant individuals). However, based on the commenters' suggestions, CRC believes it would be helpful to add to § 38.7(b)(7) a cross-reference to the section devoted to discrimination based on pregnancy. Therefore, CRC adopts § 38.7(b)(7) as proposed in the final rule, with the addition of a cross-reference to § 38.8.

Proposed § 38.7(b)(8) provided that it is an unlawful sex-based discriminatory practice to make any facilities associated with WIOA Title I-financially assisted programs or activities available only to members of one sex, with the exception that if the recipient provides restrooms or changing facilities, the recipient must provide separate or single-user restrooms or changing facilities to assure privacy. CRC received comments requesting a specific clarification of this proposed provision.

Comments: Eight commenters—the coalition of eighty-six women's, workers', and civil rights organizations; six individual advocacy organizations; and one health organization—encouraged CRC to clarify that, while recipients are authorized to provide sex-segregated locker rooms and bathrooms, they are not required to do so. These commenters explained that the revision is necessary to provide programs with control and flexibility to determine the best layout for each facility on a case-by-case basis and to offer unisex facilities in appropriate contexts.

Response: CRC agrees with the commenters that neither WIOA nor Title IX imposes a legal requirement on recipients to provide sex-segregated restrooms or changing facilities. In addition, CRC notes that OFCCP, in its Discrimination on the Basis of Sex final rule, recognized the role that providing sex-neutral single-user facilities could play in preventing harassment of transgender employees, and OFCCP therefore included, as a best practice, the recommendation that federal contractors designate single-user facilities as sex-neutral.[170] Title IX authorizes institutions, if they so choose, to maintain ''separate living facilities for the different sexes.'' [171] The U.S. Department of Education's regulations implementing Title IX provide that a ''recipient *may* provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.'' [172] Therefore, CRC accepts the commenters' suggestion to change ''must'' to ''may'' in § 38.7(b)(8) of the final rule.

Proposed § 38.7(b)(9) addressed denying individuals access to the bathrooms used by the gender with which they identify. In addition to the comments CRC received supporting and opposing the inclusion of transgender status and gender identity, already discussed in connection with § 38.7(a), CRC also received comments specifically supporting, opposing, and suggesting modifications to this proposed example of an unlawful sex-based discriminatory practice.

Comments: Nine commenters—the coalition of eighty-six women's, workers', and civil rights organizations; a group of ten advocacy organizations and a union; six individual advocacy organizations; and a health organization—applauded CRC's inclusion of this example. They stated that requiring nondiscriminatory access to bathroom facilities is consistent with the position of numerous other federal agencies, as well as thirteen States and the District of Columbia. Many of these commenters asserted that proposed § 38.7(b)(9) provided essential protection for transgender individuals

Postal Serv., Appeal No. 0120130992, 2013 WL 2368729, at *2 (EEOC May 21, 2013) (''Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.'')).

[170] OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39122.

[171] 20 U.S.C. 1686; *see also* 34 CFR 106.32.

[172] 34 CFR 106.33 (emphasis added).

because ''employers and training program staff continue to misinterpret their obligations under sex discrimination laws, and frequently deny transgender people access to appropriate restrooms.'' [173]

CRC also received comments opposing the inclusion of this example from the group of religious organizations and seven individuals. The religious organizations stated that WIOA incorporates Title IX's ''separate living facilities'' exception and that institutions are therefore permitted to maintain separate bathrooms based on biological sex. The religious organizations further asserted that interpreting Section 188's prohibition on sex discrimination in this way ''would violate basic and legitimate expectations of bodily privacy.'' The individual commenters cited privacy and safety concerns, asserting that ''unintended consequences,'' such as assault or abuse of children, would result from the inclusion of this example.

Response: CRC believes that the example proposed in § 38.7(b)(9) is consistent with Title VII and Title IX case law,[174] as well as other agencies' approaches, including that of the Department's OFCCP.[175] Thus, CRC disagrees with the religious organizations' assertion that Title IX contains ''an exemption permitting the maintenance of separate bathrooms based on *biological* sex'' (emphasis added). Indeed, after the comment period for this rule closed, a federal appellate court overturned one of the district court cases cited by the religious organizations.[176] Further, the example in § 38.7(b)(9) is the logical outgrowth of the rulings that discrimination on the basis of gender identity is discrimination on the basis of sex, as discussed earlier in this preamble and in connection with § 38.7(a).[177]

CRC also does not agree that allowing individuals to access the bathrooms used by the gender with which they identify will threaten other individuals' safety or privacy. Significantly, the commenters cited no evidence that such policies compromise the safety of other bathroom users, and CRC has identified no such evidence.[178] With regard to alleged privacy threats, such comments assume that non-transgender individuals will react to the presence of transgender individuals based on the transgender individuals' sex assigned at birth, rather than on the gender with which they identify in their daily interactions. Additionally, it is well established that private bias, prejudice, or discomfort ''is not a legitimate basis for retaining the status quo.'' [179] CRC agrees with the EEOC that:

> [S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. . . . Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome.[180]

CRC therefore retains the example of sex discrimination proposed in § 38.7(b)(9).

Comments: Most of the commenters that supported inclusion of the example in § 38.7(b)(9) recommended that clarifying changes be made. They noted that there was no principled basis for restricting the example of equal access to bathrooms, and they requested clarification that the example applies to other sex-segregated facilities as well. Many of the commenters also recommended that the example refer to facilities that are ''consistent with,'' rather than ''used by,'' the gender with which individuals identify. They explained that it is important to ensure that all individuals are able to access the facilities that are most consistent with their gender identity.

Response: CRC agrees that the legal principle of equality and non-stigmatization underlying the example proposed in § 38.7(b)(9) applies to all types of sex-segregated facilities. The proposed example was not intended to limit transgender individuals' access to other facilities that may be separated by sex. CRC further agrees that referring to the facilities that are ''consistent with the gender with which [individuals] identify'' more clearly communicates its intent to include individuals of all genders in the regulatory language.

Accordingly, CRC revises the example of sex discrimination proposed in § 38.7(b)(9) to read ''Denying individuals access to the *restrooms, locker rooms, showers, or similar facilities consistent with* the gender with which they identify'' (emphasis added).

Finally, CRC received one comment suggesting an addition to § 38.7(b).

Comment: The coalition of eighty-six women's, workers', and civil rights organizations recommended adding the following example: ''[D]iscussing current and future plans about family during the interview or career counseling process may be evidence of sex discrimination.'' The organizations asserted that adding such an example would align the rule with EEOC guidance under the ADA regarding pre-offer disability-related inquiries and under Title VII regarding inquiries about individuals' intentions to become pregnant.

Response: CRC agrees that recipients should, as a best practice, refrain from

[173] The commenters cited a national study of transgender individuals finding that 22 percent of respondents reported being denied access to restrooms consistent with their gender identity in the workplace. Injustice at Every Turn, *supra* note 53, at 56.

[174] *G.G.* v. *Gloucester Cnty. Sch. Bd.,* 822 F.3d 709, 723 (4th Cir. 2016) (upholding the Department of Education's interpretation of its Title IX regulation as requiring schools to permit transgender students to access sex-segregated facilities consistent with their gender identity), *cert. granted,* No. 16–273, 2016 WL 4565643 (U.S. Oct. 28, 2016); *Highland Bd. of Ed.* v. *U.S. Dep't of Ed.,* 2016 WL 5372349, at *11 (S.D. Ohio Sept. 26, 2016); *Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* No. 2:16–cv–00943–PP (E.D. Wis. Sept. 22, 2016), ECF No. 33; *Carcaño* v. *McCrory,* 2016 WL 4508192, at *11–16 (M.D.N.C. Aug. 26, 2016); *Hart* v. *Lew,* 973 F. Supp. 2d 561, 581–82 (D. Md. 2013). *But see Texas* v. *United States,* No. 7:16–cv–54, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016).

[175] *Lusardi* v. *Dep't of Army,* Appeal No. 0120133395, 2015 WL 1607756, at *8 (EEOC Apr. 1, 2015); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant, *G.G.* (4th Cir. Oct. 28, 2015); OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39122–23; Office of Personnel Mgmt., Diversity and Inclusion Reference Materials: Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, *available at http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/.*

[176] *G.G.,* 822 F.3d at 723.

[177] *See also* OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39118–19 (discrimination on the basis of gender identity is discrimination on the basis of sex); HHS Nondiscrimination Final Rule, *supra* note 18, at 31387–89 (same).

[178] *Cf.* Nat'l Task Force to End Sexual and Domestic Violence Against Women, National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community (Apr. 21, 2016), *available at http://endsexualviolence.org/files/NTFNationalConsensusStmtTransAccessWithSignatories.pdf* (asserting that state and local nondiscrimination laws protecting transgender people's access to facilities consistent with their gender identity have not increased sexual violence or other public safety issues).

[179] *Latta* v. *Otter,* 771 F.3d 456, 470–71 (9th Cir. 2014); *see also Palmore* v. *Sidoti,* 466 U.S. 429, 433 (1984) (''Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.''); *Cruzan* v. *Special Sch. Dist.,* 294 F.3d 981, 984 (8th Cir. 2002) (concluding that ''a reasonable person would not have found the work environment hostile or abusive'' where a school district had a policy allowing a transgender woman to use the women's faculty restroom).

[180] *Lusardi* v. *Dep't of the Army,* Appeal No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015) (citing, among others, *Fernandez* v. *Wynn Oil Co.,* 653 F.2d 1273, 1276–77 (9th Cir. 1981) (female employee could not lawfully be fired because employer's foreign clients would only work with males); *Diaz* v. *Pan Am. World Airways, Inc.,* 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants)).

discussing family plans during the interview or career counseling process. However, such discussions serve as evidence of unlawful sex discrimination only when combined with other facts that support an inference of discrimination. Accordingly, the EEOC Title VII guidance cited by the commenters states that the EEOC typically regards inquiries into whether applicants or employees intend to become pregnant ''as *evidence* of pregnancy discrimination *where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.*'' [181] Because the determination of whether such discussions support an inference of unlawful sex discrimination is highly fact specific, a categorical prohibition in regulatory text is inappropriate. CRC also finds inapposite the analogy to the ADA rule regarding pre-offer disability-related inquiries because pregnancy is not in itself a disability.[182] For these reasons, CRC declines to include this additional example in proposed § 38.7(b).

Proposed § 38.7(c) provided that a recipient's policies or practices that have an adverse impact on the basis of sex and are not program-related and consistent with program necessity constitute sex discrimination in violation of WIOA. CRC received comments supporting, opposing, and suggesting modifications to this proposed provision.

Comments: Two commenters, a think tank and a State agency, opposed CRC's disparate impact regulations in general, though they did not refer specifically to this provision.

Response: For the same reasons as discussed in connection with § 38.6, CRC has authority to promulgate disparate impact regulations, and it disagrees that this rule in general or § 38.7 in particular should prohibit only intentional discrimination, that is, disparate treatment discrimination.

CRC does, however, make two technical changes to the language proposed in § 38.7(c). First, under Title IX, as under Title VI, the disparate impact analysis examines whether the regulated entity's policy or practice has a disparate impact on a protected class and, if so, whether the entity can demonstrate that there is ''a substantial legitimate justification'' and the Department or complainant is not able to identify a less discriminatory alternative for the allegedly discriminatory practice.[183] CRC notes that that language is more closely applicable to the WIOA context than the proposed language—''are not program-related and consistent with program necessity''—which CRC adapted from Title VII.[184] In the final rule, to match the wording of the legal standard that applies to disparate impact discrimination under Title IX, CRC changes that clause to ''that lack a substantial legitimate justification.'' Second, for the sake of consistency with the other disparate impact provisions in the final rule, which refer to practices that have the ''effect'' of discriminating on a protected basis,[185] CRC replaces ''an adverse impact'' with ''the effect of discriminating.'' CRC intends no substantive changes by making these technical revisions.

Comments: The coalition of eighty-six organizations, along with an organization representing tradeswomen, commended CRC for including § 38.7(c), observing that it is particularly important for addressing gender-based occupational segregation. The commenters stated that many obstacles women face in fields considered ''nontraditional'' for women are related to requirements or criteria that are not job related or required as a business necessity. These commenters recommended that CRC include specific examples of policies and practices that may have a disparate impact on the basis of sex and therefore constitute unlawful sex discrimination if they are not job related and consistent with business necessity, such as height, weight, and strength requirements. The commenters also recommended that, where physical tests are required due to the demands of the job, accommodations that are available on job sites should also be provided during the tests. Finally, the commenters urged CRC to state that there should be uniform interview procedures and questions, such that interviews cannot be used as the basis for excluding individuals who have met other program requirements without some objective and uniform basis for making such determinations.

Response: CRC agrees that providing a short, nonexhaustive list of examples in § 38.7(c), as in the other paragraphs in this section, would assist recipients in meeting their nondiscrimination and equal opportunity responsibilities under § 38.7. As noted above, this provision is only one of several disparate impact provisions in the final rule, but CRC believes it is particularly helpful to provide examples in § 38.7(c) because there may be unique disparate impact issues in the sex discrimination context.

In the NPRM, CRC cited Title VII cases addressing the same employment practices the commenters suggested as examples of neutral practices that had disparate impacts on women and were not shown to be job related and consistent with business necessity.[186] Therefore, in the final rule, CRC adds an introductory sentence to § 38.7(c) followed by two new examples: ''Height or weight qualifications that lack a substantial legitimate justification and that negatively affect women substantially more than men'' and ''Strength, agility, or other physical requirements that lack a substantial legitimate justification and that negatively affect women substantially more than men.'' As CRC noted in the preamble to the NPRM, the disparate impact analysis may also apply to policies and practices that are unrelated to selection procedures. For instance, as discussed below in connection with § 38.8(d), denials of pregnancy accommodations may be analyzed under both disparate treatment and disparate impact analyses. The principle in § 38.7(c) is intended to encompass all such practices that have the effect of discriminating on the basis of sex and that lack a substantial legitimate justification.

CRC declines to implement the commenters' other suggestions. CRC agrees that, when selection procedures require physical tests because of the demands of the job, accommodations that are available on job sites should be provided to applicants. Such a practice would help ensure that the required physical tests do not have the effect of

[181] U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance on Pregnancy Discrimination and Related Issues I.A.3.b (2015), *available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm* (emphasis added) (hereinafter ''EEOC Pregnancy Guidance'').

[182] *Id.* at II.A.

[183] *N.Y. Urban League, Inc.* v. *New York,* 71 F.3d 1031, 1036 (2d Cir. 1995); *Ga. State Conf. of Branches of NAACP* v. *Georgia,* 775 F.2d 1403, 1417 (11th Cir. 1985); *see also* U.S. Dep't of Justice, Title IX Legal Manual IV.A.2, *available at https://www.justice.gov/crt/title-ix.*

[184] 42 U.S.C. 2000e–2(k)(1)(A)(i) (requiring a defendant to demonstrate that a challenged employment practice that causes a disparate impact on a protected basis is ''job related for the position in question and consistent with business necessity'').

[185] *See, e.g.,* §§ 38.6(d), (e), (f); 38.10(a)(3); 38.11; 38.12(e). Discriminatory ''effect'' may be more readily understood in the regulatory text than ''adverse impact'' or ''disparate impact.'' *See, e.g., Young* v. *United Parcel Serv.,* 135 S. Ct. 1338, 1345 (2015) (explaining that, ''[i]n evaluating a disparate-impact claim, courts focus on the *effects* of an employment practice, determining whether they are unlawful irrespective of motivation or intent'').

[186] CRC WIOA NPRM, *supra* note 70, at 4508 (citing *Blake* v. *City of Los Angeles,* 595 F.2d 1367 (9th Cir. 1979) (height requirement); *Equal Emp't Opportunity Comm'n* v. *Dial Corp.,* 469 F.3d 735 (8th Cir. 2006) (strength test); *Johnson* v. *AK Steel Corp.,* No. 1:07–cv–291, 2008 WL 2184230, at *8 (S.D. Ohio May 23, 2008) (no-restroom policy)).

discriminating on the basis of sex. However, CRC does not believe it is necessary to impose that categorical requirement in regulatory text. For similar reasons, CRC does not adopt the suggestion to require all recipients to use uniform interview procedures and questions. However, CRC does note that § 38.18(b) requires recipients, in their covered employment practices, to comply with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3, where applicable.

Proposed § 38.7(d) clarified that discrimination based on sex stereotypes, such as stereotypes about how persons of a particular sex are expected to look, speak, or act, is a form of unlawful sex discrimination. It provided a nonexhaustive list of examples of sex stereotyping to assist recipients in preventing, identifying, and remedying such examples of sex discrimination in their programs. CRC received comments supporting and opposing its recognition that sex-based stereotyping may constitute sex discrimination.

Comments: The coalition of eighty-six organizations, the women in trades organization, a health organization, and an individual supported CRC's explicit recognition of discriminatory sex stereotyping. An employer opposed the inclusion of § 38.7(d) in the rule. The employer asserted that CRC was discriminating against employers with traditional values, who should be permitted to impose gender-stereotyped expectations on their employees if those expectations reflect the employers' traditional values.

Response: As discussed previously in this preamble, the principle laid out in § 38.7(d) is well supported by case law [187] and is consistent with other agencies' approaches, particularly with the Department of Education's interpretation of Title IX.[188] CRC does not agree that, by including examples of unlawful sex stereotyping in this rule, it is discriminating against employers with traditional values. As the Supreme Court stated in *Price Waterhouse* v. *Hopkins,* with respect to ''the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.'' [189] Therefore, CRC retains in the final rule the principle stated in proposed § 38.7(d).

Proposed § 38.7(d)(1) addressed denial of access or other adverse treatment based on an individual's failure to comply with gender norms and expectations for dress, appearance, and/or behavior, including wearing jewelry, make-up, high-heeled shoes, suits, or neckties. CRC received two comments opposing this example.

Comments: The group of religious organizations asserted that the proposed example is contrary to case law establishing that dress and grooming standards based on biological sex do not violate Title VII. In addition, the same employer commenter that raised the objection to § 38.7(d) in general, based on the perceived need to protect the rights of employers with traditional values, specifically commented that employers should be allowed to impose dress and appearance requirements on employees consistent with the employers' traditional values.

Response: CRC acknowledges that courts have found gender-specific dress and grooming codes not to constitute sex discrimination in violation of Title VII, but CRC emphasizes that most such decisions have focused on whether the codes disparately impact one sex or impose an unequal burden.[190] The proposed example, by contrast, focuses specifically on discrimination on the basis of sex stereotypes. When dress and grooming codes have been shown to be motivated by discriminatory sex-based stereotypes, courts have found the codes to violate Title VII.[191] With this clarification, CRC adopts the example in § 38.7(d)(1) as proposed.

Proposed § 38.7(d)(2) addressed harassment or other adverse treatment of a male because he is considered effeminate or insufficiently masculine. CRC received no comments on this provision and adopts it in the final rule, with a technical edit to clarify that harassment is a type of adverse treatment.

Proposed § 38.7(d)(3) addressed adverse treatment of an individual because of the individual's actual or perceived gender identity. CRC received no unique comments on this example apart from comments on paragraphs (a) and (b)(6), and for the same reasons as discussed above in the main preamble and in connection with those paragraphs, CRC adopts § 38.7(d)(3) as proposed.

The rule proposed three examples of sex stereotypes stemming from caregiving responsibilities. Proposed § 38.7(d)(4) addressed adverse treatment based on sex stereotypes about caregiver responsibilities in general. It further provided the example of assuming that a female applicant has (or will have) family caretaking responsibilities and that those responsibilities will interfere with her ability to access any aid, benefit, service, or training. Proposed § 38.7(d)(5) addressed adverse treatment of a male because he has taken, or is planning to take, care of his newborn or recently adopted or foster child, based on the sex-stereotyped belief that women, and not men, should care for children. Proposed § 38.7(d)(6) addressed denial of access or other adverse treatment of a woman with children based on the sex-stereotyped belief that women with children should not work long hours, regardless of whether the recipient is acting out of hostility or belief that it is acting in her or her children's best interest. CRC received comments supporting all three examples and recommending modifications to paragraphs (d)(4) and (5).

Comments: The coalition of eighty-six organizations and an individual membership organization supported the recognition of sex stereotypes stemming from caregiver responsibilities. The coalition of organizations noted that such stereotypes contribute to gender-based occupational segregation. However, both commenters asserted that the rule should acknowledge that these stereotypes are not limited to caregivers of children and that caregiving stereotypes also include assumptions such as that men do not have caregiving responsibilities or that women with caregiving responsibilities are less capable, successful, or committed to their jobs than men without such responsibilities.

Response: CRC agrees that the examples of discrimination based on stereotypes mentioned by the commenters may constitute unlawful sex discrimination. However, CRC does not find it necessary to alter the proposed examples or to add further examples to the final rule. The examples of sex-based caregiving stereotypes provided in paragraphs (d)(4), (5), and (6) are illustrative, not exhaustive. The nondiscrimination principle spelled out in § 38.7(d)—that discrimination on the basis of sex stereotypes is a form of

[187] *See, e.g., Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989); *Nev. Dep't of Human Res.* v. *Hibbs,* 538 U.S. 721 (2003); *Prowel* v. *Wise Bus. Forms, Inc.,* 579 F.3d 285 (3d Cir. 2009); *Chadwick* v. *Wellpoint, Inc.,* 561 F.3d 38 (1st Cir. 2009); *Terveer* v. *Billington,* 34 F. Supp. 3d 100 (D.D.C. 2014).

[188] *See* Revised Sexual Harassment Guidance, *supra* note 63.

[189] *Price Waterhouse,* 490 U.S. at 251 (plurality op.).

[190] *See, e.g., Jespersen* v. *Harrah's Operating Co.,* 392 F.3d 1076 (9th Cir. 2004); *Nichols* v. *Azteca Rest. Enters.,* 256 F.2d 864 (9th Cir. 2001).

[191] *See, e.g., Lewis* v. *Heartland Inns,* 591 F.3d 1033, 1035, 1038–1042 (8th Cir. 2010); *Carroll* v. *Talman Fed. Sav. & Loan Ass'n,* 604 F.2d 1028, 1031 (7th Cir. 1979); *see also Hayden ex rel. A.H.* v. *Greensburg Cmty. Sch. Corp.,* 743 F.3d 569, 577–78, 583 (7th Cir. 2014).

unlawful sex discrimination—reasonably covers all of the commenters' suggestions. Further, § 38.7(d)(4) establishes the application of that general principle to the particular category of ''sex stereotypes about caregiver responsibilities,'' with no limitation on the gender of the caregiver or the age or identity of the individual being cared for. Therefore, CRC adopts § 38.7(d)(4), (5), and (6) as proposed in the final rule, except that it makes a technical correction to § 38.7(d)(4) to change ''sex assumption'' to ''sex-based assumption.'' CRC intends no substantive change by making this technical revision.

Proposed § 38.7(d)(7) addressed denial of access or other adverse treatment based on sex stereotyping, including the belief that a victim of domestic violence would disrupt the program or activity or be unable to access any aid, benefit, service, or training. CRC received comments supporting this example and recommending modifications.

Comments: The coalition of eighty-six women's, workers', and civil rights organizations; a group of ten advocacy organizations and a union; and an individual advocacy organization welcomed the addition of this example, which commenters noted would enhance survivors' safety and economic security. The coalition of organizations and the individual advocacy organization recommended that CRC provide additional illustrative examples and further discussion of the effects of this discrimination, specifically ''examples of how sex discrimination or sex stereotyping can manifest when both the victim and the abusive partner access or participate in the same program or activity.''

Response: CRC does not find it necessary to alter the proposed example in § 38.7(d)(7) or to add examples to the final rule. The list of examples provided in § 38.7(d) is not exhaustive. Moreover, the proposed regulatory text encompasses the commenters' suggestions. Section 38.7(d) states the overall principle that discrimination on the basis of sex stereotypes is a form of unlawful sex discrimination. Section 38.7(d)(7) offers just one example of the application of that principle to sex stereotyping of victims of domestic violence. CRC believes that the statement of the principle and the provision of this example provide adequate guidance to recipients regarding their obligation to refrain from discriminating against victims of domestic violence on the basis of sex stereotypes. Therefore, CRC adopts § 38.7(d)(7) as proposed in the final rule.

Proposed § 38.7(d)(8) addressed adverse treatment of a woman because she does not dress or talk in a feminine manner. CRC received no comments on this provision and adopts it in the final rule.

Proposed § 38.7(d)(9) addressed denial of access or other adverse treatment because an individual does not conform to stereotypes about individuals of a certain sex working in a particular job, sector, or industry. CRC received comments supporting and recommending modifications to this example.

Comments: Several commenters began by noting that gender-based occupational segregation and wage disparities remain widespread, and they asserted that the federal workforce development system reinforces these problems. For example, comments submitted by the coalition of eighty-six organizations, a group of ten organizations and a union, an individual advocacy organization, and an organization representing tradeswomen cited a research study finding that women are often trained for occupations considered traditionally ''female'' while men are trained for occupations considered traditionally ''male'' and that, as a result, women's earnings are substantially lower than men's once they exit federal workforce training services.[192] These commenters commended CRC for including the example of sex-based stereotyping in § 38.7(d)(9) because they identified such stereotypes as contributing to these obstacles. However, the coalition of organizations and the two individual organizations requested that CRC include further examples of the ways in which occupational segregation is perpetuated in training programs and workplaces, ''such as the isolation of women within training programs; the tracking of women and men into certain positions within a training program based on assumptions about their capabilities and skills because of their sex; denial of, or unequal access to, networking, mentoring, and/or other individual development opportunities for women; unequal on-the-job training and/or job rotations; and applying nonuniform performance appraisals that may lead to subsequent opportunities for advancement.'' Noting the importance of sharing information about ''nontraditional'' training opportunities, all three of these commenters recommended that CRC add an example addressing the failure ''to provide information about services or training opportunities in the full range of services and opportunities offered by the recipient.''

Response: CRC agrees that gender-based occupational segregation remains widespread:

> In 2012, nontraditional occupations for women employed only six percent of all women, but 44 percent of all men. The same imbalance holds for occupations that are nontraditional for men; these employ only 5 percent of men, but 40 percent of women. Gender segregation is also substantial in terms of the broad sectors where men and women work: three in four workers in education and health services are women, nine in ten workers in the construction industry and seven in ten workers in manufacturing are men.[193]

CRC is aware of the research studies cited by the commenters indicating that the federal workforce development system contributes to gender-based occupational segregation and the wage gap. With this final rule, CRC aims to enforce the WIOA nondiscrimination and equal opportunity provisions to combat these problems whenever they are the result of discrimination. CRC agrees with a commenter that job training programs ''can help end the occupational segregation that has kept women in lower paying fields by providing them training to enter nontraditional jobs that will increase their earnings and employability.''

CRC also agrees that the examples of recipient practices identified by the commenters may exacerbate gender-based occupational segregation, which may in turn contribute to pay disparities. In particular, because it is key that recipients share information about any aid, benefit, service, or training without regard to stereotypes about individuals of a particular sex working in a specific job, sector, or industry, CRC adds to § 38.7(d)(9) the phrase ''failing to provide information about'' any aid, benefit, service, or training based on such stereotypes. With regard to the other examples suggested by the commenters, the rule adequately addresses such practices when they constitute sex discrimination. For example, to the extent that such practices constitute adverse treatment based on sex stereotypes, § 38.7(d)(9) as

[192] The commenters cited Institute for Women's Policy Research, Workforce Investment System Reinforces Occupational Gender Segregation and the Gender Wage Gap (2013), *available at http://www.iwpr.org/publications/pubs/workforce-investment-system-reinforces-occupational-gender-segregation-and-the-gender-wage-gap.*

[193] Ariane Hegewisch & Heidi Hartmann, Institute for Women's Policy Research, *Occupational Segregation and the Gender Wage Gap: A Job Half Done* (2014), *available at http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done* (citations omitted).

revised encompasses them. Similarly, to the extent that such practices reflect distinctions based on sex, they are prohibited by § 38.7(b), and some are specifically addressed by the example in § 38.7(b)(4).

Additionally, for State Programs, including providers of services and benefits as part of a State Program such as one stops and eligible training providers,[194] the Governor is required by § 38.51 to monitor annually recipients' compliance with WIOA Section 188 and this rule to ensure equal opportunity, including investigating any significant differences in participation in the programs, activities, or employment provided by the recipients to determine whether the differences appear to be caused by discrimination.

CRC further notes that the prohibition on sex discrimination is not the only tool available to combat gender-based occupational segregation. For example, the affirmative outreach provision in § 38.40 requires that recipients take appropriate steps to ensure they are providing equal access to programs and activities, including reasonable efforts to include persons of different sexes.

For these reasons, CRC adopts the example in § 38.7(d)(9) but modifies it to include a recipient's failure to provide information about any aid, benefit, service, or training based on sex stereotypes.

Finally, CRC received comments proposing additions to § 38.7(d) addressing sex stereotyping based on sexual orientation.

Comment: Eight commenters—the coalition of eighty-six women's, workers', and civil rights organizations; six individual advocacy organizations; and one health organization—urged CRC to address sex stereotyping based on sexual orientation in § 38.7(d). Specifically, they recommended that CRC incorporate an example from OFCCP's proposed rule on Discrimination on the Basis of Sex addressing ''adverse treatment of an individual because the individual does not conform to sex-role expectations by being in a relationship with a person of the same sex.'' [195] Commenters reasoned that inclusion of such language would not only reflect federal case law and EEOC policy but would also provide consistency and clarity across the Department's programs.

Response: CRC notes that, in its final rule, OFCCP did not adopt the example suggested by the commenters. Rather, OFCCP amended the proposed example to cover adverse treatment of employees or applicants based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.[196] OFCCP explained that it made this change in light of the legal framework following from *Price Waterhouse,* discussed above with regard to sexual orientation and sex-based stereotypes in connection with § 38.7(a), as well as for consistency with the position taken by the U.S. Department of Health and Human Services in its rule implementing Section 1557 of the Affordable Care Act.[197] For the same reasons, CRC adopts in the final rule § 38.7(d)(10), a new example addressing adverse treatment of an applicant, participant, or beneficiary based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC finalizes § 38.7 as follows: CRC adopts § 38.7(a) as proposed, without modification. CRC adopts § 38.7(b) as proposed, with the following modifications: In paragraph (b)(5), removing a phrase stating that the use of gender-specific terms for jobs always constitutes discrimination; in paragraph (b)(7), adding a cross-reference to § 38.8, on pregnancy-based discrimination; in paragraph (b)(8), replacing ''must'' with ''may'' to reflect that recipients are permitted but not required to provide separate or single-user restrooms or changing facilities; and in paragraph (b)(9), clarifying that the access requirement applies not just to restrooms but also to locker rooms, showers, and similar facilities. CRC adopts § 38.7(c) as proposed, with the following modifications: Making technical corrections to align the wording of the standard with Title IX case law and to use the same disparate impact language that is used elsewhere in the rule; adding a sentence introducing a nonexhaustive list of examples; and adding new paragraph (c)(1), an example addressing height or weight qualifications, and new paragraph (c)(2), an example addressing strength, agility, or other physical requirements. CRC adopts § 38.7(d) as proposed, with the following modifications: Making a technical correction in paragraph (d)(2) to clarify that harassment is a form of adverse treatment; making a technical correction in paragraph (d)(4) to insert the word ''based'' in ''sex-based assumption''; adding failure to provide information about any aid, benefit, service, or training to the example in paragraph (d)(9) of adverse treatment on the basis of stereotypes about individuals of a particular sex working in a specific job, sector, or industry; and adding new paragraph (d)(10), an example addressing adverse treatment of an individual based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

Discrimination Prohibited Based on Pregnancy § 38.8

Proposed § 38.8 addressed discrimination on the basis of pregnancy. Two commenters—the coalition of eighty-six women's, workers', and civil rights organizations and the group of ten advocacy organizations and a union—praised CRC's inclusion of this section devoted to pregnancy discrimination. One commenter noted that the proposed section ''provides clarity as to recipients' legal obligations toward pregnant WIOA applicants, participants, and employees . . . and is in line with current law.''

The proposed introductory paragraph to § 38.8 stated the general principle that adverse treatment based on pregnancy, childbirth, and related medical conditions, including childbearing capacity, in a WIOA Title I-financially assisted program or activity is sex discrimination and is thus prohibited. CRC received one comment suggesting an addition to this statement.

Comment: The coalition of eighty-six women's, workers', and civil rights organizations recommended that CRC state the full PDA nondiscrimination standard in the first paragraph of § 38.8, ''including that recipients are required to treat applicants, program participants, and employees of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.''

Response: As explained previously in this preamble, the PDA governs the nondiscrimination obligations of a program or activity receiving federal financial assistance only in the employment context. However, within that context, CRC agrees with the

[194] Please note there is a definition of ''State Programs'' specific to this regulation at § 38.4(kkk).

[195] U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Discrimination on the Basis of Sex; Proposed Rule, 80 FR 5246, 5279, Jan. 30, 2015 (proposed 40 CFR 60–20.7(a)(3)).

[196] *See* 40 CFR 60–20.7(a)(3).

[197] OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39138; *see* HHS Nondiscrimination Final Rule, *supra* note 18, at 31389–90.

commenters that the nondiscrimination standard of the PDA applies, and indeed, CRC's intention was to incorporate that standard in proposed § 38.8.[198] Therefore, CRC adds, to the introductory paragraph of § 38.8 in the final rule, a sentence stating the PDA's nondiscrimination standard regarding the employment context. The introductory paragraph should therefore be understood to state that CRC applies, in all circumstances, the general principle that adverse treatment based on pregnancy, childbirth, and related medical conditions, including childbearing capacity, is prohibited sex discrimination and that CRC applies the nondiscrimination standard of the PDA (which specifically considers individuals' ''ability or inability to work'') to recipients' covered employment practices.

The introductory paragraph to proposed § 38.8 also provided a nonexhaustive list of related medical conditions.[199] CRC received one comment suggesting additions to this list.

Comment: The coalition of eighty-six organizations requested that CRC include the following additional examples of pregnancy-related medical conditions to provide recipients with greater clarity: ''impairments of the reproductive system that require a cesarean section, cervical insufficiency, pregnancy-related anemia, pregnancy-related sciatica, pregnancy-related carpal tunnel syndrome, gestational diabetes, nausea that can cause severe dehydration, abnormal heart rhythms, swelling due to limited circulation, pelvic inflammation, symphysis pubis dysfunction, breech presentation, pregnancies characterized as 'high-risk,' and depression (including but not limited to post-partum depression).''

Response: CRC declines to include additional examples in the list of related medical conditions. As the commenters acknowledged, the list in proposed § 38.8 is illustrative rather than exhaustive. When any of the suggested conditions are related to pregnancy or childbirth, the rule will encompass them.

Proposed paragraphs (a)–(d) of § 38.8 provided a nonexhaustive list of examples of unlawful pregnancy discrimination.

Proposed § 38.8(a) addressed refusing to provide any aid, benefit, service, or training on the basis of pregnancy or childbearing capacity. Proposed § 38.8(b) addressed limiting an individual's access to any aid, benefit, service, or training based on that individual's pregnancy, or requiring a doctor's note for a pregnant individual to begin or continue participation when a doctor's note is not required for similarly situated nonpregnant individuals. Proposed § 38.8(c) addressed denying access to any aid, benefit, service, or training, or requiring termination of participation in a program or activity, when an individual becomes pregnant or has a child. CRC received no comments on these three examples, and it adopts them in the final rule without change.

Proposed § 38.8(d) addressed denial of accommodations or modifications to a pregnant applicant or participant who is temporarily unable to participate in some portions of a program or activity because of pregnancy, childbirth, and/or related medical conditions, when such accommodations or modifications are provided, or required to be provided, to other participants not so affected but similar in their ability or inability to participate. CRC received two comments supporting the inclusion of this example and agreeing with CRC that the example aligns the rule with the Supreme Court's decision in *Young* v. *United Parcel Service.*[200]

According to *Young,* it is a violation of Title VII for an employer to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions when (1) the employer provides such accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, (2) the denial of accommodations ''impose[s] a significant burden'' on employees affected by pregnancy, childbirth, or related medical conditions, and (3) the employer's asserted reasons for denying accommodations to such employees ''are not sufficiently strong to justify the burden.''[201] The Court explained as follows the evidence required to prove that the employer's proffered reason is pretextual:

> We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's ''legitimate, nondiscriminatory'' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.
>
> The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.[202]

CRC will apply this framework when analyzing pregnancy-based sex discrimination allegations that seek to show disparate treatment related to accommodation requests by using indirect evidence in the employment context. CRC solicited public comments on operationalizing the pretext analysis described in *Young* and received one responsive comment.

Comment: The coalition of eighty-six organizations stated that ''the rule proposed in § 38.8 appropriately reflects the *Young* standard.'' Nevertheless, the organizations suggested that CRC clarify several points about the pretext analysis: Evidence that an employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers is relevant to the determination of whether an employer's policy or practice imposes a significant burden on pregnant workers. The commenters cautioned that the Court's language focused on a ''large percentage,'' not a ''majority.'' The commenters further noted that other evidence could also be relevant to the determination of a significant burden, such as whether the employer has multiple policies accommodating nonpregnant workers but not accommodating pregnant workers, or whether an employer's policies would reasonably be expected to result in accommodating a large percentage of nonpregnant workers and denying accommodations for a large percentage of pregnant workers.

Response: CRC agrees that the commenters' statements as characterized above are consistent with

[198] *See* 85 FR 4494, 4511, Jan. 26, 2016.

[199] The proposed paragraph also provided that a pregnancy-related medical condition may be a disability, cross-referencing § 38.4(q)(3)(ii). Comments on this provision are discussed *supra* in connection with that paragraph's definition of disability.

[200] 135 S. Ct. 1338 (2015).

[201] *Id.* at 1354.

[202] *Id.* at 1354–55.

the Court's decision. CRC will consider these points when analyzing pregnancy-based sex discrimination allegations in the employment context that seek to show disparate treatment related to accommodation requests by using indirect evidence.

CRC also received one comment suggesting modifications to the example in proposed § 38.8(d).

Comments: The coalition of eighty-six organizations pointed to the possible interaction between the ADAAA and the analysis in *Young,* which, as discussed above, compares the coverage and effects of accommodations policies and practices on pregnant individuals and similarly situated nonpregnant individuals. The organizations urged CRC to amend § 38.8(d) to require accommodations or modifications for pregnant individuals ''when such accommodations or modifications are provided, *or are required to be provided by a recipient's policy or by other relevant laws,* to other applicants or participants.'' The organizations asserted that the ADAAA requires recipients to accommodate many nonpregnant individuals who have the very same limitations typically experienced by pregnant individuals and that, combined with the standard articulated by the Court in *Young,* recipients are therefore required to provide these accommodations to many more pregnant individuals. The organizations specifically requested that CRC include, in § 38.8(d), an example ''explaining that the ADAAA's expansive coverage means that most nonpregnant individuals similar in ability to work to pregnant individuals with physical limitations will be accommodated and recipients who refuse to also accommodate pregnant workers in this situation are at significant risk of liability.''

Response: The EEOC has observed, and CRC agrees, that the ADAAA's definition of ''disability'' may not only ''make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA'' [203] but may also ''expand[ ] the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.'' [204] However, neither of those possible effects alters the pregnancy discrimination analysis itself, which CRC believes is adequately explained by the nondiscrimination standard laid out in the revised introductory paragraph of § 38.8 and in the proposed example in § 38.8(d). Thus, CRC declines to add the example requested by the commenters. Furthermore, CRC notes that the related language the commenters suggested (''or are required to be provided by a recipient's policy or by other relevant laws'') already appears in the proposed regulatory text.

CRC does, however, make one technical change to § 38.8(d) for the sake of consistency with other parts of § 38.8. As explained above, the introductory paragraph to § 38.8 now contains both the general principle of nondiscrimination on the basis of pregnancy, which applies in all circumstances, and the nondiscrimination standard of the PDA, which applies to recipients' covered employment practices. The specific incorporation of the PDA standard in proposed § 38.8(d) is therefore unnecessary, and CRC revises the language to refer generally to similarly situated individuals, consistent with the general nondiscrimination principle and the language in § 38.8(b).

Finally, CRC received comments suggesting additional examples in § 38.8.

Comment: The coalition of eighty-six organizations recommended that the final rule reiterate that an accommodation policy that disproportionately excludes employees who need accommodations because of pregnancy may constitute disparate impact discrimination. The organizations recommended that CRC provide additional examples of this form of discrimination in the area of accommodations and cross-reference the obligation to avoid disparate impact discrimination throughout the rule.

Response: CRC agrees that denials of pregnancy accommodations may be analyzed under a disparate impact analysis as well as a disparate treatment analysis.[205] As discussed previously in connection with § 38.7(c), if a recipient's accommodation policy or practice has the effect of discriminating on the basis of sex (and lacks a substantial legitimate justification), then that policy or practice constitutes unlawful sex discrimination under § 38.7(c) of the final rule. CRC therefore does not find it necessary to provide additional examples of disparate impact discrimination related to pregnancy accommodations. CRC further notes that the final rule refers in numerous sections to recipients' obligations to avoid policies, procedures, or practices that have the purpose *or effect* of discriminating on a prohibited basis—that is, to avoid both disparate treatment and disparate impact discrimination.[206] CRC does not believe it is necessary to provide further cross-references to the obligation to avoid disparate impact discrimination in the final rule.

Comment: The coalition of eighty-six organizations commended CRC for identifying lactation as a pregnancy-related medical condition and further requested an example addressing adverse treatment of individuals because they are breastfeeding or because they request accommodations to express breast milk.

Response: CRC declines to include an additional example related to breastfeeding. Lactation—which is inclusive of breastfeeding—is listed as a ''related medical condition'' in § 38.8. Moreover, the list of examples of unlawful pregnancy discrimination is merely illustrative; the fact that it does not include lactation examples does not mean that adverse treatment associated with lactation is not discriminatory. To the contrary, as lactation is a pregnancy-related medical condition,[207] adverse action against individuals because they are breastfeeding or because they request accommodations to express breast milk will be considered unlawful sex discrimination under this rule.

Comment: One individual commenter stated that ''women must have explicit guarantees of maternity leave, at least within the WIOA financially assisted program.''

Response: CRC agrees that recipients should, as a best practice, provide appropriate leave policies. Furthermore, CRC has jurisdiction to consider, on a case-by-case basis, whether a recipient's covered leave policies are discriminatory and whether the provision of leave is required as a form of reasonable accommodation. Separately, CRC notes that employees may be entitled to unpaid leave under the Family and Medical Leave Act and to paid and/or unpaid leave under State law. However, it is outside the scope of CRC's authority to institute a general maternity leave requirement in this rule. CRC therefore declines to add this requirement to § 38.8.

[203] EEOC Pregnancy Guidance, *supra* note 181, Overview of Statutory Protections; *see also Young,* 135 S. Ct. at 1348.

[204] EEOC Pregnancy Guidance, *supra* note 181, at 11.

[205] *See Young,* 135 S. Ct. at 1345.

[206] *See, e.g.,* §§ 38.6(d), (e), (f); 38.10(a)(3); 38.11; 38.12(e).

[207] *Equal Emp't Opportunity Comm'n* v. *Houston Funding II, Ltd.,* 717 F.3d 425, 430 (5th Cir. 2013) (discrimination on the basis of lactation is covered under Title VII generally and as a ''related medical condition'' under the PDA); EEOC Pregnancy Guidance, *supra* note 181, I.A.4.b.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC is finalizing § 38.8 as proposed, with the following modifications: CRC is adding to the introductory paragraph a sentence stating that the nondiscrimination standard of the PDA applies to recipients' covered employment practices, and CRC is revising paragraph (d) to encompass the general pregnancy nondiscrimination standard rather than the specific PDA standard.

Discrimination Prohibited Based on National Origin, Including Limited English Proficiency § 38.9

The proposed rule added a section on national origin discrimination. Proposed § 38.9(a) stated the existing obligation that a recipient must not discriminate on the basis of national origin in providing any aid, benefit, service, or training under any WIOA Title I-financially assisted program or activity. It also explained that national origin discrimination includes ''treating individual beneficiaries, participants, or applicants for aid, benefit, service or training under any WIOA Title I-financially assisted program or activity adversely because they (or their families or ancestors) are from a particular country or part of the world, because of ethnicity or accent (including physical, linguistic, and cultural characteristics closely associated with a national origin group), or because the recipient perceives the individual to be of a certain national origin group, even if they are not.''

Comment: Several commenters, including advocacy organizations and a professional association, expressed general support for the provisions prohibiting discrimination on the basis of national origin, including limited English proficiency. However, several advocacy organizations recommended that the proposed rule be revised to explicitly state that denial of services based on an individual's limited English proficiency may constitute impermissible national origin discrimination. These commenters argued that this change to the regulatory text was necessary to clarify that recipients are subject to Title VI's prohibitions against national origin discrimination affecting LEP individuals, as reflected in current Title VI case law, as well as guidance from CRC and from the Department of Justice. Furthermore, these commenters stated that their proposed revision is particularly important in light of the current severe underrepresentation of LEP individuals in Title I job training programs and the significant language access violations that CRC's compliance reviews have revealed.

Response: CRC agrees with the commenters' recommendation that, in addition to CRC's statement in the preamble, § 38.9(a) should explicitly include the legal prohibition of national origin discrimination affecting LEP individuals. Consistent with Title VI case law and the DOL and DOJ guidance on ensuring equal opportunity and nondiscrimination for individuals who are LEP [208] § 38.9(a) now more clearly provides that discrimination against individuals based on their limited English proficiency may be unlawful national origin discrimination. As the proposed rule set forth, Title VI provides that ''[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'' [209] Indeed, the Supreme Court in *Lau* v. *Nichols* held that excluding LEP children from effective participation in an educational program because of their inability to speak and understand English constitutes national origin discrimination prohibited by Title VI and its regulations.[210] Courts have consistently found that a recipient's failure to provide meaningful access to LEP individuals can violate Title VI's prohibition of national origin discrimination.[211] As a result, the proposed rule indicated that the definition of national origin discrimination includes discrimination based on limited English proficiency but failed to make that explicit in § 38.9(a).

CRC now adds ''including limited English proficiency'' to § 38.9(a), consistent with guidance issued by CRC in 2003 advising all recipients of federal financial assistance from the Department of Labor [212] of the Title VI prohibition against national origin discrimination affecting LEP individuals.[213] This 2003 DOL LEP Guidance was issued pursuant to Executive Order 13166, which directed each federal agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients.[214] Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in the DOJ Policy Guidance titled ''Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency.'' [215] Thus, for the reasons stated in the preamble to the proposed rule, and in consideration of the comment, we have added ''including limited English proficiency'' at the end of the first sentence of § 38.9(a).

Comment: In contrast, one State labor agency opposed including limited English proficiency in the description of what constitutes national origin discrimination, and objected that the proposed rule appeared to create a new category of national origin discrimination based on an individual's language of choice. The commenter asserted that *Lau* v. *Nichols,*[216] the principal case upon which CRC relies to justify these changes, is of questionable validity because it was abrogated in part by *Alexander* v. *Sandoval.*[217] Additionally, the commenter asserted that the proposed insertion of the phrase ''including limited English proficiency'' would be an inappropriate use of rulemaking authority because it would elevate to a statutory level language that does not exist in the United States Code.

Response: We disagree with the commenter's assertion calling into question the precedential value of *Lau* in light of *Sandoval.* CRC has already addressed this very issue in its 2003 DOL LEP Guidance.[218] There, we agreed

[208] *See* DOJ LEP Guidance, *supra* note 23; DOL LEP Guidance, *supra* note 28, at 32291.

[209] 42 U.S.C. 2000d.

[210] 414 U.S. 563, 568–69 (1974).

[211] *See, e.g., Colwell* v. *Dep't of Health & Human Servs.,* 558 F.3d 1112, 1116–17 (9th Cir. 2009) (recognizing a long history of interpreting discrimination against LEP individuals as discrimination on the basis of nation origin); *United States* v. *Maricopa Cnty.,* 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (''[L]ongstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI.''); *Faith Action for Cmty. Equity* v. *Hawaii,* No. 13–00450 SOM/RLP, 2014 WL 1691622, at *14 (D. Haw. Apr. 28, 2014) (''The foreseeable disparate impact of the English-only policy, the allegedly pretextual justifications for the English-only policy, and the potentially derogatory comments made and the attitude allegedly shown by HDOT officials suffice to make Plaintiffs' claims plausible.''); *Nat'l Multi Hous. Council* v. *Jackson,* 539 F. Supp. 2d 425, 430 (D.D.C. 2008) (''Longstanding Justice Department regulations also expressly require communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance.'').

[212] In this instance, the term ''recipient'' is broader than the definition at § 38.4(zz). See notes 13–17 and accompanying text for an explanation of the term ''recipient'' with respect to WIOA Title I programs and activities.

[213] DOL LEP Guidance, *supra* note 28, at 32290.

[214] 65 FR 50121, Aug. 16, 2000.

[215] 65 FR 50123, Aug. 16, 2000.

[216] 414 U.S. 563 (1974).

[217] 532 U.S. 275 (2001).

[218] DOL LEP Guidance, *supra* note 28, at 32292.

with DOJ's determination that *Sandoval* did not overturn *Lau* with respect to the Title VI obligation to provide meaningful access to LEP individuals.[219] Instead, *Sandoval* principally held that there is no private right of action to enforce Title VI disparate impact regulations.[220] We stated in our DOL LEP Guidance that, in consideration of *Sandoval's* impact, we would continue to strive to ensure that federally assisted programs and activities work in a way that is effective for all eligible beneficiaries, including those with limited English proficiency.[221] The same conclusion applies here.

The sole question in *Sandoval* was ''whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.'' [222] The Supreme Court concluded that ''private parties may not invoke Title VI regulations to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination.'' [223] The decision in *Sandoval* specifically declined to address ''whether the DOJ regulation was authorized by § 602, or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin.'' [224] *Sandoval* did not address DOJ's authority to enforce the Title VI disparate impact regulations or the lower court decisions that an English-only policy had the effect of discriminating on the basis of national origin.[225] *Sandoval* did not overturn *Lau's* holding that ''[l]anguage-based discrimination can constitute a form of national-origin discrimination under Title VI.'' [226]

CRC also disagrees with the commenter's assertion that including limited English proficiency in the rule would be an inappropriate use of rulemaking. It is well established that policies and practices that deny LEP individuals meaningful access to federally funded programs and activities may constitute unlawful national origin discrimination.[227] Agencies must ensure that recipients of their federal financial assistance do not directly or indirectly discriminate against LEP individuals. To ensure they do not discriminate against LEP individuals, recipients must identify the appropriate language in which to provide language access services for each LEP individual. Therefore, CRC believes the term ''preferred language'' captures information that is relevant to serving LEP individuals, and notes that term is also used by States with language access laws.[228] The commenter did not suggest an alternative term, but objected based upon the commenter's reading of *Lau* and *Sandoval.* As explained already, we disagree with the commenter's view of the case law on this issue. Thus, CRC declines to make any regulatory modifications based on the commenter's assertions.

Proposed § 38.9(b) adopted a well-established principle under Title VI of the Civil Rights Act of 1964 by requiring that recipients of federal financial assistance take reasonable steps to provide meaningful access to each LEP individual whom they serve or encounter. CRC acknowledged in the preamble to the proposed rule that its LEP guidance long has employed ''four factors'' when assessing the effectiveness of a recipient's steps to ensure meaningful access: (1) The number or proportion of LEP persons served or encountered in the eligible service population; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the recipient; and (4) the resources available to the recipient and costs.[229] CRC invited comment on this approach, particularly whether the four factors should instead be incorporated into the regulatory text, whether the weight to be accorded the ''nature and importance'' factor is appropriate, and whether there are additional factors that should be part of the analysis.

The comments and our responses regarding § 38.9(b) are set forth below.

Comment: One State labor agency recommended that, rather than leaving it to CRC to decide on appropriate factors on a case-by-case basis, the ''four factors'' test should be retained for purposes of assessing a recipient's LEP compliance. The commenter asserted that the ''four factors'' test should be retained because it has been the rule for more than two decades and discarding it would create ambiguity leading to unnecessary legal disputes between recipients and CRC.

Response: We disagree with the commenter's characterization that declining to list the ''four factors'' analysis in § 38.9 will create ambiguity and lead to unnecessary legal disputes between recipients and CRC. Thus, this final rule does not include the four factors in regulatory text, instead outlining the general rule that the obligation of a recipient is to provide meaningful access in the form of language assistance of some type. We believe a formulaic analysis detracts from the application of the general rule, as well as from the primary weight to be placed on the nature and importance of the program or activity. Recipients should, and CRC will, review each situation based on the facts presented. The principle that recipients must take reasonable steps to provide meaningful access for each LEP individual to Title I programs and activities also existed under WIA.

In consideration of this comment, CRC reviewed its LEP enforcement cases and determined that CRC has never found a recipient in violation for failing to perform the four factors analysis. Rather, recipients have been found in violation only when they fail to take reasonable steps to provide meaningful access. Additionally, while we recognize that the decision not to incorporate the four factors into the regulatory text may suggest a change from DOL LEP Guidance, the four factors and the DOL LEP Guidance may still be used as relevant guidelines for recipients. In Title VI, Congress delegated ''to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant

[219] *Id.* at 32292–93.

[220] *Id.* at 32293 and note 1; *Sandoval,* 532 U.S. at 278.

[221] DOL LEP Guidance, *supra* note 28, at 32292.

[222] *Sandoval,* 532 U.S. at 278.

[223] *Jackson* v. *Birmingham Bd. of Educ.,* 544 U.S. 167, 178 (2005).

[224] *Id.* at 279.

[225] *Id.*

[226] *J.D.H.* v. *Las Vegas Metro. Police Dep't,* No. 2:13–CV–01300–APG, 2014 WL 3809131, at *4 (D. Nev. Aug. 1, 2014), citing *Colwell* v. *Dep't of Health & Human Servs.,* 558 F.3d 1112, 1116–17 (9th Cir. 2009), *abrogated on other grounds by Sandoval,* 532 U.S. 275 (2001)) (''discrimination against LEP individuals was discrimination based on national origin in violation of Title VI'').

[227] *See supra* notes 24–26 and accompanying text.

[228] For example, pursuant to the DC Language Access Act, the DC Office of Human Rights requires covered entities to collect data on the number of LEP individuals served in an annual report. See final rulemaking at 55 DCR 6348, June 8, 2008, as amended by final rulemaking published at 61 DCR 9836, Sept. 26, 2014. The question on the DC Office of Human Rights Complaint Form for the purposes of capturing this information is ''What language do you prefer to communicate in?'' DC Government Employment Intake Questionnaire Form, *available at http://dcforms.dc.gov/webform/employment-intake-questionnaire-form.* In California, the Dymally-Alatorre Bilingual Services Act requires local agencies to provide language access to limited English proficient speakers. Ca. Govt. Code § 7290–7299.8. The Bilingual Services Program at the California Department of Human Resources provides oversight, including conducting language surveys on implementation. Cal. Dep't of Human Res., Bilingual Services Program, *available at http://www.calhr.ca.gov/state-hr-professionals/Pages/Bilingual-Services.aspx. See also* Haw. Rev. Stat. sections 371–31 to –37.

[229] *See* DOL LEP Guidance, *supra* note 28, at 32293–95.

altering the practices of the federal grantees that had produced those impacts.'' [230] Despite the four factors' absence from the rule, CRC will consider a number of relevant factors, including the ''four factors,'' based upon the facts presented in each case.

To provide guidance to recipients on our intended interpretation of § 38.9(b), the following preamble discussion sets forth a range of factors that may be relevant in any given case, regarding the requirement to take reasonable steps to provide meaningful access to services provided. Recipients must take reasonable steps to provide meaningful language access service to each LEP individual encountered. Based upon CRC's experience reviewing and enforcing compliance with LEP language access requirements, factors that CRC may consider in determining compliance regarding the appropriate level of LEP services include, but are not limited to: The nature and importance of the program, activity, or service provided by the recipient, including the nature and importance of the particular communication at issue (this factor is to be given primary weight); the length, complexity, and context of the communication; the number or proportion of LEP persons served or encountered in the eligible service population; the frequency with which LEP individuals come in contact with the program; the prevalence of the language in which the individual communicates among those eligible to be served or likely to be encountered by the program or activity; the frequency with which a recipient encounters the language in which the individual communicates; whether a recipient has explored the individual's preference, if any, for a type of language assistance service, as not all types of language assistance services may work as well as others in providing an individual meaningful access to the recipient's program or activity; the cost of language assistance services and whether a recipient has availed itself of cost-saving opportunities; all resources available to the recipient, including its capacity to leverage resources within and without its organizational structure, or to use its negotiating power to lower the costs at which language assistance services could be obtained; and whether the recipient has taken the voluntary measure of developing a language access plan.[231] With the exception of the nature and importance of the program or activity, we decline to assign a particular weight to any specific relevant factor. Instead, recipients should, and CRC will, consider and weigh all relevant factors, on a case-by-case basis, when determining whether recipients have taken reasonable steps to provide meaningful access to LEP individuals.

Thus, as proposed, CRC will not include the ''four factor'' analysis in the regulatory text of the final rule.[232]

Comment: A few commenters requested clarification of the requirements proposed in § 38.9(b). A State agency asked what specific actions recipients will be required to take to satisfy the requirement to take ''reasonable steps'' to ensure meaningful access to LEP individuals. The commenter also asserted that the proposed rule fails to provide the necessary detail clarifying how many LEP individuals must be ''served and encountered'' to trigger the requirement that the recipient take these reasonable steps, and stated that the final rule should set a reasonable number of ''encounters'' or percentage of population served that communicate in a certain manner before requiring a recipient to have procedures in place to satisfy that population's specific needs.

Response: We recognize the commenters' concerns that the proposed rule does not provide detail with respect to ''served or encountered'' but we decline to modify this provision. Recipients must take reasonable steps to provide meaningful access to *each* LEP individual. CRC recognizes that providing a specific number to trigger certain translation obligations, or detailing specific actions to take in all cases, could appear to benefit some recipients in meeting their obligations under this part, but it could also make compliance difficult for a small recipient or be wholly inapplicable to another.

This provision is intended to be a flexible standard specific to the facts of each situation. Providing additional specificity, at least in the final rule, would apply rigid standards across-the-board to all recipients and thus jeopardize that very goal. As discussed above, in evaluating the scope of a recipient's obligations to provide meaningful access, recipients should, and CRC intends to, give substantial weight to the nature and importance of the program or activity, including the particular communication at issue, in determining the appropriate level, type and manner of language assistance services to be provided. CRC will also consider any other relevant factors on a case-by-case basis, as described above. CRC intends to provide technical assistance to the workforce system on the requirement to take reasonable steps to provide meaningful access for LEP individuals and will update and/or issue tools to assist recipients to facilitate compliance.

For all of the foregoing reasons, and in consideration of the comments, regulatory modifications are unnecessary to address the commenters' concerns.

Comment: A State labor agency asked for clarification on the meaning of ''appropriate non-English language'' within § 38.9(b)(2)(i) and (ii), including specification of whether it means something other than a threshold. The commenter asserted that if it meant something other than languages meeting the threshold of 5 percent or 1,000 individuals, then the requirements of these sections are cost prohibitive and unreasonable.

Response: The text ''appropriate non-English'' language in § 38.9(b)(2)(i) and (ii) does not, as the commenter asks, mean a threshold. The use of ''appropriate'' here is not meant to be a test by which recipients determine whether to provide meaningful access; it simply refers to the language, other than English, that is being translated.

Comment: Several advocacy organizations commented that the draft regulations do not provide sufficient direction to recipients to ensure that they are not only effectively providing information to LEP individuals but also providing meaningful access to LEP individuals to participate in programs or activities under Title I. These commenters recommended that the ''and/or'' in § 38.9(b) be replaced with ''and'' to ensure that recipients are required to take reasonable steps to inform LEP individuals about Title I programs and activities and to facilitate their participation in such programs and activities. These advocacy organizations also recommended that the final regulations be expanded to include additional guidance on the reasonable steps that recipients must take to ensure that LEP individuals are afforded meaningful access to Title I programs and activities, including adding the following examples of a reasonable method to § 38.9(b)(2): ''Programming that simultaneously provides English language training with vocational or

[230] *Alexander* v. *Choate,* 469 U.S. 287, 293–94 (1985) (discussing *Guardians Ass'n* v. *Civil Serv. Comm'n,* 463 U.S. 582 (1983)).

[231] *See also* HHS Nondiscrimination Final Rule, *supra* note 18, at 31415–16 (listing a range of similar factors that may be relevant in any given LEP language access case).

[232] This is consistent with HHS's approach in its recent final rule. *See* HHS Nondiscrimination Final Rule, *supra* note 18, at 31415–16 (listing range of relevant factors in preamble that may be considered although not listed in regulatory text).

other workforce training to limited English proficient individuals (integrated education and training).''

Response: CRC believes that regulatory modifications are unnecessary to address the commenters' concerns because the use of ''and/or'' does not relieve a recipient of its obligation to provide meaningful access to individuals who are LEP. We also believe § 38.9 does provide sufficient direction to recipients regarding the provision of meaningful access to LEP individuals to participate in Title I programs and activities, and that no further examples of reasonable steps to ensure meaningful access need be provided in the regulatory text. However, as noted above, CRC intends to provide technical assistance to the workforce system on the requirement to take reasonable steps to provide meaningful access for LEP individuals and will update and/or issue tools to assist recipients to facilitate compliance. Recipients may submit technical assistance requests to CRC at *civilrightscenter@dol.gov*.

We note that § 38.9(c) makes clear that a recipient should ensure that every program delivery avenue, including electronic, in person, and/or telephonic communication, conveys in the appropriate languages how an individual can effectively learn about, participate in, and/or access any aid, benefit service or training that the recipient provides; section 38.9(d) specifies that any language assistance services, whether oral interpretation or written translation, must be provided free of charge and in a timely manner; and § 38.9(e) states that a recipient must provide adequate notice to LEP individuals of the existence of interpretation and translation services and that they are free of charge. Moreover, we decline to add the suggested example from the commenter to the regulation text: ''Programming that simultaneously provides English language training with vocational or other workforce training to limited English proficient individuals (integrated education and training).'' The appendix to § 38.9 (Illustrative Applications in Recipient Programs and Activities, Ex. 3) already provides an example that explains that, depending upon the circumstances, an English language class could be offered before, or at the same time as, a training program, but should not be offered instead of the training program.

Proposed § 38.9(c) made clear that a recipient should ensure that every program delivery avenue, including electronic, in person, and/or telephonic communication, conveys in the appropriate languages how an individual can effectively learn about, participate in, and/or access any aid, benefit, service or training that the recipient provides. This provision ensures that, as recipients convert to online delivery systems, language access is not lost in the transition. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.9(d) specified that any language assistance services, whether oral interpretation or written translation, must be provided free of charge and in a timely manner. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.9(e) stated that a recipient must provide adequate notice to LEP individuals of the existence of interpretation and translation services and that they are available free of charge. The provision would ensure that LEP individuals are aware that they do not have to navigate WIOA Title I programs and activities unassisted, or at their own expense. CRC received no comments on this provision and adopts it without change in the final rule.

Proposed § 38.9(f) stated that a recipient will not require LEP individuals to provide their own interpreters and identified restrictions on the use of certain persons to provide language assistance services for an LEP individual. Proposed paragraphs (f)(1) and (2) identified the narrow and finite situations in which a recipient may rely on an adult or a minor child accompanying an LEP individual to interpret. CRC received one comment on § 38.9(f). The comment and response are set forth below.

Comment: An advocacy organization asserted that it is never appropriate for an ''accompanying adult'' to be asked to provide communication access for LEP individuals and recommended that § 38.9 be revised to include an affirmative obligation to provide interpreters. Furthermore, the commenter recommended that a provision be added to § 38.9 creating an obligation to provide for a qualified sign language (ASL) interpreter or other reasonable accommodation for individuals who are deaf.

Response: CRC believes that § 38.9(f) provides sufficient guidance to allow recipients to strike the proper balance between the many situations where the use of informal interpreters is inappropriate and the few situations where the limited use of ''an accompanying adult'' is necessary and appropriate in light of the nature of a service or benefit being provided and the factual context in which the interpretation is being provided. This provision allows the LEP individual to rely on an adult of their own choosing, but requires the recipient, after offering an interpreter, to document that choice so that there can be no question regarding the voluntariness of the choice of interpreter. Proposed paragraph (f)(3) outlines that, where precise, complete, and accurate interpretations or translation of information and/or testimony are critical for adjudicatory or legal reasons, or where the competency of the LEP person's interpreter is not established, a recipient may decide to provide its own, independent interpreter, even if an LEP individual wants to use the individual's own interpreter as well. Thus, CRC declines to make any modification to § 38.9(f).

Regarding the comment suggesting the ASL interpreter, providing a sign language interpreter is specifically covered under the obligation to provide auxiliary aids and services to individuals with disabilities (§ 38.15), not the obligation to provide services to individuals with limited English proficiency. For this reason, CRC declines to make the suggested changes.

In the proposed rule, § 38.9(g) addressed recipients' LEP requirements as to vital information. Section 38.9(g)(1) provided that, for languages spoken by a significant number or portion of the population eligible to be served or likely to be encountered, recipients must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site. Written training materials offered or used within employment-related training programs as defined under § 38.4(t) are excluded from these translation requirements. The vital information these training materials contain can be provided to LEP participants by oral interpretation, summarization during the training program itself, or other reasonable steps. However, recipients must still take reasonable steps to ensure meaningful access to training programs as stated in paragraph (b) of this section.

In the proposed rule, § 38.9(g)(2) required that, ''for languages not spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, a recipient must make reasonable steps to meet the particularized language needs of LEP individuals who seek to learn about, participate in, and/or access the aid, benefit, service or training that the recipient provides. Vital information

may be conveyed orally if not translated.'' For these languages, recipients are not obligated to provide written translations of vital information in advance of encountering any specific LEP individual. Recipients are, however, required to take reasonable steps, including oral translation, to provide access to vital information, once an LEP individual seeks to learn about, participate in, and/or access a WIOA Title I program or activity.

Proposed § 38.9(g)(3) stated that recipients must include a ''Babel notice'' indicating that language assistance is available, in all communications of vital information, such as hard-copy letters or decisions or those communications posted on Web sites.

The comments and our responses regarding § 38.9(g)(1)–(3) are set forth below.

Comment: Although eliminating the requirement to translate vital information was the commenter's preference, a State government agency urged CRC to, at the very least, add more flexibility for recipients to provide vital information through means other than hard copy and electronic written forms. This commenter directed CRC to existing guidance, which the commenter described as sufficient and as providing flexibility to recipients who do not have the means to keep and create both hard copy and electronic translations of vital information contained in written form. Furthermore, the commenter asserted that the translation requirements would divert funding currently being used to meet other modernization efforts (*e.g.,* the move to online automated systems).

Response: Contrary to the commenter's belief, recipients do in fact have flexibility to translate into either hard copy or electronic form. CRC believes that proposed § 38.9(g) does provide that flexibility. The rule requires recipients to translate vital information in written materials into certain languages and make the translations readily available in hard copy, upon request, *or* electronically such as on a Web site. The intentional use of the word ''or'' allows recipients flexibility. CRC expects, however, that the availability and/or provision of translated vital information to LEP individuals will be comparable to that afforded to non-LEP individuals. CRC also cautions that the use of a Web site and web-based technology as the sole or primary way for individuals to obtain information may have the effect of denying or limiting access to LEP individuals and members of other protected groups, apart from LEP individuals, in violation of federal nondiscrimination law.[233]

With respect to the commenter's concern that the requirement would divert funds from other modernization efforts, CRC is sensitive to the budgetary demands on recipients. CRC recommends that readers consult longstanding guidance about taking reasonable steps to ensure meaningful access to vital information and other aspects of programs and activities.

In 2002, the DOJ LEP Guidance explained that determining ''[w]hether or not a document (or the information it solicits) is 'vital' may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner.'' [234] Similarly, the DOL LEP Guidance tracked the DOJ Guidance as to vital document translation.[235] To facilitate the process, ''recipients are encouraged to create a plan for consistently determining, over time and across its various activities, what documents are 'vital' to the meaningful access of the LEP populations they serve.'' [236] The 2002 DOJ LEP Guidance also explained the importance of ''pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be 'fixed' later and that inaccurate interpretations do not cause delay or other costs, [as well as] centralizing interpreter and translator services to achieve economies of scale . . . [which] may help reduce costs.'' [237] Recipients were directed to ''carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance.'' [238] Some recipients may have taken greater strides in meeting their LEP requirements over the last 14 years; all recipients should have current plans, including budgetary plans, in place to meet these requirements. CRC is available to provide technical assistance to the workforce system on the requirement to take reasonable steps to provide meaningful access for LEP individuals and will update and/or issue tools to assist recipients to facilitate compliance.

Comment: A State labor agency recommended against the requirements of § 38.9(g) unless the partner is colocated within a one-stop center.

Response: In response to one State labor agency's recommendation to delete § 38.9(g) unless the partner is colocated within a one-stop center, we decline the recommendation but provide broader context for the commenter regarding the obligations of recipients. One-stop partners, as defined in section 121(b) of WIOA, are recipients for purposes of this rule and are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the one-stop delivery system. One-stop centers are not just a physical location, but may include a larger electronic network. Recipients, including one-stop partners, regardless of location, must translate vital information in accordance with § 38.9(g). Written training materials offered or used within employment-related training programs as defined under § 38.4(t) are excluded but recipients must take reasonable steps to ensure meaningful access for LEP individuals as stated in § 38.9(b). Thus, CRC declines to make any regulatory modifications.

Comment: A State agency emphasized the importance of defining ''standardized documents'' to clarify the scope of the translation requirement. The commenter proposed that the term ''standardized documents'' be defined to mean ''static documents that are not unique to a case.'' Additionally, the commenter noted that it would be reasonable to include the standard elements of documents that may also contain unique, targeted, or dynamic

[233] *See* U.S. Dep't of Labor, Emp't & Training Admin., Unemployment Insurance Program Letter No. 02–16, State Responsibilities for Ensuring Access to Unemployment Insurance Benefits (Oct. 1, 2015), *available at http://wdr.doleta.gov/directives/attach/UIPL/UIPL_02-16.pdf.*

[234] DOJ 2002 LEP Guidance, *supra* note 23, at 41463.

[235] DOL 2002 LEP Guidance, *supra* note 28, at 32298.

[236] DOJ 2002 LEP Guidance, *supra* note 23, at 41463; DOL LEP Guidance, *supra* note 28, at 32298.

[237] DOJ 2002 LEP Guidance, *supra* note 23, at 41460.

[238] *Id.; Colwell* v. *Dep't of Health & Human Servs.,* 558 F.3d 1112, 1129 (9th Cir. 2009) (holding recipients' allegations ''that they are spending money on language assistance'' was ''insufficient'' to establish a hardship); *Sandoval* v. *Hagan,* 7 F. Supp. 2d 1234, 1312 (M.D. Ala. 1998) (holding recipient cannot establish a substantial legitimate cost concern under Title VI to cease the translation of exams into foreign languages when the recipient has a budget of over $50 million and such translations costs would be ''trifling'' in comparison), *aff'd,* 197 F.3d 484 (11th Cir. 1999); *rev'd* on other grounds, *Alexander* v. *Sandoval,* 532 U.S. 275 (2001).

information (*e.g.,* representative versions of common correspondence).

Response: We agree that ''vital information in written materials,'' as discussed in § 38.9(g)(1), may include standard language in certain documents, for example, template language in a benefits letter requesting a response from the beneficiary. However, we decline the commenter's recommendation to define ''standardized documents'' because the term is self-explanatory. We also note that the translation requirement regarding vital information in written materials is not necessarily limited to standardized documents (or standard language in standard documents), contrary to the commenter's suggestion in defining that term. For example, recipients are required to translate vital information in case-specific documents in certain circumstances, such as documents containing decisions about benefits or appeal rights. Of course, recipients could not and are thus not required to translate vital information in case-specific documents prior to the time of issuance as the contents of such communications cannot be discerned in advance.

Comment: A State agency asked CRC to clarify whether the Babel notice must be translated as a vital document because previous communications with CRC indicated otherwise.

Response: Proposed § 38.9(g)(3) required recipients to include a ''Babel notice'' indicating that language assistance is available, in all communications of vital information, such as hard-copy letters or decisions, or those communications posted on Web sites. The definition of ''Babel notice'' in § 38.4(i) clarifies that the notice must be in ''multiple languages.'' This requirement ensures that LEP individuals know how to obtain language assistance for vital information that has not been translated into the LEP individual's preferred, non-English language. Accordingly, consistent with its definition and like other vital information, the Babel notice must be translated into multiple languages. We appreciate the commenter's concern that CRC should ensure that all communications with respect to this requirement are consistent with the final rule. While we are unaware of any communications with recipients that contradicted these requirements, recipients should rely upon the requirements of §§ 38.9(g)(3) and 38.4(i) going forward.

Comment: Several advocacy organizations strongly disagreed with the exclusion provided in the translation requirement for training materials, reasoning that recipients should be required to create an environment in which LEP individuals can participate in training programs, not simply receive information about the available opportunities. A union recommended that CRC provide funding for the costs of translating training materials for LEP individuals, rather than exclude them from the translation requirement.

Response: CRC appreciates the commenters' concern regarding translation of training materials for employment-related training programs. In deciding not to adopt the commenters' suggestion, and to keep the regulatory exception for such training materials, CRC considered that translation of written training materials may be challenging for training providers for a number of reasons, including the variety, size, and technical nature of training materials, and the cost of written translation services. CRC believes that recipients can take reasonable steps to provide meaningful access to employment-related training programs without translating written training materials. The vital information these materials contain can be provided to LEP participants by oral interpretation or summarization during the training program itself or other steps outlined in the regulation text and the appendix to the regulation. Of course, recipients retain the option of translating training materials if they wish to do so.

The final rule does not preclude recipients from translating training materials, and for purposes of cost, from using economies of scale to share translation materials and provide greater access than what is required under this rule. The DOJ's 2002 LEP Guidance explained the importance of ''pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be 'fixed' later and that inaccurate interpretations do not cause delay or other costs, [and] centralizing interpreter and translator services to achieve economies of scale . . . [which] may help reduce costs.'' [239] As noted above, recipients were directed to ''carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance.'' [240] Thus, regulatory modifications are unnecessary, and we note that providing funding for specific translation projects is beyond the scope of this rule.

In the preamble to proposed § 38.9, CRC also discussed thresholds which would trigger a requirement to translate standardized vital documents into particular languages. In the proposed rule, CRC gave examples for consideration of thresholds based upon the number of languages (*e.g.,* top ten languages spoken by LEP individuals); percentage of language speakers (*e.g.,* languages spoken by at least 5 percent of LEP individuals); the number of language speakers (*e.g.,* languages spoken by at least 1,000 LEP individuals); and composite thresholds combining these approaches, *e.g.,* languages spoken by at least 5 percent of LEP individuals or 1,000 LEP individuals, whichever is lower). CRC sought comment on what thresholds, if any, should be required, and to what geographic areas or service areas (State-level or lower) the threshold should apply. If thresholds were recommended, CRC also sought comment on the time that should be allowed for recipients to come into compliance with the threshold(s), including whether this regulation should permit recipients to implement their obligations with a phased-in approach.

Comment: Without making a particular recommendation about the appropriate threshold, a State labor agency described relevant portions of the 2003 DOL LEP Guidance that the commenter thought CRC should consider, including examples incorporated from DOJ's LEP Guidance in 2002. The commenter noted that the DOL LEP Guidance did not specifically define what is ''a significant number or portion'' of an LEP population, but it did describe the safe harbor provisions from the DOJ 2002 LEP Guidance, which the commenter asserted were reasonable; provided tangible guidelines for recipients; and specified that ''strong evidence of compliance'' exists where ''[t]he DOJ recipient provides written translation of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered.'' [241] The commenter also stated that the existing DOL LEP Guidance explains that when

[239] DOJ 2002 LEP Guidance, *supra* note 23, at 41460.

[240] *Id.*

[241] DOL LEP Guidance, *supra* note 28, at 32290 (quoting DOJ LEP Guidance).

a recipient is determining whether a particular language should be subject to the translation requirement, ''it is also advisable to consider the frequency of different types of language contacts'' and that resources available to the recipient and costs are legitimate considerations.[242] The commenter objected that the proposed rule failed to address these provisions.

Response: CRC declines to adopt a safe harbor provision in the final rule. As discussed above, after considering the comments on the proposed rule, CRC believes that providing a specific, inflexible standard to trigger translation obligations may make compliance difficult for a small recipient or be wholly inapplicable to another.

CRC agrees with the commenter that a number of relevant factors should be considered when evaluating a recipient's compliance with § 38.9(g). As discussed regarding § 38.9(b), CRC will consider all relevant factors (on a case-by-case basis) when evaluating whether a recipient has provided meaningful access for LEP individuals generally, and when evaluating whether the recipient has translated vital information into appropriate languages more specifically. Primary weight will be given to the nature and importance of the program or activity, but other factors may also be relevant in a particular case, including, as the commenter suggested, the LEP population in the service area, the frequency of different types of language contacts, the resources available, and costs. With regard to costs, as noted above, recipients must ''carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance.'' [243]

In this regard, both DOL's and DOJ's LEP Guidances are useful but must yield in the event that they conflict with the statute or regulations to which they apply.[244] Ultimately, recipients are bound by the obligations set forth in WIOA and this part, and CRC declines to specifically incorporate the guidance provisions cited by the commenter into this rule for all recipients.

Comment: Some commenters recommended that CRC adopt specific numerical thresholds that would trigger the obligation to translate vital documents in advance of encountering any specific LEP individual. Other commenters recommended that CRC adopt no thresholds at all. An individual commenter stated that the establishment of any threshold would result in discrimination because there would be a portion of the population that was not fairly served. Several advocacy organizations recommended that recipients be required to translate vital information in written materials for languages spoken by at least 500 LEP individuals in the service area, or for languages spoken by at least 5 percent of LEP individuals in that area, whichever is lower. A State workforce agency recommended that the threshold be consistent with the ''DOJ Civil Rights Policy,'' which we believe is a reference to the DOJ LEP Guidance. A State workforce agency recommended that the threshold be set as a percentage of language speakers based on data from the U.S. Census Bureau and the ongoing statistical data collected by the American Community Survey. After asserting that CRC should eliminate the requirement for the translation of vital information, a State agency recommended a threshold based on the percentage of LEP individuals state-wide if a threshold was necessary. The commenter also urged CRC to explicitly exempt State-level information systems and documents from the translation requirement, unless the adopted threshold was based on a percentage of LEP individuals state-wide. A few government agencies urged CRC to eliminate the requirement for the translation of vital information into multiple languages. One commenter recommended that CRC instead allow States to determine the most appropriate translation policy.

A few State agencies asked for clarification of the meaning of ''significant number'' as it relates to the requirement to translate vital information. Similarly, referencing language in § 38.9(c), one of these State agencies asked how recipients would determine the languages into which they would need to translate documents.

Response: Recipients are required to take reasonable steps to provide meaningful language access services for each LEP individual. To ensure equal opportunity for LEP individuals, and to prevent discrimination based on national origin, CRC declines to eliminate the requirement for the translation of vital information into multiple languages for LEP individuals. Vital information is information that is necessary for an individual to understand in order to obtain, or understand how to obtain, any aid, benefit, service or training. Without such information about WIOA Title I programs, individuals will not have meaningful access to the aid, services, benefits and training those programs provide. As explained above, it is well established that policies and practices that deny LEP individuals meaningful access to federally assisted programs and activities may constitute unlawful national origin discrimination.[245]

Therefore, recipients must take reasonable steps to provide LEP individuals with meaningful access to WIOA Title I programs and activities. While recipients, including States, are not free, as one commenter urged, to determine the most appropriate translation policy without reference to this standard, CRC's decision to forgo thresholds that trigger advance translation of vital documents allows recipients the flexibility to tailor, to their specific circumstances, the reasonable steps they will take to provide meaningful access to LEP individuals.

Thus, in answer to one commenter's question about how recipients would determine the languages for which they need to translate documents in advance, CRC recommends that recipients create an LEP Plan by consulting the appendix to § 38.9, the 2003 DOL LEP Guidance, as well as the Department of Justice's 2011 Language Access Assessment and Planning Self-Assessment Tool for Federally Conducted and Federally Assisted Programs (LEP Tool).[246] The latter resource includes a self-assessment that guides recipients through the process of analyzing demographics in the relevant geographic area; assessing the frequency of contact with LEP individuals; factoring the importance of the services provided by the recipient; and managing resources and costs.

Based on the information gathered through the self-assessment, the LEP Tool provides a roadmap for recipients to create an LEP Plan tailored to their specific circumstances, including a determination of which languages are encountered with sufficient frequency (or are spoken by a significant number

[242] *See id.* at 32294.

[243] DOJ LEP Guidance, *supra* note 23, at 41460.

[244] LEP guidance documents clarify preexisting Title VI responsibilities but do not create new obligations beyond those in the statute and its implementing regulations. *See Colwell* v. *Dep't of Health & Human Servs.,* 558 F.3d 1112, 1125 (9th Cir. 2009); *Nat'l Multi Hous. Council* v. *Jackson,* 539 F. Supp. 2d 425, 431 (D.D.C. 2008).

[245] *See supra* notes 24–26 and accompanying text.

[246] *https://www.lep.gov/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf.*

or proportion of the service population that is eligible or likely to be encountered) to require advance translation of vital information. In this way, recipients are more apt to fulfill their obligation to provide meaningful access to their programs and activities in a cost-effective manner.

Indeed, the DOL LEP Guidance issued in 2003 did not specifically define what constitutes a ''significant number or proportion of the eligible service population'' that would trigger the need to translate vital information into a particular language (in advance of encountering any specific LEP individual) because that number should be measured on a case-by-case basis. The 1999 rule similarly did not define the phrase or adopt a threshold. Although we have extensively considered whether to include thresholds that would trigger advance translation of vital information in written materials, as either a safe harbor or as an across-the-board minimum requirement, we decline to set such thresholds in the final rule.

Although thresholds may improve access for some national origin populations, the approach does not comprehensively effectuate WIOA's prohibition of national origin discrimination affecting LEP individuals. Setting thresholds would be both under-inclusive and over-inclusive, given the diverse range, type, and sizes of entities covered by Section 188 and the diverse national origin populations within the service areas of recipients' respective programs and activities. For instance, a threshold requiring all recipients, regardless of type or size, to provide language assistance services in languages spoken by 5 percent of a county's LEP population could result in the provision of language assistance services in more languages than the entity would otherwise be required to provide under its obligation in § 38.9(g). This threshold would apply regardless of the number of individuals with limited English proficiency who are eligible to be served or likely to be encountered by the recipient's program or activity and regardless of the recipient's operational capacity. Similarly, this threshold could leave behind significant numbers of individuals with limited English proficiency served by the recipient's program or activity, who communicate in a language that constitutes less than 5 percent of the county's limited English proficient population.

Although some federal regulations set thresholds, those regulations address entities or programs of similar sizes and types.[247] In comparison, WIOA and this part regulate more diverse types of recipients with potentially more diverse limited English proficient populations. CRC is concerned that significant limited English proficient populations might receive no or inadequate language assistance services under a threshold-based regulation. CRC is also concerned about the burden an across-the-board translation threshold might place on small covered entities.

Moreover, we value the flexibility inherent in this contextualized approach to assess recipients' compliance with the requirement to take reasonable steps to provide meaningful access for LEP individuals. We thus decline to impose the prescriptive standards recommended by the commenters as inconsistent with this customized regulatory approach.[248]

Finally, we note that even when there is no requirement for advance translation in a particular language, recipients still have a duty to take reasonable steps to provide meaningful language access services to each LEP individual, once encountered, pursuant to § 38.9(g)(2).

Comment: Several advocacy organizations recommended establishing a threshold using data at the regulated entity's service delivery level to determine the appropriate languages into which to translate vital information. The commenters explained that State-level data may not necessarily reflect the wide variations in local communities.

Response: CRC acknowledges the commenters' concern that State-level data are not a perfect solution to capturing the variations in local communities. As set forth above, however, CRC has not adopted specific thresholds. Thus, the commenters' concern is addressed by § 38.9(g) and regulatory modifications are unnecessary.

Comment: Several advocacy organizations recommended that regulated entities be mandated to implement requirements to translate vital information as soon as possible, at most within a one-year timeframe, reasoning that any delay is a delay in ensuring that job seekers and workers who are LEP have access to Title I services.

Response: We requested comments on whether to delay enforcement of translation requirements in the event we required (for the first time) thresholds that trigger the obligation to automatically translate vital information into certain languages. Since we are not implementing such thresholds, but retaining the status quo, there is no need to delay the enforcement of requirements that are already in place. Accordingly, CRC declines to put a timeframe on translating vital documents.

Comment: In the proposed rule, CRC sought comment on other methodologies for formulating language access thresholds regarding written materials containing vital information that would result in meaningful access for individuals regardless of national origin, while being mindful of the potential burden on recipients.

A local workforce agency provided information about an existing program in Chicago. Specifically, the commenter stated that the diversity of employees at its one-stop center enables the center staff to provide on-site translation, in addition to utilizing the language services provided by the State-contracted service provider. Additionally, the commenter described the existing procedures in place regarding requests for language services, which enables customers to acquire data upon request from the service provider. The commenter asserted that recipients that provide on-site language services have a reporting process to capture the number of services needed. Finally, the commenter stated that recipients can capture real numbers that address the quantity of services provided by the workforce area by identifying and noting LEP individuals in their database during the registration process.

Response: CRC notes that the commenter's experiences demonstrate that this model is a promising approach for recipients with proper planning and commitment to compliance.

Comment: Finally, an advocacy organization recommended that the rule be revised to include certified ASL interpreter services for translation of vital information. The commenter explained this could accommodate the many individuals in the deaf community who feel that they are not adequately supported for success in employment due to the lack of effective communication of vital information.

[247] *See* 45 CFR 155.205(c)(2)(iii), (iv) (regarding HHS's regulation of health care exchanges); 26 CFR 1.501(r)–4(b)(5)(ii) (Department of the Treasury's regulation regarding hospital organizations and financial assistance policies); 7 CFR 272.4(b) (Department of Agriculture's Supplemental Nutrition Assistance Program).

[248] *See* HHS Nondiscrimination Final Rule, *supra* note 18, at 31419 (declining to adopt ''thresholds for the non-English languages in which covered entities must provide a range of language assistance services'' as an approach that ''does not comprehensively effectuate'' the statutory prohibition of national origin discrimination, and instead adopting a ''contextualized approach . . . to assess compliance with the requirement to take reasonable steps to provide meaningful access'').

Response: As explained in connection with § 38.15, providing sign language interpretation is specifically covered under the obligation to provide auxiliary aids and services to individuals with disabilities. Communications with individuals with disabilities must be as effective as communications with others. However, § 38.9 does not address access for individuals with disabilities, only the prohibition on national origin discrimination, and § 38.9(g) restates the obligation to provide translated vital information for LEP individuals to ensure meaningful access. For this reason, CRC declines to make the suggested changes.

CRC therefore adopts § 38.9(g) as proposed, except for two technical corrections: Changing ''make'' to ''take'' in paragraph (g)(1) and, in paragraph (g)(2), for consistency with the definition of ''Babel notice,'' specifying that the Babel notice must indicate in multiple languages that language assistance is available.

CRC received no comments on proposed § 38.9(h) and adopts it in the final rule without modification.

Proposed § 38.9(i) provided that recipients should develop a written language access plan to ensure LEP individuals have meaningful access to their programs and activities, and references the appendix to § 38.9 where CRC has provided guidance to recipients on developing a language access plan.

Comment: Noting the use of the word ''should'' in § 38.9(i), a State agency asked whether a language access plan was required or recommended. And, if required, the commenter asked for clarification on the required contents of the plan.

Response: CRC's use of the word ''should'' is intentional. Developing a language access plan is not a requirement, but may be considered as a relevant factor among others when analyzing whether a recipient has afforded LEP individuals meaningful access to programs and activities under WIOA Title I and this part. CRC recognizes that a recipient may wish to conduct thorough assessments of its language assistance needs and comprehensively create the operational infrastructure to execute a variety of high quality language assistance services. CRC urges recipients to pursue such high standards and to create language access plans that will identify in advance the types and levels of services that will be provided in each of the contexts in which the recipient encounters LEP individuals. The appendix to § 38.9 provides detailed guidance to recipients on developing a language access plan.

In the appendix to § 38.9, CRC makes the following technical edits: In the first sentence of the appendix, adding the word ''meaningful'' to match the language access standard as described above; in the first sentence of example 1, referring to the final rule instead of the proposed rule and changing ''its'' to ''their'' to correct a grammatical error, and in the first sentence of example 2, changing ''on'' to ''as to'' for the sake of clarity.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and considering the comments received, CRC finalizes § 38.9 as follows: CRC adopts § 38.9(a) as proposed but adds the words ''including limiting English proficiency'' at the end of the first sentence. CRC finalizes proposed § 38.9(b)–(f) without modification. CRC finalizes § 38.9(g) as proposed, with the exception of two technical changes; revising ''make'' to ''take'' in the first sentence of paragraph (g)(2) and clarifying that the Babel notice must be in multiple languages. CRC adopts proposed § 38.9(h) and (i) without modification.

Harassment Prohibited § 38.10

CRC proposed a new § 38.10 to provide additional direction for the existing obligation to prevent harassment because of all bases protected by WIOA Section 188 and this part. Most commenters providing input on this issue supported the proposed provision. An advocacy organization specifically supported the addition of harassment based on age.

Proposed § 38.10(b) defined harassment because of sex under WIOA broadly to include harassment based on gender identity and failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, or related medical conditions; and sex-based harassment that is not sexual in nature but is because of sex or where one sex is targeted for the harassment. CRC received comments supporting, opposing, and recommending modifications to this paragraph.[249]

Comments: Several commenters commended CRC's recognition of sex-based harassment as a form of sex discrimination. For example, an organization representing tradeswomen noted that sexual harassment ''is a serious impediment to women's success in nontraditional jobs and job training.'' That commenter urged CRC to require training program providers to incorporate a sexual harassment prevention policy and training into the training program curriculum, especially in programs that train for male-dominated jobs. Both the women in trades organization and the coalition of eighty-six women's, workers', and civil rights organizations further suggested that CRC clarify the circumstances under which recipients are obligated to prevent and remedy sexual harassment by specific parties, such as fellow program participants, coworkers, and supervisors.

Response: With regard to sexual harassment prevention policies and training, CRC agrees that recipients should, as a best practice, foster an environment in which all individuals feel safe, welcome, and treated fairly by developing and implementing procedures to ensure that individuals are not harassed because of sex. However, it is beyond the scope of this rule to impose a categorical requirement in regulatory text that all recipients take these steps. Therefore, CRC declines to make the suggested changes.

CRC also declines to expand § 38.10(b) to address recipients' liability for various parties' sexual harassment. To do so would require incorporation of principles of tort and agency law into the final rule, which CRC believes is not necessary. CRC recognizes and follows the principles of liability for harassment established by the Department of Education's Title IX guidance documents[250] and by Title VII and Title IX case law.[251]

CRC makes a technical change to § 38.10(b). As proposed, the regulatory text may have been unclear that harassment based on gender identity and harassment based on failure to comport with sex stereotypes can be independent forms of harassment because of sex. Therefore, in the final rule, the two are listed individually and separated by a semicolon. CRC intends

[249] In addition to the comments described in the text, CRC received comments supporting and opposing the inclusion in § 38.10(b) of gender identity and sexual orientation. For the same reasons as discussed previously in the main preamble and in connection with the definition of ''sex'' in § 38.7(a), CRC retains gender identity in this provision as proposed and declines to add sexual orientation.

[250] *See, e.g.,* U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), *available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf*; Revised Sexual Harassment Guidance, *supra* note 63.

[251] Relevant Title IX cases include *Davis* v. *Monroe County Board of Education,* 526 U.S. 629 (1999), and *Gebser* v. *Lago Vista Independent School District,* 524 U.S. 274 (1998). Relevant Title VII cases include *Vance* v. *Ball State University,* 133 S. Ct. 2434 (2013); *Burlington Indus., Inc.* v. *Ellerth,* 524 U.S. 742 (1998); and *Faragher* v. *City of Boca Raton,* 524 U.S. 775 (1998).

no substantive change by making this revision.

Discrimination Prohibited Based on Citizenship Status § 38.11

The proposed rule added a new § 38.11 titled ''Discrimination prohibited based on citizenship status'' to provide additional direction to recipients regarding the protections certain noncitizens have from discrimination based on their citizenship status. Please note that other statutes and regulations may define citizenship discrimination differently than it is defined for the purposes of the final rule. CRC will enforce this provision consistent with other federal agencies' interpretations of their federal statutory eligibility requirements.

Comment: A professional association supported expansion of antidiscrimination provisions regarding ethnicity to cover citizenship status and national origin, including limited English proficiency. The commenter stated that these changes recognize the full diversity of the U.S. workforce. Several advocacy organizations agreed that the prohibition on discrimination based on citizenship status provides greater clarity to recipients about the protection for certain noncitizens. The commenters were particularly supportive of the inclusion of individuals, such as those with work authorization through the Deferred Action for Childhood Arrivals initiative, who the commenters asserted are eligible for services under Title I and who should be protected from discrimination in the provision of these services. An individual commenter, however, argued that non-citizens should not be granted equal opportunities and equal status as citizens.

Response: With respect to the bases of citizenship and national origin, WIOA Section 188(a)(5) expressly protects the right of citizens and nationals of the United States, lawfully admitted permanent resident aliens, refugees, asylees, and parolees, and other immigrants authorized by the Secretary of Homeland Security to work in the United States to participate in WIOA Title I programs and activities without being subjected to discrimination.[252] Accordingly, the individual commenter's position that non-citizens should be categorically excluded from these protections is contrary to the specific statutory language of Section 188 of WIOA and beyond CRC's authority to adopt.

Discrimination Prohibited Based on Disability § 38.12

Proposed § 38.12 revised the title of this section [253] and added a new paragraph (p) which incorporates the ADAAA's prohibition on claims of discrimination because of an individual's lack of disability.[254] Overall, this section retained the language from the 1999 and 2015 rules, which paralleled the wording of DOJ's ''General prohibitions against discrimination'' Title II ADA regulation, including the requirement that a recipient must administer WIOA Title I programs and activities ''in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'' [255] The ''most integrated setting appropriate'' requirement must also be consistent with the requirements of the Rehabilitation Act, as amended by WIOA.

Comment: A State agency supported the language in § 38.12(d). A training provider commented that clarifying language should be added in § 38.12(d) to define ''most integrated setting'' consistent with the ADA and the Supreme Court's opinion in *Olmstead* v. *L.C. ex rel. Zimring.*[256] However, a statewide association representing community service providers asserted that CRC's proposed rule exceeded statutory authority. The commenter objected to the proposed requirements, saying that it would put additional restrictions on employment by mandating integration within not only the community, but also within the work unit. The commenter warned that such requirements could lead to individuals with disabilities being replaced by workers without disabilities.

An individual commenter argued that a ''one-size-fits-all'' approach that assumes that integration and equalized services is the best solution for all individuals with disabilities will be detrimental to people that greatly benefit from group programs and specialized services.

Indeed, a number of commenters focused on § 38.12 in general, and § 38.12(d) in particular, to comment about work for individuals at subminimum wage and/or in so-called ''sheltered workshops,'' which provide training and employment opportunities [257] in segregated or ''sheltered'' settings. A coalition of organizations ''urge[d] the Department to ensure that the proposed regulations promote competitive integrated employment for students and youth with disabilities.'' Another commenter objected:

> While maximizing opportunities for competitive integrated employment among individuals with disabilities was one of the central purposes of WIOA, the goal of competitive integrated employment is not mentioned in the nondiscrimination regulations. It is critical that the nondiscrimination mandates in this proposed rule require that covered entities provide people with disabilities equal opportunity to access competitive integrated employment and protect the rights of people with disabilities to receive a fair income comparable to that of other employees, be employed in settings that include people with and without disabilities rather than limited to segregated facilities, and access opportunities for advancement that are comparable to those of their non-disabled peers.

Response: CRC appreciates the supportive comments we received and disagrees that the rule exceeds statutory authority. As discussed above, CRC has the authority to promulgate regulations necessary to implement WIOA's equal opportunity and nondiscrimination provisions under Section 188(e). Regarding the commenter's request to add clarifying language regarding ''the most integrated setting'' in light of the ADA and the *Olmstead* case, we believe this standard is clear, and has been so since the 1999 rule. We also believe that it is consistent with disability law (including Supreme Court precedent). Therefore, we decline to define it further. A recipient must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. This is an individualized determination that is based on the specific needs of the individual with a

[252] 29 U.S.C. 3248(a)(5). Although Section 188(a)(5) refers to the Attorney General, § 38.11 refers instead to the Secretary of Homeland Security because Congress transferred the authority to authorize aliens to work from the Attorney General to the Secretary of Homeland Security in the Homeland Security Act of 2002. *See* Homeland Security Act of 2002, Public Law 107–296, 8 U.S.C. 1103(a)(1). Section 1517 of the Homeland Security Act, 6 U.S.C. 557, provides that a reference in any other federal law to any function transferred by the Act ''and exercised on or after the effective date of the Act'' shall refer to the Secretary of Homeland Security or other official or component of the Department of Homeland Security to whom that function is transferred. *See also Clark* v. *Martinez,* 543 U.S. 371, 374 n.1 (2005) (noting that, with limited exception, the immigration authorities previously exercised by the Attorney General and the former Immigration and Naturalization Service ''now reside in the Secretary of Homeland Security'' and the Department of Homeland Security).

[253] *See* 29 CFR 37.7 (1999 rule); 29 CFR 38.7 (2015 rule).

[254] 42 U.S.C. 12201(g).

[255] 28 CFR 35.130(d); 29 CFR 37.12(d) (1999 rule); 29 CFR 38.12(d) (2015 rule).

[256] 527 U.S. 581 (1999).

[257] Sheltered workshops are also sometimes referred to as ''work centers.''

disability. Overall, the provision is intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others (without disabilities), based on presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with this requirement, recipients are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. We therefore disagree that correctly administering the obligation to operate programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities would result in individuals with disabilities being replaced by individuals without disabilities.

Next, CRC disagrees with the belief of some commenters that the rule directly addresses competitive integrated employment or integration in the ''work unit,'' or that the rule requires in all cases the elimination of sheltered workshops and subminimum wage employment. Neither the proposed rule nor the final rule contains a definition for ''competitive integrated employment'' or ''work unit.'' It appears that one of the commenters may have been referring to a 2015 Department of Education NPRM that addresses these issues.[258] Regarding the advocacy organizations that asked CRC to require competitive integrated employment in the final rule, we decline to do so. The Rehabilitation Act as amended by WIOA, as well as the Department of Education's regulations implementing the Rehabilitation Act,[259] defines the term ''competitive integrated employment,'' and moreover, competitive integrated employment of individuals with disabilities is an overall goal in the Rehabilitation Act as amended by WIOA. We note that in many instances, providing employment related services in non-integrated settings (such as sheltered workshops) may violate the ''most integrated setting appropriate'' standard in the Rehabilitation Act, the ADA, and this rule. For the purposes of Section 188 of WIOA and this regulation, the ''most integrated setting appropriate'' standard is consistent with the requirements of the Rehabilitation Act and the ADA. Additionally, WIOA prioritizes and emphasizes competitive integrated employment. We therefore add explanatory references in § 38.12(a)(1) and (4) to ensure compliance.

Comment: Several commenters warned of the potential impacts of the proposed rule on sheltered workshops. An employment service provider requested that CRC delete any language in the proposed rule that states or implies that pre-vocational and group training services (aka sheltered workshops) are discriminatory towards persons with disabilities. The commenter stated that the language in the proposed rule could lead to the elimination of center-based, pre-vocational, sheltered training programs across the nation for individuals with developmental disabilities. An individual commenter agreed and stressed that group centered employment is not discriminatory; instead it allows persons with disabilities to work with their peers in a group centered supported environment. Similarly, another individual commenter argued that group work centers are not discriminatory and provide valuable skills for individuals with disabilities who may not be ready for the competitive community jobs. An individual commenter stated that the elimination of group work centers would exceed congressional intent and interfere with a person's choice in employment. Several commenters argued that the loss of these programs would be detrimental and cause more persons with disabilities to be isolated and less likely to be employed.

An adult education provider argued that its facility provides individuals with disabilities, who do not receive funding, job training in the form of part-time employment at the work center. The commenter argued that the proposed rule could eliminate this as an option, which would decrease the availability of job training opportunities to individuals with disabilities. The commenter stressed that people with disabilities need on-the-job support, and without segregated job training for various periods of time, particularly for those who are not funded for services, a substantial number of individuals would never have the opportunity to achieve gainful and meaningful employment.

Response: While there are specific provisions in the 2014 reauthorization of the Rehabilitation Act that impact the eligibility of certain individuals to work in so-called sheltered workshops, there are no specific provisions in the Section 188 rule that either directly approve or disapprove of work in such settings. Rather, the integration requirement of § 38.12(d) requires recipients to administer their Title I—funded programs and activities in the most integrated setting appropriate to the needs of individuals with disabilities. As stated previously, this is an individualized determination that is based on the specific needs of the individual with a disability. Overall, the provision is intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with this requirement, recipients are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. As noted earlier, the ''most integrated setting appropriate'' requirement must also be consistent with the requirements of the Rehabilitation Act as amended by WIOA.

Comment: An individual commenter stated that the proposed rule would eliminate employment choices for persons with disabilities, including preventing those with severe disabilities from working in community rehabilitation programs. The commenter argued that all employment, including that paid at a subminimum wage, has value. The commenter argued that without work centers many individuals with disabilities would be stuck at home or forced to participate in ''glorified day care.''

Conversely, several commenters asserted that the Department should ensure that the proposed rules promote competitive wages for people with disabilities. The commenters cited statistics that showed that many individuals with disabilities working in sheltered workshops are being paid less than minimum wage, and in some cases at $0.50 per hour.

Response: While there are specific provisions in the Fair Labor Standards Act and the 2014 reauthorization of the Rehabilitation Act that govern and impact the eligibility of certain individuals with disabilities to work at less than the federal minimum wage, there are no specific provisions in the Section 188 rule that directly address this issue. However, under § 38.12(a), a recipient is not permitted to discriminate by, among other things, (1) denying a qualified individual with a disability the opportunity to participate in or benefit from any aid, benefit, service, or training; (2) affording a qualified individual with a disability an opportunity to participate in or benefit

[258] U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs., State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage; Notice of Proposed Rulemaking, 80 FR 21059, Apr. 16, 2015.

[259] 34 CFR parts 316 and 463.

from any aid, benefit, service, or training that is not equal to that afforded to others; (3) providing a qualified individual with a disability with any aid, benefit, service or training that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; or (4) providing different, segregated, or separate aid, benefit, service, or training to individuals with disabilities, or to any class of individuals with disabilities, unless such action is necessary to provide qualified individuals with disabilities with any aid, benefit, service, or training that is as effective as those provided to others, and consistent with the requirements of the Rehabilitation Act as amended by WIOA.

Therefore, this rule neither directly approves nor disapproves specific wages for individuals with disabilities. Rather, the rule addresses nondiscrimination and equal opportunity on the basis of disability which may take wages into account on a case-by-case basis.

In addition, CRC received a few general comments concerning the prohibitions on disability discrimination in proposed § 38.12.

Comment: An advocacy organization commended the Department on expanding inclusion of individuals who are blind or visually impaired within the workforce development system. The commenter stressed that Rehabilitation Service Administration service programs have become more restrictive for persons with visual impairments; therefore these individuals, particularly older individuals, will need to rely on the larger workforce development system to sustain and return to work.

Response: CRC appreciates the feedback from the commenter. The goal of this rule is to ensure that when individuals with disabilities engage the larger workforce development system, they are able to do so in an accessible manner, without discrimination.

Comment: An individual commenter recommended that the Department remove ''failure'' from Divisions of Vocational Rehabilitation as the entry point to 14(c) program participation. The commenter stated that not all individuals are ready to work once they complete high school and requiring failure would damage the individual's view of competitive employment. The commenter also suggested that high schools should continue to be able to contract with Section 14(c) certificate holders.[260] The commenter noted that these programs provide opportunities for individuals with the most severe disabilities.

Response: This comment refers to provisions in Section 511 of the Rehabilitation Act,[261] which CRC does not implement, and which are therefore outside the scope of these regulations.

Comment: An individual commenter recommended that the Department lower or remove the threshold spending amounts for PETS services and allow State agencies the ability to provide services to all individuals with disabilities.

Response: Threshold spending amounts regarding the services recipients provide to individuals with disabilities are outside the scope of this rule. Instead, recipients must provide aid, benefits, services, and training on an equal basis to qualified individuals with disabilities. Where reasonable accommodations or modifications are necessary to achieve that result, recipients must provide them absent undue hardship or a fundamental alteration of the program, activity, or service.

Comment: A professional association supported more accessible services for individuals with disabilities, and urged that these provisions recognize the specific needs of individuals with mental health conditions and cognitive disabilities to ensure that they receive services that are specifically tailored to their needs. The commenter suggested additional training for program staff to help staff recognize appropriate training and employment opportunities for such individuals.

Response: The statute and regulations require that no individual with a disability be excluded from participation from, denied the benefits of, or subjected to discrimination under any program or activity on the basis of disability,[262] and that qualified individuals with disabilities should have the same opportunity to participate in or benefit from any aid, benefit, service, or training.[263] By prohibiting discrimination and requiring equal opportunity and inclusion of individuals with disabilities, we believe that this final rule will ensure that all individuals with disabilities receive services that are tailored to their interests and abilities, including individuals with mental health conditions and cognitive disabilities. It is critical for recipients to maintain high expectations for program participants, and to provide opportunities based on the individual's interests and abilities, rather than on assumptions based on stereotypes regarding particular types of disabilities. In addition, recipients are required to provide reasonable modifications of policies, practices, and procedures where necessary to avoid discrimination against individuals with particular disabilities, and to provide auxiliary aids and services where necessary to ensure effective communication.

CRC agrees that training WIOA staff to understand these obligations is a best practice, but declines to explicitly mandate the specific training requested in the final rule. Each recipient is responsible for ensuring compliance with its obligations under WIOA and this part, including determining the appropriate types and frequency of staff training.

Comment: An advocacy organization urged CRC to include examples of how some of the nondiscrimination provisions apply in the context of WIOA Title I—funded entities. For example, providing reasonable accommodations to individuals with disabilities means that American Job Centers must, among other things, use accessible language where necessary to ensure that a person with an intellectual disability can fully participate in and benefit from Job Center services, programs and activities, and must use effective engagement strategies when needed to ensure full participation and benefit for a person with cognitive or psychiatric disabilities.

Response: The nondiscrimination provisions that apply to recipients under Section 188 with respect to individuals with disabilities are broad and expansive, effectively tracking similar nondiscrimination provisions in the ADA. For this reason, it is unlikely that providing a few examples of fact-specific discrimination within the regulatory text will be particularly useful. Therefore, CRC declines to provide additional examples in the text. However, additional examples of achieving universal access and equal opportunity can be found in the Department's recent guidance Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.[264]

[260] Section 14(c) refers to the Fair Labor Standards Act, 29 U.S.C. 214(c).

[261] 29 U.S.C. 794f.

[262] 29 U.S.C. 3248(a)(2).

[263] *See* § 38.12(a)(1).

[264] U.S. Dep't of Labor, Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide, *available at https://www.dol.gov/oasam/programs/crc/Section188Guide.pdf* (hereinafter ''Section 188 Disability Reference Guide'').

For these reasons, CRC adopts § 38.12 with the following changes: One change to paragraph (a)(1) to add an additional example regarding meaningful opportunities consistent with the Rehabilitation Act amendments in WIOA, and two changes to paragraph (a)(4): A grammatical correction (changing ''are'' to ''is'') and a clarification that the most integrated setting appropriate must be consistent with the Rehabilitation Act as amended by WIOA.

Accessibility Requirements § 38.13

The proposed rule added § 38.13, which did not have a counterpart in the 1999 or 2015 rule, to address the new emphasis Congress placed on ensuring programmatic and physical accessibility to WIOA Title I-financially assisted services, programs and activities. In no fewer than ten provisions of Title I of WIOA, Congress referred to recipients' obligation to make WIOA Title I-financially assisted programs and activities accessible.[265]

Proposed paragraph (a) addressed physical accessibility requirements and proposed paragraph (b) addressed programmatic accessibility requirements. The proposed programmatic accessibility language tracked language that Congress considered in 2005 in the context of debating amendments to WIA in an effort to improve accessibility to the workforce development system for individuals with disabilities.[266]

Comment: An advocacy organization and a State agency supported § 38.13(a)'s requirements for physical accessibility in existing facilities and new construction/alterations. An advocacy organization recommended CRC include examples of the steps recipients must take to ensure accessibility.

Response: The physical accessibility requirements that apply to recipients under Section 188 track long-standing accessibility requirements under the ADA and Section 504 of the Rehabilitation Act. For this reason, it is unlikely that providing a few examples of the requirements will be particularly useful. Therefore, CRC declines to provide additional examples in the text. However, additional examples can be found in Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.[267]

Comment: Several commenters addressed the programmatic accessibility requirements in § 38.13(b). Advocacy organizations and a State agency agreed with the definition of programmatic accessibility in § 38.13(b). Two advocacy organizations recommended the following change to ensure successful implementation of programmatic accessibility: Providing notice to individuals with disabilities of their right to programmatic accessibility, including verbal offers to provide information in an alternative format such as large font text, Braille, or electronic disc.

Response: Providing unsolicited verbal offers of information in alternative formats is contrary to the ADA, since it reflects another's perception or stereotype about particular disabilities. The individual is always free to request such an accommodation of auxiliary aids and services, and the obligation to provide such is only triggered upon such a request. As discussed above, CRC agrees it is important to provide written notice of the general availability of auxiliary aids and services to all participants. Accordingly, as discussed above in § 38.4(i), CRC amends the equal opportunity notice in § 38.35 to add that notification.

Comment: An advocacy organization suggested CRC add language to the final rule requiring ongoing training of program staff on what programmatic accessibility requires including best practices in promoting integrated and competitive employment, disability cultural competency, and examples of reasonable accommodations and modifications to policies, practices, and procedures.

Response: CRC agrees that training WIOA staff on programmatic accessibility requirements is a best practice, but declines to explicitly mandate that specific level of training in the final rule. Each recipient is responsible for ensuring compliance with its obligations under WIOA and this part, including determining the appropriate types and frequency of staff training. Recipients that are seeking additional guidance on these issues can consult Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.[268]

Comment: The advocacy organization also suggested CRC add requirements regarding modification of standard equipment, technology or software programs used by the Title I-financially assisted program or activity as assessment, diagnostic, training, or skills-building tools.

Response: These requirements are already contained within the rule. A recipient is required to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others, unless doing so would result in a fundamental alteration of a service, program, or activity.[269] In addition, a recipient must provide reasonable accommodations to qualified individuals with disabilities, unless providing the accommodation would cause undue hardship.[270] Moreover, a recipient must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity.[271]

Comment: The advocacy organization also recommended CRC add requirements regarding coordinating with other State services and benefit delivery systems.

Response: While CRC supports the coordination with other State services and benefit delivery systems as a best practice, we decline to require it in all cases. As discussed below, a certain level of coordination is required for Governors, facilitated by their State-level Equal Opportunity Officers (and described in their Nondiscrimination Plans). For other recipients, CRC prefers to allow more flexibility to structure their compliance with WIOA Section 188 and this part regarding such coordination.

For these reasons, CRC adopts § 38.13 as proposed, with the exception of a minor modification to § 38.13(a) to more accurately describe the source of some recipients' additional obligations regarding accessibility requirements.

Reasonable Accommodations and Reasonable Modifications for Individuals With Disabilities § 38.14

With the exception of an introductory clause in one paragraph, proposed § 38.14 retained the existing text from § 37.8 in the 1999 rule and § 38.8 in the 2015 rule.

[265] *See, e.g.,* 29 U.S.C. 3112(b)(2)(C)(vii), 29 U.S.C. 3122(b)(4)(A)(iii), 29 U.S.C. 3122(d)(6)(A), 29 U.S.C. 3122(d)(13).

[266] S. Rep. No. 109–134, 2005 WL 2250857, at *11 (2005).

[267] Section 188 Disability Reference Guide, *supra* note 264.

[268] Section 188 Disability Reference Guide, *supra* note 264.

[269] *See* § 38.15(d).

[270] *See* § 38.14(a).

[271] *See* § 38.14(b).

Comment: Several commenters provided comments on proposed § 38.14 regarding reasonable accommodations and modifications for individuals with disabilities. A State agency expressed concern about the threshold of proof required in § 38.14 to determine whether a modification places an undue burden on the recipient, and how that determination would be made. The commenter recommended modifying the language to incorporate the EEOC's role in evaluating the evidence presented on behalf of the recipient to determine the validity of their claim of undue hardship.

Response: The current language is sufficient without change. The definition of ''undue hardship'' in § 38.4 includes the factors to be considered in determining whether an accommodation would impose an undue hardship on a recipient. The threshold of proof is consistent with the ADA and the 1999 and 2015 rules. Requiring the EEOC to evaluate evidence to determine if it properly supports a claim of undue hardship goes beyond the scope of these regulations.

Comment: An advocacy organization suggested specific revisions to proposed § 38.14 to ensure accessibility and that recipients involve the individual seeking an accommodation in the process of deciding whether the requested accommodation will be provided. The commenter suggested additional language as follows (suggested additions in bold and deletions indicated with ellipses):

- In those circumstances where a recipient believes that the proposed accommodation would cause undue hardship, the recipient has the burden of proving that the accommodation would result in such hardship.
- The recipient must make the decision that the accommodation would cause such hardship only after considering all factors listed in the definition of ''undue hardship'' in § 38.44(rrr)(1). The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. **The written statement must meet readability standards that reflect the program participant's literacy level and plainly communicate the actual reasoning behind a conclusion that an accommodation would comprise an undue hardship.** The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the accommodation.
- If a requested accommodation would result in undue hardship, the recipient must, in consultation with said individual(s), take . . . other actions that would not result in undue hardship, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefit, service, training, or employment provided by the recipient.

Response: In paragraph (a)(2), the language is sufficient without change. Imposing a readability standard that reflects another's perception or stereotype about an individual with a disability's literacy level (absent a request to do so by the individual with a disability) is inappropriate, and contrary to the ADA and other federal anti-discrimination statues. The individual is always free to request such an accommodation or modification, and the obligation to provide such is only triggered upon such a request.

In paragraph (a)(3), CRC changes the provision to state ''after consultation with an individual with a disability (or individuals with disabilities).'' This revision is consistent with the requirements under the ADA.

Comment: A coalition of organizations representing the interests of individuals with disabilities argued that CRC needs to change the way covered entities handle the cost of ongoing accommodations for persons with disabilities. The commenters recommended that CRC implement regulations that encourage all entities covered under WIOA to adopt a centralized funding system to pay for the cost of reasonable accommodations for employment of persons with disabilities. The commenters asserted that when hiring managers have to pay for the cost of accommodations out of their division's budget, these managers have a powerful disincentive against hiring people with disabilities, especially those who need ongoing accommodations. Overall, the commenters stated that centralized funding systems would increase opportunities for persons with disabilities to secure jobs and promotions.

Response: While we support creative ideas like a centralized accommodation fund that increases the availability of accommodations, CRC believes that mandating such a solution is not necessary to ensure that recipients meet their obligations to provide reasonable accommodations to individuals with disabilities under WIOA and this part, and should therefore be up to individual recipients. In addition, it is outside the scope of this rule to require that recipients utilize a particular funding system to pay for accommodations.

Comment: A union stated that if further accommodations were necessitated by the proposed rule, additional funding may be needed to effectuate these accommodations.

Response: The final rule creates no new obligations for recipients regarding reasonable accommodations and modifications that were not already required by existing laws. Accommodations in the rule parallel those already required under the ADA and Section 504 of the Rehabilitation Act, as well as those that were required under the 1999 and 2015 rules.

Summary of Regulatory Changes

For the reasons described above and in the NPRM, and considering the comments received, CRC finalizes § 38.14 as proposed, with a modification to paragraph (a)(3) to clarify the consultation requirement.

Communications With Individuals With Disabilities § 38.15

Proposed § 38.15 revised paragraphs (a) and (b) from the 1999 and 2015 rules [272] to be consistent with DOJ's ADA Title II regulations. Proposed § 38.15 also contains new language regarding video remote interpreting services and accessible electronic and information technologies.

Comment: A coalition of organizations representing the interests of individuals with disabilities stated that part 38 of the proposed rule should be amended to ensure all nondiscrimination and equal opportunity provisions are applicable to all technological aspects in employment. With respect to Web sites, recipients should be required to caption all audio-based content, and such auditory content should also be provided in American Sign Language (ASL). Transcripts of video descriptions should be required to provide maximum access. Moreover, all relevant information should be fully accessible for persons with disabilities, including deafblind individuals.

Response: A recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and

[272] *See* 29 CFR 37.9 (1999 rule); 29 CFR 38.9 (2015 rule).

depends on a number of factors. There is no proactive requirement separate from an individual's request to provide auxiliary aids and services. We therefore decline to make a change with respect to the requirements regarding the provision of auxiliary aids and services.

Although CRC declines to require recipients to use specific Web site accessibility standards under this rule, recipients must ensure that information provided through electronic and information technology, such as on Web sites, is accessible to individuals with disabilities. In CRC's experience, where a recipient provides required information through Web sites, it may be difficult to ensure compliance with accessibility requirements without adherence to modern standards, such as the Section 508 Standards [273] or the WCAG 2.0 Level AA guidelines,[274] which include criteria that provide comprehensive Web accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, developmental, learning, and neurological difficulties. Accordingly, we strongly encourage recipients that disseminate information via Web sites to consider these specific standards as they take steps to ensure that their Web sites comply with the requirements of these regulations and with federal civil rights laws. Having considered these issues, and in the interest of clarity on this point, we revise the regulatory language in § 38.15(a)(5)(ii) to add examples of specific modern Web accessibility standards currently available.

Comment: An advocacy organization expressed support for the requirements for accessible electronic and information technology. However, a State agency commented that the provisions requiring recipients to utilize electronic and information technologies, applications, or adaptations that incorporate accessibility features for individuals with disabilities could preclude training providers from listing their training programs because of the extra cost to provide accessibility to an individual with disabilities.

Response: CRC notes that additional accessibility features will not necessarily cost more; in many cases the features are already built in or may be required by other laws. Accordingly, CRC declines to change the rule as suggested.

Comment: An advocacy organization supported the use of video remote interpreting in the proposed rule, reasoning that the rule allows for the use of VRI as an alternative to a live qualified interpreter. A coalition of organizations representing the interests of individuals with disabilities stated that CRC should not utilize the DOJ's definition of ''VRI'' because it is inadequate and vague and could lead to the use of a smartphone to be used to Skype the interpreter. The commenters stated that this would be problematic because VRI effectiveness would be dependent on the size of the cell phone screen and effective signal strength.

The commenters also raised numerous concerns about the effectiveness of VRI technology including malfunctioning of equipment and video quality. The commenters were concerned that the inclusion of VRI would lead to a decrease in onsite interpreters who have greater flexibility, access to environmental cues, and are not subject to technology or equipment malfunctions. Therefore, the commenters recommended that CRC add language to the final rule limiting the use of VRI to certain situations like brief meetings or appointments with the consent of the person with the disability. The commenters also stated that the regulations should provide guidance on how VRI should be used. Further, the commenters stated that VRI is not always an appropriate means of communication for all individuals with disabilities. The commenters added that any person who is given the responsibility to obtain an interpreter should conduct an analysis to determine whether VRI is appropriate based on the consumer's disability and preference between VRI and on-site interpreter.

Response: The current language, which mirrors the DOJ ADA Title II regulations, is sufficient. A recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. Thus, if VRI is not appropriate for a particular individual with a disability, the recipient must provide a different option, absent undue hardship. Of course, in most cases recipients and qualified individuals with disabilities must in good faith engage in an interactive process in which they exchange relevant information so the recipient may determine an effective accommodation, giving primary consideration to the request of the individual with the disability. This process should reveal whether VRI is appropriate for a particular individual.

Again, the type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In addition, with respect to video remote interpreting, there are particular requirements for how VRI should be used under § 38.15(a)(4) that address the speed, size, and quality of the service, which would in many cases limit the use of a smart phone for VRI.

For these reasons, CRC adopts § 38.15 as proposed, except for modifications in § 38.15(a)(5)(ii) to add examples of specific modern Web accessibility standards currently available, as well as technical changes (including a regulatory citation) [275] in § 38.15(c).

Service Animals § 38.16

The proposed rule added a new § 38.16 to provide direction to recipients regarding the obligation to modify their policies, practices or procedures to permit the use of a service animal by an individual with a disability. This section tracked the ADA Title II regulations issued by the DOJ regarding service animals.[276]

Comment: A coalition of advocacy organizations supported the inclusion of § 38.16 regarding a recipient's obligation to modify policies and practices to permit the use of a service animal. Another advocacy organization commended the Department for using the DOJ's ADA regulations and guidance, particularly with regard to service animals. However, the organization recommended that CRC follow DOJ's guidance more closely and, where the WIOA context does not require differences, CRC should incorporate and defer to the DOJ's ADA regulations by specific reference.

Response: In the interest of uniformity, the proposed rule tracked DOJ's ADA Title II provisions regarding service animals, as well as its definition of a service animal. As a matter of policy, CRC provides the full text of those provisions with appropriate modifications in its own regulations, rather than incorporating DOJ's by reference. In some instances, the specific DOJ provision may not be applicable to a recipient, or a different regulatory section may apply. In addition, this will prevent having to revise CRC regulations if the DOJ regulation is subsequently revised in a way that conflicts with this part.

Comment: A State agency recommended that CRC utilize the term

[273] 36 CFR part 1194.

[274] *See, e.g., http://www.w3.org/TR/WCAG20/.*

[275] 36 CFR part 1191, appendix B, section 103.

[276] 28 CFR 35.136.

''service dog'' to be consistent with the ADA.

Response: While DOJ's ADA 2010 Title II regulation limited service animals to dogs, the regulation continued to refer to them as ''service animals'' and not ''service dogs'' in both the definition and the specific regulatory section. Thus, the proposed rule is consistent with DOJ's current language, and should be readily understood by recipients and individuals with disabilities. For these reasons, CRC declines to make the suggested changes to proposed § 38.16.

Mobility Aids and Devices § 38.17

The proposed rule added a new § 38.17 to provide direction to recipients regarding the use of wheelchairs and manually powered mobility aids by program participants and employees. The new language is based on the DOJ ADA Title II regulations.[277] CRC received one supportive comment on this provision from a coalition of disability advocacy organizations, and adopts § 38.17 as proposed.

Employment Practices Covered § 38.18

CRC received no comments on this provision and, accordingly, adopts § 38.18 as proposed, with the exception of one technical change, replacing ''incorporated into this part by reference'' with ''adopted by this part'' in paragraph (d).

Intimidation and Retaliation Prohibited § 38.19

CRC received no comments on this provision and, accordingly, adopts § 38.19 as proposed.

Administration of This Part § 38.20

CRC received no comments on this provision and, accordingly, adopts § 38.20 as proposed.

Interpretation of This Part § 38.21

CRC received no comments on this provision and, accordingly, adopts § 38.21 as proposed.

Delegation of Administration and Interpretation of This Part § 38.22

CRC received no comments on this provision and, accordingly, adopts § 38.22 as proposed.

Coordination With Other Agencies § 38.23

CRC received no comments on this provision and, accordingly, adopts § 38.23 as proposed.

Effect on Other Laws and Policies § 38.24

CRC received no comments on this provision and, accordingly, adopts § 38.24 as proposed.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

Assurances

A Grant Applicant's Obligation To Provide a Written Assurance § 38.25

Section 38.25 of the proposed rule generally retained the existing requirements in § 38.20 for grant applicants. In § 38.25(a)(1), CRC proposed adding language to emphasize the existing obligation that, as a condition of an award of financial assistance under Title I of WIOA, a grant applicant assures that it ''has the ability to comply with the nondiscrimination and equal opportunity provisions of the following laws and will remain in compliance for the duration of the award of federal financial assistance.'' CRC proposed this revision because the 1999 and 2015 rules did not provide that this requirement applies for the duration of the award.

CRC received one comment from a coalition of organizations that strongly supported the revisions to the written assurance section.

CRC adopts § 38.25 as proposed with the exception of two technical changes: Moving the words ''by reference'' to the end of the last sentence in paragraph (a)(2), and adding the parenthetical phrase ''including limited English proficiency'' following ''national origin'' in paragraph (a)(1)(i)(A). CRC makes the latter change for the same reasons as discussed above in connection with the addition of the phrase to § 38.9(a) and for the sake of consistency with that and other provisions of the rule.

Duration and Scope of the Assurance § 38.26 and Covenants § 38.27

In proposed §§ 38.26 and 38.27, CRC retained the same language as in the 1999 and 2015 rules,[278] with the exception of revised section headings. CRC received no comments on these sections and therefore adopts §§ 38.26 and 38.27 as proposed.

Equal Opportunity Officers

Designation of Equal Opportunity Officers § 38.28

Section 38.28 proposed several changes to the 2015 rule's § 38.23 and the 1999 rule's § 37.23 and incorporated components from the 2015 rule's § 38.27, and the 1999 rule's § 37.27. First, § 38.28(a) proposed the requirement that the Governor designate a State-level EO Officer, who would report directly to the Governor. Paragraph (a) also required the State-level EO Officer to be responsible for statewide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA, and that the State-level EO Officer have staff and resources sufficient to carry out these requirements. Under paragraph (b), the NPRM proposed to require that each recipient, with the exception of small recipients and service providers, designate a recipient-level EO Officer, who must have staff and resources sufficient to carry out the requirements of this part. CRC received a total of 21 comments on these proposals.

Comment: Several State agencies requested clarification that the State-level EO Officer can be appointed by and report to the Governor's designee, rather than the actual Governor. In support of their position, two State agencies referenced the proposed subpart A definition of ''Governor'' to include ''the chief elected official . . . or [the Governor's] designee.'' These commenters indicated that allowing the State-level EO Officer to report to the Governor's designee, such as a director or liaison, gives State-level EO Officers the proper authority, visibility, and level of support needed to carry out their responsibilities.

Response: CRC agrees that the definition of ''Governor'' under proposed § 38.4(aa) included the ''Governor's designee'' as part of the definition of ''Governor.'' CRC has retained the reference to the Governor's designee in the final rule. Accordingly, the designated State-level EO Officer must report directly to the Governor or the Governor's designee, such as a director, liaison, or other appropriately titled official in the Governor's office, who has the authority of the Governor. CRC recognizes the autonomy that the Governors have in structuring their offices, but also emphasizes that State-level EO Officers must have the authority extended by the Governor to fulfill their responsibilities under Section 188. Because the Governor is ultimately responsible for ensuring compliance with the nondiscrimination and equal opportunity obligations within the State, CRC believes that the Governor is best suited to determine to whom the EO Officer should report.

Comment: Several commenters argued that the proposed rule's requirement to have a State-level EO Officer and a recipient-level EO Officer was duplicative and inefficient. A State

[277] 28 CFR 35.137.

[278] 29 CFR 37.21 and 37.22 (1999 rule); 29 CFR 38.21 and 38.22 (2015 rule).

agency argued that having a specific individual report to the Governor is burdensome, duplicative, confusing, and an undue hardship to States that would have to create a new EO Officer position or restructure their current EO Officer position. One State workforce agency requested clarity on whether the new State-level EO Officer who reports directly to the Governor would be established independently of a State's WIOA Title I-B administrative agency. The commenter requested clarification as to whether the new State-level EO Officer reporting directly to the Governor is a new position or is simply the same EO Officer.

Response: CRC disagrees with the assertion that this requirement would result in a duplication of efforts. Governors retain flexibility as to whom to designate as a State-level EO Officer, which includes the ability to restructure the current EO Officer position to meet the requirements of §§ 38.28 through 38.31. The requirement that recipients, including Governors, designate an EO Officer is longstanding and exists under the 2015 rule, just as it existed under the 1999 rule. In practice, most Governors have empowered a designee, typically, the director(s) of a State cabinet agency or agencies that oversee(s) labor and workforce programs, to appoint an EO Officer often times referred to as the State EO Officer. That EO Officer reported to the State agency cabinet director and, in practice, often limited oversight to the EO Officer's own specific agency.

However, the Governor has obligations beyond the duties of a recipient to ensure nondiscrimination and equal opportunity across all State Programs including State Workforce Agencies. Indeed, under certain circumstances the Governor can be held jointly and severally liable for all violations of these nondiscrimination and equal opportunity provisions under § 38.52, which includes State Workforce Agencies as defined in § 38.4(lll), and State Programs as defined in § 38.4(kkk). This final rule's requirement serves to emphasize the importance of the Governor's obligations, and ensure that a State-level EO Officer can carry out those obligations—with authority flowing from the Office of the Governor and with the staff and resources sufficient to carry out those requirements.

The changes in the rule do not remove the flexibilities available to a Governor to determine how the equal opportunity program works in the State, and is described in the Governor's Nondiscrimination Plan. For example, the Governor can designate a new State-level EO Officer or restructure a current EO Officer position as the Governor's State-level EO Officer. As noted above, the rule also does not change the definition of ''Governor,'' and an individual designated to act on the Governor's behalf may also carry out the responsibilities of the Governor under this part. In that case, the Governor's authority to ensure equal opportunity would flow to the Governor's designee and, in turn, to the State-level EO Officer. The State-level EO Officer would then have the authority necessary to carry out the Governor's equal opportunity obligations.

In response to these comments, and to provide more clarity, CRC inserts subheadings in the regulatory text as follows: ''Governors'' in § 38.28(a) and ''All recipients'' in § 38.28(b). The final rule also clarifies the distinction between the ''State-level EO Officer'' for the Governor in paragraph (a) and the ''recipient-level EO Officer'' for all recipients in paragraph (b). These modifications are intended only to clarify § 38.28 as proposed and are not intended as substantive changes.

Comment: Several State agencies questioned how the EO Officer and support staff would be funded and asserted that the requirement adds an additional staff member without additional funding. The commenters argued the proposed rule would divert much needed funding away from job training towards administrative costs for the new EO Officer and additional staff. Relatedly, a State labor agency argued that WIOA funding was insufficient to support the proposed rule's requirement that the EO Officer has sufficient funds and resources.

Response: CRC disagrees with the commenters' assertions that this rule requires additional staff or funding that would lead to underfunding in other areas. Regarding the commenter's concern that statutory funding is insufficient to support the proposed rule's requirement that EO Officers have sufficient funds and resources, CRC believes the changes to the rule requiring a State-level EO Officer will allow States to become more efficient while implementing a more effective equal opportunity program. An individual with the requisite knowledge, skills and abilities coupled with the authority provided by reporting to the Governor, will enhance the State's ability to develop an efficient and effective nondiscrimination program. Those efficiencies result because the new State-level EO Officer will improve the coordination of the recipient-level EO Officers for all of the State Programs. The Governor or designee and State-level EO Officer should rely on the Nondiscrimination Plan as the planning tool to eliminate duplication of staff efforts and to ensure appropriate delegation of duties. CRC is available to provide technical assistance in this regard. Otherwise, specific funding levels are beyond the scope of this rule.

With respect to the Governor's obligations, as mentioned above in this section, the Governor retains discretion in structuring the State-level EO Officer position. The Governor has the option of creating a new State-level EO Officer position or retaining the current EO Officer to serve as the State-level EO Officer. In this regard, the Governor controls how these positions are funded. The rule does not require the Governor to hire additional staff to meet these obligations unless necessary to provide the State-level EO Officer with the resources sufficient to meet the obligations under this part. CRC anticipates that current State EO Officers will in certain States become the Governor's State-level EO Officer, and recognizes that, in practice, the Governor can combine these positions into a single position within the parameters of this part.

Comment: A State workforce development board requested an exemption from the proposed rule's requirement that the State-level EO Officer should report directly to the Governor when the EO Officer has direct access to the Governor. The commenter argued that its State is a single-State-area with only one Workforce Investment Board and its Executive Director is a cabinet member of the Governor's administration and thus reports directly to the Governor.

Response: All Governors have the obligation to designate a State-level EO Officer. In the example the commenter offered, the Executive Director of the Workforce Development Board reports directly to the Governor. If the Governor designates the Executive Director as discussed above, the State-level EO Officer could report to the Executive Director.

Comment: Several State agencies and a private citizen commented that the EO Officers currently have enough authority and CRC was well equipped under existing regulations to ensure that EO Officers have the authority and resources to do their job. These commenters encouraged CRC to conduct a thorough analysis of the Methods of Administration (renamed in the NPRM as the ''Nondiscrimination Plan'') and work immediately with the States, when needed, to ensure that the EO Officer has available resources and is placed in a position of authority with sufficient

visibility and support to carry out the responsibilities under this part.

Response: CRC acknowledges that some States may already provide EO Officers with the requisite authority and resources to ensure compliance with nondiscrimination and equal opportunity provisions. However, it has been CRC's experience that often times EO Officers are completely removed from the reporting chain to the Governor, or the authority granted the EO Officer is limited to the agency which the EO Officer oversees. The revisions in the final rule in § 38.28 resolve these issues. By requiring State-level EO Officers to report directly to the Governor, who is ultimately responsible for ensuring nondiscrimination and equal opportunity in all State Programs, the Governor will be more knowledgeable about the nondiscrimination and equal opportunity issues faced by the WIOA Title I-financially assisted programs and activities and will be in a better position to effectively administer the required Nondiscrimination Plan in § 38.54. While CRC is available to provide technical assistance to all recipients and their EO Officers, CRC declines, however, to assume from the Governor the obligation to monitor the authority and resources of the State-level EO Officers. That responsibility remains with the Governor.

Comment: One State agency said that moving the equal opportunity monitoring function directly under the Governor would separate the equal opportunity and program compliance monitoring functions between two different governmental entities, leading to less efficiency in overall program monitoring and economic inefficiencies. That State agency also commented that monitoring programs under WIOA is not an appropriate function for the Governor's office. A different State agency commented that it would be impractical for the State-level EO Officer to report directly to the Governor. Another State agency argued that the proposed rule failed to consider the flexibility that WIOA gives States to organize and administer their workforce development system. Several commenters expressed frustration that the proposed rule requires the designation of a recipient-level EO Officer for each recipient and does not dictate how a State must organize this function.

Response: As mentioned above, proposed § 38.28 required a State-level EO Officer to direct the flow of information directly to the Governor, who is already responsible for ensuring compliance with the nondiscrimination and equal opportunity provisions in part 38. CRC disagrees with the commenters' assertion that it is not an appropriate function for the Governor's Office to monitor programs. The monitoring and oversight obligations of the Governor have existed dating back at least to the 1999 rule, as has the requirement that each recipient designate an EO Officer.[279] CRC believes that requiring each recipient to designate at least one recipient-level EO Officer is essential to ensure appropriate monitoring of the recipient's individual compliance with WIOA Section 188 and this part.

CRC agrees with commenters that States should have flexibility in deciding the structure and function of the State-level EO Officer position and other recipient-level EO Officer positions, within the requirements of this part. For that reason, as addressed above, Governors have the autonomy to structure the State-level EO Officer position according to the needs of their States. Governors need not separate equal opportunity from program compliance monitoring functions provided that the appropriate EO Officer receives the results of the equal opportunity monitoring and can act appropriately to ensure equal opportunity and nondiscrimination. The Governor may designate a current EO Officer as the State-level EO Officer. This requirement does not mandate that the Governor create a new State-level EO Officer position through a new placement. An individual could serve as both the State-level EO Officer and as a recipient-level EO Officer provided there is no conflict of interest[280] and that the individual has sufficient staff and resources to properly perform both the duties of the State-level EO Officer position and the recipient-level EO Officer position.

Furthermore, CRC has retained the definition of ''Governor'' to include the Governor's designee. Therefore, CRC disagrees that the new reporting structure is impractical. This provision allows the Governor the proper flexibility and discretion needed to determine the manner in which to delegate authority, while also providing the State-level EO Officer the requisite authority to ensure compliance with this part.

Comment: A state agency argued that the revised definitions in §§ 38.28 and 38.29 should be deleted because they would expand the number of EO Officers and increase duplication of effort and expense, and could discourage the participation of non-mandatory partners. The commenter attributed this to its belief that the proposed rule expanded the definition of recipient to include not just State Workforce Agencies, but also State-level partner agencies, State and local workforce boards, one-stop operators, and others. The state agency commented that inclusion of on-the-job training employers would ''kill'' their programs.

Response: Again, CRC disagrees that these provisions will result in a duplication of effort and expense. Recipients retain flexibility as to whom to designate as their recipient-level EO Officers, which includes the ability to restructure a current recipient-level EO Officer position to meet the requirements of §§ 38.28 and 38.29. Moreover, a recipient-level EO Officer with the requisite knowledge, skills and abilities coupled with the authority provided by reporting to the highest level of the recipient will enhance the recipient's ability to develop an efficient and effective nondiscrimination program, including coordination with other EO Officers to avoid duplication.

Although the definition of ''recipient'' in proposed § 38.4(zz) expanded to include federally operated Job Corps Centers, CRC proposed no other change to this definition. CRC has consistently included state-level partner agencies, state and local workforce investment boards, one-stop operators, and on-the-job training employers as part of the definition of ''recipient'' in the 1999 and 2015 rules. The inclusion of these entities in the definition of recipient remains appropriate. Moreover, we note that as the requirement to designate an EO Officer has existed, CRC believes that most large, on-the-job training providers are already compliant, and small providers do not have all of the same obligations as other recipients under WIOA and this part.[281]

Comment: Several commenters discussed CRC's authority under WIOA to implement § 38.28. One State agency argued that CRC did not have the authority under WIOA to require a State to appoint a State-level EO Officer, mandate that the State-level EO Officer must report directly to the Governor, and dictate the structure for program administration. Similarly, another commenter argued that Section 188 provides no authority for the Department to prescribe the reporting structure for the individual designated

[279] 29 CFR 37.54(d)(2)(ii) (1999 rule); 29 CFR 38.54(d)(2)(ii) (2015 rule).

[280] § 38.30 (EO Officers ''must not have other responsibilities or activities that create a conflict or the appearance of a conflict with the responsibilities of an EO Officer'').

[281] *See* §§ 38.4(hhh) and 38.32.

by the Governor to serve as the State-level EO Officer.

Response: CRC disagrees with commenters' characterization of CRC's authority under WIOA Section 188. As an initial matter, Section 188 of WIOA delegates to the Secretary of Labor the responsibility for enforcing this section through implementing regulations. The Secretary has delegated to CRC the authority to enforce Section 188 of WIOA and thus to promulgate this rule. It is CRC's responsibility to ensure that access to any WIOA Title I-financially assisted program, service, or benefit is free from discrimination. Thus, CRC has the authority to promulgate regulations that will be most effective in accomplishing this goal, including mandating the reporting structure for recipients that receive WIOA Title I financial assistance to ensure effective monitoring and compliance.

Moreover, the relationship between the Governor and the State-level EO Officer is not unique to this final rule. As a recipient, the Governor, just like all other recipients, has been required under the 1999 and 2015 rules to designate an EO Officer, and the practice, as CRC understands it, was to have that EO Officer serve as the State EO Officer with the responsibility for the Governor's Methods of Administration (MOA). However, as discussed above, that State EO Officer may not have held the authority to effectively implement the MOA, monitor compliance by all State Programs, and then ensure accountability. By requiring the State-level EO Officer to report to the Governor, the Governor will have a specific individual with the distinct responsibilities for coordinating compliance with the nondiscrimination and equal opportunity provisions in WIOA and this part, throughout the State, as described in the Nondiscrimination Plan, formerly the Methods of Administration.

Comment: Several commenters argued that the proposed requirement that the Governor appoint a State-level EO Officer would weaken that office's position and make it susceptible to political pressure. These commenters argued that State-level EO Officers may be hesitant to take on controversial positions because the Governor could terminate the State-level EO Officer for any reason. Several commenters also pointed out that the State-level EO Officer position would be subject to frequent turnover upon a change in the Governor's administration. These commenters argued that this would be detrimental to the performance and continuity of the programs.

Response: Regardless of political turnover in respective States' Governors' offices, Governors and State-level EO Officers are expected to comply with the provisions in this part. State-level EO Officers who report directly to the Governor strengthen oversight and allow the Governor to make informed decisions to ensure nondiscrimination and equal opportunity. Moreover, the final rule does not require that the State-level EO Officer be a political employee whose term is limited by that of the Governor. CRC notes that recipients are prohibited from engaging in employment discrimination on the basis of political affiliation with respect to employment that is in the administration of or in connection with any WIOA Title I-funded program. Thus, CRC anticipates that State-level EO Officers will complete their required tasks free from political pressure and regardless of administration turnover.

Summary of Regulatory Changes

In response to the comments received, CRC has revised § 38.28 to clarify further the distinction between Governors and recipients generally, but has not made any substantive changes to the proposed rule. CRC modifies § 38.28(a) and (b) to include the subheadings ''Governors'' and ''All recipients,'' respectively. CRC also clarifies the distinction between the State-level EO Officer for the Governor in paragraph (a) and the recipient-level EO Officer for all recipients in paragraph (b), including by changing ''statewide'' to the more precise ''State Program-wide'' in paragraph (a). As discussed in response to a comment below, CRC further revises paragraph (b) to specify the level of the official to whom the recipient-level EO Officer must directly report, with specific examples.

Recipients' Obligations Regarding Equal Opportunity Officers § 38.29

The proposed rule relocated this section to highlight the importance of all recipients' responsibilities regarding their EO Officers. As indicated in the NPRM, proposed § 38.29 is applicable to the EO Officers of all recipients, including the Governor.

In proposed § 38.29(a), CRC incorporated the existing obligation that the EO Officer be a senior level employee. CRC added to this provision that the EO Officer, as a senior-level employee, report directly to the Chief Executive Officer, Chief Operating Officer, or equivalent top-level official of the recipient. CRC explained that the proposed change in paragraph (a) was to ensure that EO Officers have the requisite authority to successfully carry out the responsibilities in this part. Proposed paragraph (b) added a requirement to designate an EO Officer who can fulfill the responsibilities as described in § 38.31. This provision was proposed to ensure that EO Officers have the required capabilities to comply with their obligations under this part. CRC received four comments on these changes.

Comment: A State agency and a coalition of organizations commented that they supported § 38.29 because it would ensure that EO Officers have adequate authority and staffing to carry out their duties.

However, a State labor agency argued that § 38.29's requirement that the EO Officer be a senior level employee who reports directly to the Chief Executive Officer was contradictory to § 38.28's requirement that the EO Officer report to the Governor who is defined as ''the Chief Elected Official . . . or the Governor's designee.'' The commenter also noted that ''Chief Executive Officer'' was not defined in the proposed regulations. A State workforce development board requested clarification on CRC's definition of Chief Executive Officer or Chief Operating Officer. The commenter asked whether CRC's definition would include Executive Directors of State Workforce Agencies designated as the WIOA Fiscal Agent, Grant Recipient, State Administrative Entity, and WIOA Liaison.

Response: Section 38.29 is consistent with the provisions found in §§ 38.28 and 38.30 and details all recipients' obligations regarding their EO Officers. In response to the comments received, CRC revises §§ 38.28(b) and 38.29 to clarify the distinction between the Governor's responsibilities as to the State-level EO Officer and those of all recipients generally regarding EO Officers, but is not making any substantive changes from the NPRM to proposed § 38.28(a) or § 38.29. As did the proposed rule, the final rule requires that two types of EO Officers be designated.

First, § 38.28(a) provides that the Governor must designate a State-level EO Officer who reports directly to the Governor or designee. That State-level EO Officer is responsible for overseeing the obligations of the Governor to coordinate and monitor compliance State Program-wide with this part. Second, § 38.28(b) provides that each recipient must designate a recipient-level EO Officer that reports to the highest-level official of that recipient, to coordinate that recipient's compliance with this part. Because a Governor may

also be a recipient, the position of ''Governor'' appears in § 38.28(b) as an example of the ''highest-level'' official of the entity that is a recipient. The recipient-level EO Officer designated by the Governor in the Governor's role as recipient, however, is only responsible for compliance in that program, and thus has a different role than the State-level EO Officer who is responsible for State Program-wide compliance. Nevertheless, a recipient-level EO Officer may also serve as the State-level EO Officer, provided there is no conflict of interest and that individual has sufficient staff and resources to adequately perform the duties of both positions.

Next, §§ 38.29 through 38.31 apply to both types of EO Officers (State-level and recipient-level). Thus, to add clarity, CRC revises the title of § 38.29 and the section's introductory sentence to specify that ''All recipients have the following obligations related to their EO Officers.'' These clarifications will improve readability and address commenters' concerns that § 38.29(a) contradicts the requirement that the State-level EO Officer report directly to the Governor in § 38.28(a).

CRC emphasizes that the requirements for EO Officers generally in §§ 38.29 through 38.31 apply to all EO Officers, whether State-level or recipient-level. The State-level EO Officer, however, will have additional responsibilities in connection with the Governor's monitoring and oversight of State Programs. Thus, the State-level EO Officer has the same responsibilities and qualifications of a recipient-level EO Officer, but with the additional mandate to carry out the Governor's obligations. As indicated in § 38.28(a), State-level EO Officers are responsible for State Program-wide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA and this rule.

CRC declines to define the terms Chief Executive Officer, Chief Operating Officer, or equivalent official in the final rule. The purpose of this provision is to ensure that EO Officers report to the top-ranking official within the entity that is the recipient, who is responsible for overseeing compliance of that recipient. Rather than provide a description, CRC has provided more examples of the titles that such officials may have. In the final rule, CRC revises § 38.28(b) to specify that all recipients must designate a recipient-level EO Officer, ''who reports directly to the individual in the highest position of authority for the entity that is the recipient, such as the Governor, the Administrator of the State Department of Employment Services, the Chair of the Local Workforce Development Board, the Chief Executive Officer, the Chief Operating Officer, or an equivalent official.'' This revision provides more examples of the level of officials to whom the recipient-level EO Officer must report, and incorporates the same language as is included for all EO Officers in final § 38.29(a).

Comment: Referring to proposed § 38.30, a State agency recommended that, instead of requiring that the EO Officer be a senior-level employee, the EO Officer could hold a middle management position with access to the Governor's designee. The commenter stated that, if the EO Officer must be a senior level employee with additional staffing, then there should be shared funding.

Response: As mentioned in the NPRM and above, CRC wants to ensure through these provisions that EO Officers have the requisite authority to effectuate compliance with WIOA Section 188 and this part. CRC retains the requirement that the EO Officer must be a senior level employee. The 1999 rule at § 37.24 and the 2015 rule at § 38.24 required that the EO Officer be a senior level employee; that requirement has not changed. Thus, the same provisions in this final rule require no additional funding to implement. As to the requirement in proposed and final §§ 38.28(a) and (b) and 38.29(e) that the EO Officer have sufficient staff to ensure compliance, CRC notes that the 1999 rule at § 37.26(c) and 2015 rule at § 38.26(c) already required that the recipient assign sufficient staff and resources to the EO Officer. Thus, this provision is not new either and consequently should require no additional funding to implement. Regarding the commenter's suggestion to require ''shared funding,'' the allocation of specific funds is beyond the scope of this rule.

Summary of Regulatory Changes

For the reasons described in the proposed rule and considering the comments received, CRC finalizes proposed § 38.29, with some modifications. CRC modifies the title and introductory sentence to state: ''All recipients have the following obligations related to their EO Officers.'' Additionally, CRC revises paragraph (a) to further describe the EO Officer's authority to report directly to ''the individual in the highest position of authority for the entity that is the recipient,'' and provides additional examples of the titles of those officials, ''such as the Governor, the Administrator of the State Department of Employment Services, the Chair of the Local Workforce Development Board the Chief Executive Officer, the Chief Operating Officer, or equivalent top-level official of the recipient.'' CRC also makes a grammatical correction to paragraph (d) (changing ''appears'' to ''appear'').

Requisite Skill and Authority of Equal Opportunity Officer § 38.30

Together with proposed §§ 38.28 and 38.29, proposed § 38.30 was intended to emphasize the level of authority recipients must give to the EO Officer and the capabilities of the person holding that position. This provision explained that the EO Officer must be a senior level employee of the recipient who possesses the knowledge, skills, and abilities necessary to competently fulfill the responsibilities of the EO Officer, described in this part. The provision also states that the EO Officer may be assigned other duties but must not have other responsibilities or activities that create a conflict or the appearance of one. CRC received six substantive comments regarding this provision.

Comment: A State agency and State workforce development board supported the requisite skill and authority given to the EO Officer in § 38.30. The State agency commented that this provision would ensure that the Governor would not have reservations delegating authority to the EO Officer because the EO Officer would be qualified to enforce compliance with WIOA and would be accountable for any conflicts of interest. The State workforce development board recommended that similar requirements for skill and authority be in place for Equal Opportunity Liaisons that are assigned to individual American Job Centers or be required in each State ''Nondiscrimination Plan.''

Response: CRC appreciates the commenters' support for proposed § 38.30. In the final rule, CRC adopts proposed § 38.30 and declines to require States to include language in the Nondiscrimination Plan regarding Equal Opportunity Liaisons. Some, but not all States, have the Equal Opportunity Liaison position. While CRC agrees that Equal Opportunity Liaisons should have sufficient authority and skills, CRC declines to require recipients to have such a position or to include regulatory provisions addressing that position. Thus, unless the Equal Opportunity Liaison also serves as an EO Officer, the EO Liaison position is outside of the scope of this rule's requirements. However, States are not restricted from listing skills needed for other positions

such as the EO Liaison position in their Nondiscrimination Plans.

Comment: An advocacy organization recommended that the EO Officer be provided training on disability discrimination and disability issues.

Response: While CRC generally agrees that the EO Officer should, as a best practice, be trained on disability discrimination, CRC declines to single out a specific protected category about which EO Officers should be trained. CRC believes that the legitimate exercise of discretion regarding training on disability and other protected bases is best left with recipients. Section 38.30 only requires that the EO Officer possess the knowledge, skills, and abilities that are necessary to comply with this part. CRC notes that § 38.31(f) also requires that EO Officers undergo training (at the recipient's expense) to maintain competency, which would include training related to disability discrimination along with all of the other protected bases under Section 188 and this part. Accordingly, CRC declines to specify in the final rule that recipients must provide disability discrimination training for EO Officers.

Comment: A State agency noted that ''size'' is not defined and requested an explanation as to when a recipient is large enough to warrant a dedicated EO Officer. The commenter recommended that any restrictions on what an agency can and cannot do with their staff was overly intrusive and should be stricken.

Response: CRC disagrees that the requirements in proposed § 38.30 are intrusive. CRC declines to modify the provision that precludes the EO Officer from having other responsibilities whenever the size of the recipient, or the size of its WIOA Title I—funded programs, would prevent the EO Officer from competently fulfilling the duties of the office. CRC in this provision has given recipients the flexibility to assign other duties to the EO Officer as long as those duties do not interfere with the EO Officer duties or present an actual or apparent conflict. The proposed rule does not define ''size'' as used in § 38.30 because CRC wants to give recipients the flexibility to structure their workforces in the manner that best meets their needs, while still complying with this part. For that reason, the rule does not require in all cases that EO Officers be dedicated exclusively to their duties under this part.

Moreover, regarding when a recipient would be considered a small recipient, the 1999 rule, the 2015 rule and the proposed rule defined ''small recipient'' in § 38.4(hhh) as a recipient who: (1) Serves a total of fewer than 15 beneficiaries during the entire grant year; and (2) employs fewer than 15 employees on any given day during the grant year. As indicated in the 2015 rule and proposed rule §§ 38.28(b) and 38.32, small recipients do not need to designate recipient-level EO Officers. Thus, any recipient who qualifies as a small recipient under § 38.4(hhh), or as a ''service provider'' under § 38.4(ggg), is not obligated to designate a recipient-level EO Officer.

Equal Opportunity Officer Responsibilities § 38.31

Most of the language in the 1999 and 2015 rules was retained in proposed § 38.31, with some additions. Proposed § 38.31 added new language in paragraph (d) clarifying the existing requirements that the EO Officer develop and publish the recipient's procedures for processing discrimination complaints by adding examples of specific procedures to be included and that the EO Officer make sure that those procedures are followed, including by tracking the discrimination complaints filed against the recipient, developing procedures for investigating and resolving discrimination complaints, and making available to the public, in appropriate languages and formats, the procedures for filing a complaint. Proposed paragraph (e) added to the EO Officer's responsibilities an outreach and education requirement, which recipients were already required to undertake pursuant to the 1999 and 2015 rules.[282] In addition, the NPRM deleted § 38.25(e), which addressed reporting lines of authority for the Equal Opportunity Officer because those reporting lines are now addressed in the final rule under §§ 38.28 and 38.29(a). Finally, the NPRM proposed language in paragraph (f) to clarify that the existing training obligation for the EO Officer includes EO Officer staff training. CRC received seven comments on these provisions.

Comment: A State workforce development board supported § 38.31, describing the requirements as well-defined. The commenter also recommended that this provision be added to requirements that apply to Equal Opportunity Liaisons. The commenter also stated that, if the provision was not included in the final rule, then the Department should consider including it within the State Nondiscrimination Plan.

Response: While CRC generally agrees that persons other than the EO Officers may be involved in overseeing or monitoring compliance with the nondiscrimination and equal opportunity provisions as set out in this subpart, CRC declines to regulate each of these positions and their responsibilities. As mentioned in the section above, CRC does not regulate EO Liaisons that States may designate to help fulfill their obligations under part 38 unless they also serve as EO Officers. Instead, CRC's focus is on the EO Officer and that individual's responsibilities. States have the flexibility, however, to decide how best to incorporate EO Liaisons and their responsibilities within the structure of their programs. States are not prohibited from listing skills needed for other positions such as the EO Liaison in their Nondiscrimination Plans. In fact, CRC encourages this practice, but declines to make it a requirement.

Comment: Some commenters requested clarification of the EO Officer's responsibilities. A State workforce agency asked whether employee complaints in the agency would be the responsibility of the ''State EO Officer'' or other human resources staff.

Response: The recipient-level EO Officer is responsible for developing and publishing the recipient's procedures for processing discrimination complaints, including covered employee complaints, and for making sure those procedures are followed as described in § 38.72. The State-level EO Officer oversees all recipient-level EO Officers assigned to State Programs. Since States retain flexibility to structure their equal opportunity staff as they deem necessary to comply with this part, a State could require the recipient-level EO Officer to process complaints, or to oversee human resources staff that handle complaint processing, provided no conflict of interest exists and human resources staff have the requisite knowledge to fulfill equal opportunity responsibilities. Again, the recipient-level EO Officer is accountable for overseeing that process, ensuring there is no conflict of interest, and confirming that the process complies with Section 188 of WIOA and this part.

Comment: One commenter asked whether the Department would allocate funding for trainings because the proposed rule stated that budgetary restrictions are not a sufficient excuse for not sending EO Officers to training.

Response: As mentioned in the NPRM, EO Officers reported to CRC that they were unable to attend trainings for budgetary reasons. CRC rejected budgetary reasons as a basis for recipients to deny training opportunities

[282] 29 CFR 37.42 (1999 rule); 29 CFR 38.42 (2015 rule).

to EO Officers and their staff. CRC continues to believe that recipients must permit their EO Officers and staff to participate in such training whenever necessary to ensure that EO Officers and their staff have the requisite knowledge to comply with their responsibilities under this part. Furthermore, under proposed § 38.25 (§ 38.20 in the 2015 rule and § 37.20 in the 1999 rule), in their written assurances, grant applicants agree to comply fully with the nondiscrimination and equal opportunity provisions in this part. Providing training to EO Officers and their staff is part of that obligation. The requirement to provide training for the EO Officer and staff has existed for years. Indeed, under the 2015 rule at §§ 38.25(f) and 38.26(d), and the 1999 rule at §§ 37.25(f) and 37.26(d), recipients were required to ensure that the EO Officer and staff were afforded the opportunity to receive the training necessary and appropriate to maintain competency. CRC retains this requirement in the final rule in § 38.31(f). Allocation of funding for specific expenses is beyond the scope of this rule.

Comment: A State agency requested clarification on how or whether the State-level EO Officer and the recipient-level EO Officer would coordinate monitoring activities. The commenter argued that this oversight could be time-consuming and costly for State agencies because, for example, a one-stop operator would be monitored at a minimum of three times a year: By the State-level EO Officer, the recipient-level EO Officer of at least one state-level agency partner, and by the local Workforce Development Board or LWDA grant recipient. One commenter suggested that CRC should provide the policy, procedure, and forms on processing, investigating, and tracking a complaint. The commenter argued that this would unify the procedures and allow all States to provide a uniform result.

Response: CRC understands the commenter's concerns about cost and time management issues, but reiterates that such concerns do not relieve recipients from complying with Section 188 of WIOA or this part. CRC believes that the Nondiscrimination Plan will be an effective tool to help States coordinate efforts and avoid duplicative costs and drafts this final rule to give States the flexibility to determine how State-level and recipient-level EO Officers should coordinate monitoring activities. The final rule retains the EO Officer's responsibilities to develop and publish the recipient's procedures for processing complaints, which recipients are currently required to do under the 2015 rule in §§ 38.76 and 38.77, and were required to do under the 1999 rule in §§ 37.76 and 37.77.

As to whether CRC should provide the policy, procedure and forms that the commenter requests, CRC notes that the EO Officer is the recipient's employee likely to be the best suited to help recipients develop and publish procedures for processing discrimination complaints and the investigatory practices that occur thereafter. CRC believes it has provided sufficient criteria for recipients and their EO Officers related to the processing and tracking of complaints. The requirements in subpart D include a subheading titled ''Complaint Processing Procedures,'' beginning at § 38.69, which includes sections that identify, among other things, the required contents of a complaint, required elements of a recipient's complaint processing procedures, and the recipient's obligations as to complaints generally. CRC believes its detailed provisions in this rule provide sufficient direction to help recipients develop and publish procedures for processing discrimination complaints. Recipients also are encouraged to contact CRC for technical assistance.

Comment: A local workforce agency stated that implementation of the proposed rule would take more than six months and possibly more than a year. The commenter recommended that CRC mandate that State-level EO Officers hold training sessions for local EO Officers on a quarterly basis. The commenter argued that training would help with interpretation of the rule and help the State unify its objectives to ensure that the State-level EO Officer is providing the best oversight and implementation of Section 188 of WIOA.

Response: CRC appreciates the commenters' concerns regarding implementation and training. However, the 30-day effective date for the final rule provides recipients with sufficient time to come into compliance. CRC notes that most of the requirements in the final rule are obligations that currently exist. For those provisions where CRC believes that more time is needed for implementation, CRC has explicitly provided that additional time in the regulatory text.[283]

With respect to the suggestion that State-level EO Officers be required to train recipient-level EO Officers on a quarterly basis, CRC understands the commenters' concern, but declines to impose that requirement in this rule. CRC wishes to retain States' flexibility in deciding how often training should be conducted, so long as they are complying with their overall obligations in this part. The requirements in §§ 38.29(f) and 38.31(f) emphasize that the EO Officer and staff receive training necessary to maintain competency. In that regard, the revisions set forth in §§ 38.28 through 38.30 modifying the reporting structure of the State-level EO Officers and the management level of the recipient-level EO Officer now puts Governors and recipients in the best position to determine the frequency of training needed for State-level EO Officers and other EO Officers to maintain competency to enable them to ensure compliance with this rule.

Small Recipient Equal Opportunity Officer Obligations § 38.32

Proposed § 38.32 replaced the word ''developing'' with ''adopting'' because small recipients may not be required to develop complaint procedures and process complaints. Governors have the discretion to prescribe the complaint processing procedures applicable to small recipients pursuant to § 38.73. CRC received no comments on this provision and adopts § 38.32 as proposed.

Service Provider Equal Opportunity Officer Obligations § 38.33

The NPRM modified the title of § 38.28 to ''Service provider Equal Opportunity Officer obligations'' and renumbered it as § 38.33. CRC received no comments on this provision and adopts § 38.33 as proposed.

Notice and Communication

Recipients' Obligations To Disseminate Equal Opportunity Notice § 38.34

Proposed § 38.34 retained language from the 1999 and 2015 rules,[284] while incorporating minor revisions to paragraphs (a)(6) and (b). Proposed § 38.34(a)(6) added a requirement that the equal opportunity notice be provided to ''those with limited English proficiency.'' Similarly, § 38.34(b) proposed that the notice be provided ''in appropriate languages to ensure meaningful access for LEP individuals as described in § 38.9.'' Proposed § 38.9

[283] For example, recipients have two years after the effective date of this rule to update their data collection of LEP individuals' primary and preferred languages under § 38.41(b)(2). Section 38.55 also provides an additional 180 days for States to develop and implement their initial Nondiscrimination Plans. Furthermore, § 38.36(d) gives recipients up to 90 days to comply with the new equal opportunity notice requirements in §§ 38.34 and 38.35.

[284] 29 CFR 37.29 (1999 rule); 29 CFR 38.29 (2015 rule).

included recipients' obligation to provide written translations of vital documents for LEP populations. We received no comments exclusively pertaining to this provision,[285] and adopt § 38.34 as proposed.

Equal Opportunity Notice/Poster § 38.35

Section 38.35 proposed the specific wording recipients must use in their equal opportunity notices and posters. CRC retained most of the language from the 1999 and 2015 rules.[286] Proposed § 38.35 added the term ''poster'' to the title, noting an explicit requirement that the notice be posted in conspicuous physical locations and on Web site pages. Proposed § 38.35 also added parentheticals to the required wording, explaining that ''sex'' as a prohibited basis for discrimination includes ''pregnancy, child birth, and related medical conditions, sex stereotyping, transgender status, and gender identity'' and ''national origin'' includes ''limited English proficiency.'' Section 38.35 proposed these changes to be consistent with current law and to remind beneficiaries and recipients that discrimination based on these subcategories is prohibited. The NPRM also proposed language in the notice/poster stating that CRC will accept complaints via U.S. mail and email at an address provided on CRC's Web site.[287]

Many organizations expressed support for the requirements in proposed § 38.35. An individual commenter stated that the equal opportunity notice seems to have a comprehensive scope, allowing individuals that have been or are being discriminated against under WIOA programs to be aware of their rights and file a complaint. Some commenters recommended specific revisions to the required wording of the equal opportunity notice. In total, we received 11 comments on this section, which are addressed below.

Comment: One commenter recommended that CRC add language to this provision that ''the notice, poster, and/or appeal rights set forth in this section must be provided in an accessible format.''

Response: CRC declines to add the suggested wording to § 38.35 because it is worded as an across-the-board requirement. Section 38.36(b) provides that the notice must be provided in appropriate formats to registrants, applicants, participants, and employees with visual impairments. That provision adequately puts recipients on notice regarding their obligations to publish the equal opportunity notice and to provide the notice in an accessible format. Section 38.15 provides further instruction to recipients regarding communications with individuals with disabilities. Sections 38.36 and § 38.15 therefore appropriately capture the commenters' concerns. For these reasons, CRC declines to make the change suggested by the commenter. However, as discussed above in connection with § 38.4(i), we are adding two sentences to § 38.35 to provide similar notice to beneficiaries. The equal opportunity notice now alerts individuals with disabilities of their right to request auxiliary aids and services at no cost.

Comment: Several advocacy organizations recommended adding ''sexual orientation'' to the parenthetical language concerning sex as a form of discrimination.

Response: CRC appreciates the commenters' suggestion, but declines to make this change. For the same reasons described above in the main preamble and in connection with the discussion of § 38.7(a), CRC has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation alone is a form of sex discrimination. CRC will continue to monitor legal developments in this area.

Comment: Two State agencies suggested removing the parenthetical language relating to transgender status and gender identity from the notice/poster requirement in proposed § 38.35. One agency argued that the posters identifying prohibited discrimination be limited to the governing statutory provisions. Similarly, another State agency commented that Title VII does not include the parenthetical language proposed. Specifically, the State agency noted that the area of law regarding sex discrimination is unsettled and thus the parentheticals as to gender identity and transgender status should be removed. A coalition of organizations, on the other hand, supported expanding the statutory provisions by including parentheticals for certain prohibited bases.

Response: For the same reasons discussed previously in the main preamble and in connection with the definition of ''sex'' in § 38.7(a), CRC finds the inclusion of gender identity and transgender status in the final rule to be consistent with case law under Title VII and Title IX. We therefore decline to remove the parenthetical language from the notice/poster requirement in this section.

Comment: One State agency recommended that the required wording of the equal opportunity notice/poster should specify that recipients accept complaints via email and without signature.

Response: Nothing in the equal opportunity notice mandated in § 38.35 prohibits a recipient from accepting complaints via email. A complaint may be filed electronically if the complaint meets the requirements outlined in proposed § 38.70(d). One required element of a complaint is a written or electronic signature of the complainant (or representative). CRC continues to believe that it is important for complaints to include signatures. A signature indicates that the contents in the complaint are grounded in fact, and to the best of the complainant's knowledge, the information is being presented in good faith. Accordingly, CRC declines to specify in the notice/poster that recipients accept complaints by email without signature.

For the same reasons as discussed above in connection with § 38.5, CRC makes technical revisions to the wording and punctuation of the first sentence of the EO notice/poster to clarify the list of protected bases.

Recipients' Obligations To Publish Equal Opportunity Notice § 38.36

Proposed § 38.36 retained the language in § 38.31(a)(1) of the 2015 rule, and § 37.31(a)(1) of the 1999 rule, that the equal opportunity notice be posted prominently in reasonable numbers and places. Proposed § 38.36(a)(1) added a requirement that the notice be posted ''in available and conspicuous physical locations,'' as well as on the recipient's Web site pages. CRC updated this provision to reflect the current widespread use of Web site pages to convey program and employment information. CRC also highlighted the need to post the notice in places that are easily visible and to which employees, beneficiaries and program participants have ready access. Similarly, proposed § 38.36(a)(3) retained the requirement that the notice be included in employee and participant handbooks and manuals, and clarified that this included electronic handbooks and manuals to account for their current widespread use. Proposed paragraph (a)(4) was updated to require that the notice would be made a part of each participant's and

[285] We received one comment from an advocacy organization that generally cross-referenced this provision along with proposed §§ 38.4(i), 38.4(ttt), 38.36 and 38.39. Our response to that comment is addressed in the section-by-section analysis of § 38.36.

[286] 29 CFR 37.30 (1999 rule); 29 CFR 38.30 (2015 rule).

[287] U.S. Dep't of Labor, Civil Rights Center, *https://www.dol.gov/oasam/programs/crc/*.

employee's electronic as well as paper file, if both are maintained.

Proposed paragraph (b) of § 38.36 required that the notice be provided in appropriate formats for registrants, applicants, eligible applicants/registrants, applicants for employment and employees and participants with visual impairments, correcting an oversight in the 1999 and 2015 rules that such notice be given only to participants. Paragraph (b) retained the language from the 1999 and 2015 rules that, where notice has been given in an alternate format to a participant with a visual impairment, a record that such notice has been given must be made a part of the participant's file. CRC emphasizes that it is a record that *notice was given* that should be added to the main file, not a record that the individual has a visual impairment. That type of medical or disability information must be maintained in a separate file in accordance with § 38.41(b)(3).

Proposed paragraph (c) of § 38.36 stated that the notice must be provided to participants in appropriate languages other than English as required in § 38.9, which sets out recipients' obligations as to LEP individuals. This provision was added because recipients had an existing obligation under the 1999 and 2015 rules to provide limited English proficient individuals with meaningful access to this notice.[288]

Proposed paragraph (d) of § 38.36 provided that the notice required by proposed §§ 38.34 and 38.35 must be initially published and provided within 90 days of the effective date of this part, or of the date this part first applies to the recipient, whichever comes later.

Several advocacy organizations expressed support for the requirements in proposed § 38.36. We received five comments on the provisions in this section.

Comment: A coalition of organizations representing the interests of individuals with disabilities commented that ASL versions of notices should be available to ensure equal access for deaf, hard of hearing, and deafblind beneficiaries, employees, and job applicants, as well as those with additional disabilities. The commenters asserted that recipients cannot assume that English notification is sufficient for individuals who are fluent in ASL.

Response: CRC agrees that ASL versions of the equal opportunity notice should be made available upon request in appropriate cases, and the final rule reflects that requirement in § 38.15. However, unsolicited offers of information in ASL or alternative formats may be contrary to the ADA, whenever they reflect another's perception or stereotype about particular disabilities. Instead, individuals are always free to request the notice in ASL, and the obligation to provide it is only triggered upon such a request.

As stated in § 38.15, which parallels the language of DOJ's ADA Title II regulations, a recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and depends on a number of factors. There is no proactive requirement separate from an individual request to provide notification in ASL. For these reasons CRC declines to make the suggested changes to § 38.36.

Comment: One State agency commented that it should be the responsibility of the human resources department of the recipient, as opposed to the EO Officer, to ensure that the equal opportunity notice is included in each participant's and employee's electronic and paper file, if one of each is kept.

Response: CRC agrees with the commenter that it is the recipient's responsibility to ensure that the notice is included in each employee's and participant's file. Section 38.36 explicitly addresses the commenter's concern and is appropriately titled ''Recipients' obligations to publish equal opportunity notice.'' Thus, the recipient has the flexibility to determine which members of its staff will ensure compliance with this obligation and can choose to assign that role to its Human Resources staff.

Comment: A State agency recommended that the provisions of § 38.36 be applicable to partner agencies only if the partner is colocated within a one-stop center, reasoning that this is an unfunded mandate for partner agencies.

Response: CRC disagrees with the State agency's description of this obligation, and declines to adopt the commenter's suggestion. As discussed above, the requirement to publish the equal opportunity notice is not new and existed in the 1999 and 2015 rules. Moreover, CRC will make translations of this notice available to recipients in the ten most frequently used languages in the U.S. other than English. While there will be some cost associated with printing and disseminating the notice, as discussed below, the final rule does not impose an unfunded mandate on State or other governments as defined by the Unfunded Mandates Reform Act.[289]

Regarding the issue of colocation, as discussed in § 38.2 above, this final rule covers recipients regardless of whether they are colocated within a one-stop center. All covered entities, including one-stop partner agencies, must meet the equal opportunity obligations of WIOA and this part. Those obligations include publication and dissemination of the equal opportunity notice under § 38.36. While the statute now makes partnerships with certain entities mandatory, both the 1999 and 2015 rules required compliance by all one-stop partners. Thus, CRC's jurisdiction has not changed, nor has the category of entities that are required to comply with the notice requirement.

Notice Requirement for Service Providers § 38.37

Proposed § 38.37 retained the same substantive requirements as the 1999 and 2015 rules,[290] with updates to the title, internal citations, and the name of the Methods of Administration (now the Nondiscrimination Plan). We received one comment on this section.

Comment: A local workforce development board asked whether service providers will be required to ''sign-off'' to indicate that they have received, read, and understood the requirements of the equal opportunity notice. If so, the commenter suggested that that requirement be defined in the State Nondiscrimination Plan.

Response: Proposed § 38.37 did not require signatures from service providers to indicate that they received the equal opportunity notice from the Governor or LWDA grant recipient, or understood that notice. Instead, proposed § 38.37 required the Governor

[288] *See* 29 CFR 37.35(a)(2) (1999 rule); 29 CFR 38.35(a)(2) (2015 rule).

[289] *See infra* discussion of the Unfunded Mandates Reform Act.

[290] 29 CFR 37.33 (1999 rule); 29 CFR 38.33 (2015 rule).

or LWDA grant recipient to disseminate the notice on behalf of service providers pursuant to § 38.34, with the requisite language provided in § 38.35. The Nondiscrimination Plan must include a description of how the Governor will ensure that the equal opportunity notice requirement will be met for service providers. The service providers themselves will be bound by, and should have signed, the written assurance required by § 38.25 in which the providers agree to comply with the Section 188 equal opportunity regulations. Accordingly, apart from the provisions of § 38.25, we decline to impose the requirement that service providers ''sign off'' that they have received the equal opportunity notice in the final rule, and adopt § 38.37 as proposed.

Publications, Broadcasts, and Other Communications § 38.38

Proposed § 38.38 contained most of the same requirements as the corresponding sections in the 1999 and 2015 rules.[291] Proposed § 38.38(a) provided that, where materials indicate that the recipient may be reached by ''voice'' telephone, the materials must also ''prominently'' provide the telephone number of the text telephone (TTY) ''or equally effective telecommunications system'' such as a relay service used by the recipient. These modifications reflected current technology used by individuals with hearing impairments. Proposed paragraph (c) of this section made a minor revision, replacing the term ''prohibited ground'' with ''prohibited basis'' for consistency with this part. We received one comment on § 38.38.

Comment: A coalition of organizations representing the interests of individuals with disabilities recommended that the proposed language in § 38.38 that aims to reflect current technology used by individuals with hearing impairments be replaced with ''videophones, captioned telephones, or equally effective telecommunications systems.'' With regard to videophones, the commenters recommended that covered entities accept video relay calls and be prohibited from requiring callers to use a particular form of telephone, such as the text telephone (TTY), to place a call. Furthermore, the commenters stated that videophones and captioned telephones, including their respective relay systems—video relay service (VRS) and internet-protocol captioned telephone service (IP–CTS), as well as all other relay services—should be readily available to all deaf, hard of hearing, and deafblind employees, as well as those with additional disabilities, so that covered entities can permit them to make calls on the same basis that hearing colleagues are able to make phone calls. The commenters asserted that any concerns about videophones and IP–CTS posing a risk of disrupting or interfering with a covered entity's internet service can be resolved by using a network that is either a separate internet service or completely walled off from the intranet of the entity solely for videophone use. The commenters also noted that use of videophones and captioned phones has been denied in some cases as a result of concerns regarding access to confidential information, despite the fact that Telecommunication Relay Service rules clearly state that all calls are kept confidential. The commenters concluded that any restriction in response to privacy concerns should be eliminated.

Response: While CRC believes that the proposed language of ''equally effective telecommunications system'' would include ''videophones, captioned telephones, or equally effective telecommunications systems,'' including additional examples of current technology regarding telephones will be useful for recipients. CRC accepts the recommendation to revise the last sentence in § 38.38(a) to include the examples of videophone and captioned telephone.

The issue of requiring recipients to have specific telecommunications devices and technology available to be used to place or receive a call is governed by § 38.15, which requires that a recipient take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of the individual with a disability. Accordingly, CRC declines to set blanket mandatory requirements, such as requiring recipients to accept video relay calls in all instances; providing the specific communications device requested in all cases (as opposed to an effective alternative communications device); or imposing specific internet network requirements. Under some circumstances, the failure to provide specific devices or systems may constitute discrimination, and CRC will evaluate the facts presented on a case-by-case basis by applying the standards in § 38.15.

For these reasons, CRC adopts § 38.38(a) with the addition of two examples to paragraph (a).

Communication of Notice in Orientations § 38.39

Proposed § 38.39 generally retained the same requirements as the 1999 and 2015 rules,[292] with modifications to account for current technology and the existing requirements to provide language services to LEP individuals, and equally effective communications for individuals with disabilities.[293] The 1999 and 2015 rules required recipients, during each presentation to orient new participants, employees or the general public to its WIOA Title I funded programs or activities, to include a discussion of rights and responsibilities under Section 188 and this part, including the right to file a discrimination complaint. The proposed rule clarified that not only in-person orientations but also those provided remotely over the internet or using other technology are subject to these notice requirements. Proposed § 38.39 also required that the discussion of rights and responsibilities during the orientation be communicated in appropriate languages to ensure language access as required in § 38.9 of this part and in accessible formats as required in § 38.15 of this part. We received two comments on these provisions.

Comment: A coalition of organizations expressed support for requiring recipients' equal opportunity notice to be communicated in orientation presentations to new participants, employees, and/or the general public. The commenters reasoned that this provision will help increase recipient compliance by ensuring that individuals engaging in the workforce development system are aware of their rights. A coalition of organizations representing the interests of individuals with disabilities commented that ASL versions of equal opportunity notices should be provided during orientation. The commenters

[291] 29 CFR 37.34 (1999 rule); 29 CFR 38.34 (2015 rule).

[292] 29 CFR 37.36 (1999 rule); 29 CFR 38.36 (2015 rule).

[293] *See, e.g.,* §§ 38.9 and 38.15.

noted that, regardless of the format of the orientation, whether in person or remote, the orientation should be fully and equally accessible to individuals with disabilities.

Response: CRC agrees that proposed § 38.39 will increase compliance and promote awareness of individuals' rights under WIOA Section 188. CRC also agrees that, when required, the orientation discussion of rights and responsibilities should be communicated in a format that is accessible to individuals with disabilities. However, §§ 38.39 and 38.15 are intended to be consistent with the requirements of the ADA.[294] As mentioned in § 38.36, to determine the type of auxiliary aid and service that is necessary, recipients must give primary consideration to the request of the individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and depends on a number of factors. There is no proactive requirement separate from an individual request to provide notification in ASL. Accordingly, CRC declines to adopt the suggested changes, and finalizes proposed § 38.39 without modification.

Affirmative Outreach § 38.40

Proposed § 38.40 generally contained the same requirements as the 1999 and 2015 rules.[295] However, the proposed rule changed the title of this section from requiring ''universal access'' to requiring ''affirmative outreach'' to more descriptively explain the requirements contained in this section.

Section 38.40 also proposed limited updates to clarify that the affirmative outreach requirement applies not just to the listed examples of groups and populations, but to ''the various groups protected by these regulations.'' CRC expanded the existing list of example groups by adding ''national origin groups, various religions, [and] individuals with limited English proficiency.'' We also changed the reference to ''both sexes'' to ''persons of different sexes'' to broaden the terminology. We received three substantive comments on § 38.40.

Comment: Several advocacy organizations expressed support for the provisions requiring affirmative outreach. One advocacy organization specifically expressed support for CRC's inclusion of ''individuals in different age groups.'' Other advocacy organizations recommended that CRC strengthen the affirmative outreach provisions by requiring that ''reasonable efforts to include members of various groups protected by these regulations'' include analysis of local population data to identify ethnic/national origin groups and individuals with limited English proficiency that should be targeted by such outreach. Furthermore, the commenters stated that outreach materials should be translated into any language identified in § 38.9 to effectively reach limited English proficient speakers of those languages.

Response: CRC appreciates the commenters' support of the affirmative outreach requirement, and finds it unnecessary to adopt the commenters' recommendations regarding local population data and translation of outreach materials. CRC disagrees with the commenters that § 38.40 needs to specifically mention analysis of local population data. Section 38.40 requires recipients to conduct affirmative outreach that targets various populations in order to ''ensure that [recipients] are providing equal access to their WIOA Title I-financially assisted programs and activities.'' Targeting various populations in this manner necessarily includes a preliminary determination of which populations to target. Making that determination will likely involve consulting various sources of information—including equal opportunity data, performance data, local population data, and other relevant resources from within and without the recipient's organization. Using these types of resources to determine which populations to target for affirmative outreach is something recipients should have been doing under the 1999 and 2015 rules (§§ 37.42 and 38.42, respectively), and should continue to do pursuant to § 38.40 of this final rule. Otherwise, recipients would not be ''tak[ing] appropriate steps to ensure that they are providing equal access to their WIOA Title I-financially assisted programs and activities.''

Regarding translation of outreach materials, CRC believes that § 38.40 implicitly requires such translation whenever the required outreach is to targeted LEP populations. Otherwise, the outreach would not include ''tak[ing] appropriate steps'' and would not ''involve reasonable efforts to include members'' of the targeted group.[296] Also, when outreach material contains vital information, § 38.9(g)(1) in the final rule appropriately captures recipients' obligation to translate that vital information. As defined in § 38.4(ttt), vital information includes information that is necessary for an individual to understand how to obtain any aid, benefit, service, or training. Whether outreach materials contain vital information will be a fact-specific inquiry dependent upon the circumstances of each case. Accordingly, CRC views as a best practice that recipients translate all outreach materials into languages identified in § 38.9(g)(1), but declines to impose that requirement in this rule for materials that neither include vital information nor target an LEP population.

Comment: A coalition of organizations recommended making the list of ''reasonable efforts'' a list of minimum, specific targeted outreach required of recipients to address underrepresentation or inequitable representation of protected individuals within WIOA programs and activities. These commenters also recommended that the Department require all recipients to provide all applicants and program participants information, including wages and benefits, about the full range of employment opportunities offered by the program, reasoning that research shows that women might have pursued training for different, higher paying occupations had they received more detailed information about the wages and benefits of different occupations before they began their training.

Response: While CRC acknowledges the obligation for recipients to conduct affirmative outreach as provided in proposed § 38.40, CRC also believes that the outreach required to comply with WIOA and this part will depend upon the circumstances of individual recipients, who should therefore have the flexibility to adopt case-specific reasonable efforts under this requirement. Accordingly, CRC declines to impose a list of required minimum reasonable efforts.

Similarly, CRC declines to require recipients to provide wage and benefit information to all applicants and program participants, but considers it a best practice for recipients to implement. Indeed, CRC strongly encourages recipients to provide as much information as possible regarding wages and benefits for occupations to help applicants and participants make informed decisions about the

[294] *See also* DOJ Final Rule to Implement ADAAA, *supra* note 18.

[295] 29 CFR 37.42 (1999 rule); 29 CFR 38.42 (2015 rule).

[296] § 38.40. This is consistent with § 38.9(b)(1)'s reference to ''outreach to LEP communities to improve service delivery in needed languages.'' *See also* Appendix to § 38.9, Recipient LEP Plan: Promising Practices, ¶ 8 (listing outreach as an example of an implementing step in a recipient's LEP plan).

occupations before receiving training. If recipients choose to provide information regarding possible wages and benefits, that information should be provided on an equal basis to all applicants and program participants. CRC also notes that, if recipients steer women or members of other protected groups into lower paying occupations, they may be liable for discrimination under WIOA Section 188 and § 38.5 of this part.

Data and Information Collection and Maintenance

Collection and Maintenance of Equal Opportunity Data and Other Information § 38.41

Proposed § 38.41 generally retained the same requirements as the 1999 and 2015 rules.[297] CRC did, however, propose changes in § 38.41(b)(2) and added new paragraph (b)(3).

Proposed paragraph (b)(2) added ''limited English proficiency and preferred language'' to the list of categories of information that each recipient must record about each applicant, registrant, eligible applicant/registrant, participant, and terminee. As noted in the NPRM, this data collection obligation would not apply to applicants for employment and employees because the obligation as to LEP individuals in § 38.9 does not apply to those categories of individuals. Recipients' collection of information relates directly to serving (not employing) LEP individuals. In addition, CRC proposed to delay enforcement regarding collection of these two new data points for two years from the effective date of the final rule to allow recipients adequate time to update their data collection and maintenance systems.

Proposed paragraph (b)(3) introduced new obligations regarding a recipient's responsibilities to keep the medical or disability-related information it collects about a particular individual on a separate form, and in separate files. This new paragraph listed the range of persons who may have access to such files or be informed of a particular individual's disability, medical condition, work restrictions, or reasonable accommodation under certain circumstances. We received 16 substantive comments regarding § 38.41.

Comment: Several commenters supported the new equal opportunity data elements that must be collected by recipients. A local workforce agency stated that the additional data would help recipients learn more about the individuals using their services. The commenter said capturing and recording these data points would be easy to incorporate into their operation. Similarly, several advocacy organizations supported the collection of the additional data elements and recommended that CRC require these data to be made publicly available annually to monitor the effectiveness of outreach and nondiscrimination regulations. A coalition of organizations stated that the collection of additional data is essential to ensure compliance and would move WIOA programs away from reinforcing gender inequities.

In contrast, several commenters expressed opposition to the collection of additional data elements by recipients. Many State agencies and professional associations argued that the new data collection requirements were outside of the scope of Section 188 of WIOA. Specifically, State agencies urged that CRC eliminate the requirement relating to LEP individuals and their preferred languages. In support of their position, a State agency commented that ''limited English proficiency'' was difficult to quantify and thus the data would be questionable. Another State agency commented that the collection of ''preferred language of an individual'' would create unnecessary costs. A third State agency questioned the value of collecting more information because individuals are not required to disclose their race/ethnicity, sex, and disability status. The commenter therefore argued that any report generated using this information would be useless because the information could be inaccurate and imprecise.

Response: After careful consideration, CRC retains the requirement that recipients must record the limited English proficiency and preferred language of an individual. As some commenters noted, capturing these data will help recipients learn more about the preferred languages of the individuals using their services. Although there is no way for recipients to guarantee 100 percent accuracy as to the information received from applicants, registrants, participants, and terminees, CRC recognizes that giving individuals the opportunity to self-identify their preferred language is the most efficient and effective way to capture this information as to LEP individuals. This information is also used by States with language access laws.[298] CRC, however, declines to require recipients to make the collected information publicly available as part of this rule because CRC understands that this information is already publicly available for most core programs.[299] Therefore, CRC does not consider it necessary to impose that requirement on recipients in this provision.

Finally, as explained above, it is well-settled that discrimination on the basis of national origin may include discrimination against LEP individuals. Collection of LEP and preferred language data is therefore within the scope of these implementing regulations, and a necessary step towards meeting the nondiscrimination and equal opportunity obligations of WIOA Section 188 and this part. CRC recognizes that the addition of these two data points will impose additional obligations on recipients' data collection systems. Thus, as proposed in the NPRM, CRC will allow recipients two years to come into compliance with the requirement to update their data collection practices as to limited English proficiency and preferred language, and amends the third sentence in § 38.41(b)(2) to reflect that compliance date.

Comment: CRC received several comments regarding the collection of disability information in proposed § 38.41(b)(3). In order to make WIOA Title I programs more responsive to individuals with disabilities, an advocacy organization suggested that CRC modify the rule to indicate that a person with a disability may voluntarily disclose their disability status during the course of service, and this information should be used by workforce system staff for a limited number of reasons with the focus on enhancing the services provided to the individual.

The advocacy organization also stated that the proposed rule did not take into account that there are numerous reasons staff may need to have knowledge of an individual's disability status beyond eligibility for Title I of WIOA. The commenter further opined that the proposed rule may be too restrictive and could result in Title I programs failing to be fully responsive to the needs of individuals with disabilities as service recipients. To support its position, the commenter provided examples of instances where knowledge of an individual's disability would improve the services offered to that individual. The commenter also stressed that the proposed rule must emphasize that this voluntarily disclosed disability information is confidential. Similarly,

[297] 29 CFR 37.37 (1999 rule); 29 CFR 38.37 (2015 rule).

[298] *See supra* note 228 and accompanying text.

[299] *See* U.S. Dep't of Labor, Emp't & Training Admin., WIA Performance Results, *https://www.doleta.gov/performance/results/eta_default.cfm#wiasrd_databook.*

an advocacy organization supported the recipient's responsibility to keep medical and disability related information on separate forms and in separate files.

Response: CRC agrees that recipients must treat information obtained regarding an individual's disability or medical condition as confidential, and that in appropriate circumstances such information may be relevant beyond eligibility for WIOA services. CRC declines, however, to adopt the modifications suggested by the commenter because they are unnecessary. The final rule does contemplate situations beyond eligibility determinations in which an individual's disability is relevant. For example, other sections of the rule describe recipients' obligations regarding physical accessibility and communications with individuals with disabilities.[300] In those situations, information received regarding an individual's disability must be treated in a confidential manner, in accordance with § 38.41(b)(3).

The requirements of § 38.41(b)(3) are only intended to address the manner in which disability status information must be maintained by the recipient, in order to ensure that it is treated in a confidential manner. This provision parallels the requirements of the ADA on this issue. New paragraph (b)(3) is also consistent with the Department's regulations implementing Section 504 of the Rehabilitation Act, and with the EEOC's regulations implementing Title I of the ADA.[301] CRC believes that consistency across enforcement agencies will better enable recipients to develop protocols that are consistent with these requirements.

Regarding the advocacy organization's comment, an individual with a disability is always free to disclose disability status if desired; however, such disclosure is limited to those to whom the individual with a disability chooses to make the disclosure, unless other officials are permitted to know pursuant to § 38.41(b)(3). Permitting medical or disability information to be shared without the individual's specific consent is contrary to the requirements of the ADA. Thus, CRC stresses the importance of keeping narrow the range of persons who may be permitted to access files containing medical and disability-related information to ensure that sensitive disability information remains confidential. The rule's obligations do not limit when individuals with disabilities may voluntarily self-identify, but govern how the recipient should treat such information once it is received.

Comment: Several commenters made recommendations to improve the quality of data collected by grant recipients. An advocacy organization commented that recipients were collecting data on ''too limited a pool of customers.'' The commenter recommended that recipients collect and record the age (and other protected bases) of all those who seek services. The commenter argued that without a report on all individuals who seek information or services, there is no base against which participants, registrants, applicants, and others can be monitored or analyzed. A coalition of organizations suggested that CRC require recipients to collect data on WIOA service and program usage by race, sex, and ethnicity. The commenters also recommended that these data be cross-tabulated so that recipients and CRC can better evaluate the utilization of WIOA services and programs by each particular group (*e.g.,* African American women or Latinas).

Response: CRC appreciates the commenters' suggestions to expand the data collection requirements and their usage. However, CRC declines to do so, and disagrees that under this final rule there is no base against which participants, registrants, applicants, and others can be monitored or analyzed. Section 38.31 requires each recipient's EO Officer ''to make sure that the recipient and its subrecipients are not violating their nondiscrimination and equal opportunity obligations under WIOA Title I and this part, which includes monitoring the collection of [equal opportunity] data required [in § 38.41] to ensure compliance . . . .'' Monitoring the data in this way—to ensure a recipient has not violated its nondiscrimination and equal opportunity obligations—will often require comparing that equal opportunity data to various sources, including programmatic data (*e.g.,* performance data), local population data (*e.g.,* census data), and other relevant resources from within and without the recipient's organization. Otherwise, recipients' EO Officers would not be fulfilling their duty to use the equal opportunity data collected ''to ensure compliance.''

Therefore, it is unnecessary to require data collection in addition to that already contemplated by § 38.41. Furthermore, CRC notes that the data collection requirement generally captures the commenter's concern, in any event, because those who seek information or services for WIOA Title I programs are mostly accounted for within the prescribed categories in § 38.41: Applicants, registrants, participants, terminees, employees, and applicants for employment.[302]

Additionally, recipients' obligation to collect and maintain data on the race/ethnicity, age, sex, and (where known) disability status of all applicants, registrants, participants, and employees existed in the 1999 rule; currently exists in the 2015 rule; and CRC retains this requirement in § 38.41. CRC declines to impose a blanket additional requirement that the data be cross-tabulated by subgroups as this might in some circumstances impose an additional burden on recipients. However, CRC would expect recipients to conduct cross-tabulated analyses between individual groups and to take a more thorough look at the intersections of race and sex when appropriate as part of the monitoring process.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes § 38.41 as proposed, with one modification. Paragraph (b)(2) now allows recipients two years from the effective date of this final rule to begin collecting the LEP status and preferred language of individuals.

Information To Be Provided to the Civil Rights Center (CRC) by Grant Applicants and Recipients § 38.42

Proposed § 38.42 retained most of the requirements from the 1999 and 2015 rules.[303] Proposed paragraph (a) of this section added pregnancy, child birth or related medical conditions, transgender status, and gender identity in parentheses as forms of sex discrimination prohibited under this part and ''limited English proficiency'' in parentheticals as a form of national origin discrimination prohibited by this part. Proposed paragraph (b) removed the reference to grant applicants. Proposed paragraphs (c) and (e) inserted the phrase ''that the Director considers'' before the word ''necessary'' to advise recipients that the Director of CRC ultimately determines what information is necessary for CRC to investigate complaints and conduct compliance reviews. The Director will also decide what information is necessary to determine whether the grant applicant

[300] *See* §§ 38.13(a) and 38.15.

[301] *See* 29 CFR 1630.14(b)(1)(i)–(iii).

[302] CRC notes for the commenters' convenience that the definition of ''applicant'' in § 38.4(c) includes an individual ''who has signified . . . interest by submitting personal information in response to a request by the recipient.''

[303] 29 CFR 37.38 (1999 rule); 29 CFR 38.38 (2015 rule).

would be able to comply with the nondiscrimination and equal opportunity provisions of WIOA and this part. As indicated in the NPRM, proposed paragraph (e) confirmed CRC's ability to engage in pre-award reviews of grant applicants, but CRC does not contemplate the delay or denial of an award. Processes that may result in the delay or denial of an award to a grant applicant were addressed in proposed § 38.62. We received three substantive comments on proposed § 38.42.

Comment: An organization representing women in the trades recommended that the Department require State and local workforce systems to provide information on their gender equity gap analysis and how funds have been used to improve programs and close gaps. The commenter suggested that the Department require States, workforce areas, and job training programs that demonstrate a gender equity wage gap at placement or underrepresentation of women in training programs in male dominated fields to develop written affirmative action/gender equity plans.

Response: We acknowledge the pay disparities that exist between men and women, and the need to close the gender wage gap.[304] CRC believes the final rule requires Governor and recipient monitoring responsibilities that will identify and remedy gaps that are the result of discrimination or denial of equal opportunity. Pursuant to § 38.31(b) of the final rule, EO Officers are required to monitor and investigate the activities of recipients to ensure compliance with nondiscrimination and equal opportunity obligations. Additionally, Governors are required, under § 38.54, to develop and implement Nondiscrimination Plans for proper oversight of recipients' State Programs. CRC believes that the requirements set forth in §§ 38.31, 38.42 and 38.54 address the commenters' concerns, while not imposing additional obligations on recipients' staff and resources. Therefore, CRC declines to require grant applicants and recipients to perform the analyses suggested by the commenters, or to create affirmative action plans.

Comment: A State agency argued that the requirement in § 38.42(a) to notify the Director whenever a discrimination lawsuit or administrative enforcement action has been filed is overly burdensome and unrelated to equal opportunity compliance. The commenter stressed that initiating a discrimination action does not mean that there has been a violation. The commenter also mentioned that under Section 188 of WIOA, CRC only has jurisdiction over violations; therefore notice serves no legitimate purpose and is arbitrary. Furthermore, the commenter stated that the requirement was overly broad because a State can be a recipient outside the context of a State Workforce Agency. The commenter recommended that the requirement in § 38.42(a) be removed or modified.

Response: CRC declines to remove or modify the language set forth in proposed § 38.42(a). That section proposed no new obligations on recipients, but only clarified the scope of sex and national origin discrimination under existing law by adding parenthetical explanations. In both the 1999 and 2015 rules, CRC required that grant applicants and recipients notify the Director of CRC when administrative enforcement actions or lawsuits were filed against it. Thus, there is no new burden associated with this provision, and the existing burden to give notice of enforcement actions and lawsuits is minimal. While CRC acknowledges that the initiation of a discrimination action does not mean there has been a violation, CRC's goal is to help recipients come into compliance if a violation does exist. CRC believes it is in the best position to offer recipients technical assistance to ensure compliance with the nondiscrimination and equal opportunity provisions when it has pertinent information about an enforcement action or lawsuit as soon as possible.

CRC agrees that a State can be a recipient outside of the context of a State Workforce Agency. Indeed, §§ 38.2 and 38.4(zz) and (kkk) describe the entities to which part 38 applies, and define ''recipient'' and ''State Programs.'' Entities that receive WIOA Title I federal financial assistance remain obligated to comply with the nondiscrimination and equal opportunity provisions of this part. That obligation has not changed, even with the minor modifications we have proposed in § 38.42.

Comment: A State labor agency stated that the requirements in § 38.42(c) are vague and broad and should be specifically defined.

Response: CRC declines to modify the language in proposed § 38.42(c). This provision appropriately allows the Director flexibility in requesting and obtaining necessary documents and information to properly investigate complaints and conduct compliance reviews. Each discrimination action filed presents its own set of unique facts. Because of that variability, the Director cannot specify in this rule the precise information needed to appropriately investigate a particular complaint or conduct a particular compliance review under the nondiscrimination and equal opportunity provisions of this part. Moreover, proposed § 38.42(c) contains no new requirements for grant applicants or recipients as compared to the 1999 and 2015 rules. Accordingly, the proposed language is adopted in the final rule.

Required Maintenance of Records by Recipients § 38.43

Proposed § 38.43(a) retained most of the language from the 1999 and 2015 rules,[305] but added the preservation of ''electronic records'' to the existing requirement that grant applicants and recipients maintain certain records. The electronic record keeping requirement retained the same three-year period that applies to hard copy records. Proposed paragraph (b) expanded the requirements from the 1999 and 2015 rules by requiring the preservation of records once a discrimination complaint has been filed or a compliance review is initiated. As explained in the NPRM, CRC chose to incorporate compliance reviews in this records retention section because the same preservation of records is necessary for the duration of a compliance review as for a complaint investigation. We received one comment on § 38.43.

Comment: A local workforce agency supported the requirements in proposed § 38.43, commenting that generating and maintaining electronic records would provide additional support to the recipient's current recordkeeping. The commenter stated that the requirement would allow recipients to have their records and files easily available for discrimination complaints and compliance reviews.

Response: CRC agrees and, for the reasons set forth above and in the NPRM and considering the comments received, finalizes proposed § 38.43 without modification.

[304] A comparison of average annual wage data from 2013 reveals that women make 78 cents for every dollar that men make. U.S. Bureau of the Census, Income and Poverty in the United States: 2013 (Sept. 2014), *available at https://www.census.gov/library/publications/2014/demo/p60-249.html*. Data on average weekly wages from the Bureau of Labor Statistics for the same year shows a similar gap with women making 82 cents for every dollar that men make. Bureau of Labor Statistics, U.S. Department of Labor, Highlights of Women's Earnings (Dec. 2014) (averaging annual data collected from the Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers), *available at http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2013.pdf*.

[305] 29 CFR 37.39 (1999 rule); 29 CFR 38.39 (2015 rule).

CRC Access to Information and Information Sources § 38.44

Proposed § 38.44(a) included a minor revision to the corresponding section of the 1999 and 2015 rules,[306] by requiring that each grant applicant and recipient must permit access by the Director ''or the Director's designee'' to premises, employees, and participants for the purpose of conducting investigations, compliance reviews, monitoring activities, or other similar activities outlined in this section. We received two substantive comments on proposed § 38.44.

Comment: A State agency recommended that § 38.44(a) be revised to state that sub-recipients must also provide access to the Director. The commenter noted that some recipients may not be able to provide access to sub-recipients' premises, employees, etc.

Response: CRC appreciates the commenter's recommendation, but declines to revise paragraph (a) to specifically require that sub-recipients provide access to the Director. Section 38.4(zz) defines ''recipient'' to include entities that receive WIOA Title-I financial assistance ''directly from the Department or through the Governor or *another recipient*'' (emphasis added). This definition captures the commenters' concern regarding sub-recipients. Sub-recipients, like (primary) recipients, are expected to provide the Director the same access to the entity's premises, employees, and participants.

Comment: A State agency requested that the term ''normal business hours'' be stricken and replaced with ''hours of operation,'' reasoning that this change would allow access to a recipient's facilities and the employee who filed the complaint, regardless of the assigned shift. Furthermore, the commenter stated that this change would promote higher levels of compliance by the recipients, knowing that investigations could occur at any time, day or night.

Response: We agree with the commenter's recommendation. Therefore, we have replaced ''normal business hours'' with ''its hours of operation.'' As a practical matter, however, CRC has interpreted ''normal business hours'' to mean the hours of operation for that specific entity,[307] so this revision does not represent a change in CRC's current practice.

Summary of Regulatory Changes

For the reasons described in the proposed rule and considering the comments received, CRC finalizes proposed § 38.44 with one modification. We replace the phrase ''normal business hours'' with ''its hours of operation'' in paragraph (a).

Confidentiality Responsibilities of Grant Applicants, Recipients, and the Department § 38.45

Proposed § 38.45 retained the same requirements as the 1999 and 2015 rules [308] but made small organizational changes to this section to improve readability. CRC received no comments on this provision and adopts § 38.45 as proposed.

Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of the Workforce Innovation and Opportunity Act (WIOA)

Subpart Application to State Programs § 38.50

Proposed § 38.50 modified the title of this section and replaced the term ''State Employment Security Agencies'' with ''State Workforce Agencies'' to remain consistent with WIOA and with ETA's regulations.[309] CRC received no comments on this provision and adopts § 38.50 as proposed.

Governor's Oversight and Monitoring Responsibilities for State Programs § 38.51

Proposed § 38.51 mostly retained the requirements in this section from the 1999 and 2015 rules, but also incorporated certain paragraphs from a different section of those rules.[310] This reorganization was intended to underscore the importance of the Governor's monitoring responsibilities.

Specifically, proposed § 38.51(a) retained the Governor's oversight responsibilities,[311] which included ensuring compliance with the nondiscrimination and equal opportunity provisions of WIOA Section 188 and this part, and negotiating, where appropriate, with a recipient to secure voluntary compliance when noncompliance is found under proposed § 38.91(b). Proposed § 38.51(b) incorporated the Governor's obligation to monitor recipients for compliance,[312] and changed the frequency of that monitoring requirement from ''periodically'' to ''annually.''

Proposed § 38.51(b)(1) added ''limited English proficiency'' and ''preferred language'' to the list of categories of records and data that the Governor must analyze. We received 18 comments on proposed § 38.51.

Comment: Several commenters supported the annual monitoring requirement under § 38.51(b). An advocacy organization stated that annual monitoring would provide greater focus on areas requiring improvement and identify any structural barriers in the way of programmatic access. In support of this change, an advocacy organization commented that periodic reviews were too ambiguous. Additionally, two advocacy organizations supported the annual review requirements outlined in § 38.51, including statistical or quantifiable analysis of recipient data and the investigation of any significant differences in participation to determine whether they are due to discrimination.

In contrast, many State agencies disagreed with the proposed rule's annual monitoring requirement. Several commenters claimed that annual monitoring was not supported by WIOA. Two of these commenters argued there was no statistical justification for why annual monitoring was the most effective option and concluded that the annual requirement was arbitrary. Another State agency recommended periodic monitoring, reasoning that annual assessments are unnecessary as that State had never found any violations of equal opportunity and nondiscrimination requirements. To further support their position, numerous commenters pointed to the increase in workload that an annual monitoring requirement would create, without additional funding or resources from the Department. One State agency asked whether additional resources would be provided to conduct annual reviews. Several State agencies argued that increasing the frequency of reviews would reduce their quality.

In conclusion, the various State agencies asserted that states were in the best position to determine when monitoring is appropriate and recommended the Department replace ''annual'' with ''periodic.'' Although State agencies recommended replacing ''annual'' with ''periodic,'' they also indicated that many of these States currently monitor their recipients once

[306] 29 CFR 37.30 (1999 rule); 29 CFR 38.40 (2015 rule).

[307] For example, if a recipient's normal business hours were from 10 p.m. to 6 a.m., CRC would expect that recipient to allow the Director access to the recipient's premises, employees, and participants during that time.

[308] 29 CFR 37.41 (1999 rule); 29 CFR 38.41 (2015 rule).

[309] U.S. Dep't of Labor, Emp't & Training Admin., Workforce Innovation and Opportunity Act; Final Rule, 81 FR 56071, Aug. 19, 2016 (hereinafter ''ETA WIOA Final Rule'').

[310] 29 CFR 37.54(d)(2)(ii)(A)–(C) (1999 rule); 29 CFR 38.54(d)(2)(ii)(A)–(C) (2015 rule).

[311] 29 CFR 37.51 (1999 rule); 29 CFR 38.51 (2015 rule).

[312] 29 CFR 37.54(d)(2)(ii)(A)–(C) (1999 rule); 29 CFR 38.54(d)(2)(ii)(A)–(C) (2015 rule).

every two years. Some State agencies specifically recommended that the monitoring requirement be changed to a biennial schedule to allow more latitude and flexibility.

Response: After careful consideration of all the comments, CRC declines to replace ''annual'' with ''periodic'' or ''biennial'' monitoring. CRC agrees with commenters who believed that the 1999 and 2015 rules requiring periodic monitoring were too ambiguous and did not lead to effective monitoring for many States. Under the 1999 and 2015 rules, CRC acknowledges that its expectations for monitoring were somewhat unclear. Thus, CRC retains the annual monitoring requirement from the proposed rule to underscore the importance of the Governor's oversight responsibilities in compliance with this subpart. This monitoring requirement is within the scope of CRC's authority to issue regulations necessary to implement the equal opportunity and nondiscrimination provisions of WIOA Section 188, including enforcement procedures.[313]

CRC believes that monitoring conducted less than annually is ineffective, particularly when dealing with accessibility issues and correcting any discriminatory activity that may occur. For example, the populations being served may shift from year to year. Governors need to identify and correct, as soon as possible, any discriminatory practices or barriers that individuals face when attempting to access a service or program. Some violations may take time to remedy; under biennial or periodic monitoring, remedies will be slower in implementation. CRC believes that annual monitoring provides for better communication between the Governor and the State Programs, and that coordinated planning will enhance the quality of monitoring. Moreover, this monitoring requirement is consistent with ETA's regulation requiring oversight of one-stop career centers [314] and helps maintain consistency in state-level practices nationwide. While allocation of funding for specific obligations is beyond the scope of this rule, the Nondiscrimination Plan will be an effective tool for coordination of state-wide monitoring and to minimize associated costs.

Comment: One advocacy organization expressed concern that equal opportunity data collection by recipients was separated from performance data collection by service providers. The commenter recommended that the regulations clearly explain how equal opportunity data and performance data will be integrated for analysis purposes. The commenter stressed that this type of integrated analysis was crucial for the Governor to determine whether significant differences in participation are due to discrimination, a failure of performance, or some other reason.

Response: We appreciate the commenter's concerns but believe the rule as written provides the ability for Governors/recipients to perform the kinds of analyses needed to uncover discriminatory patterns or practices. While this rule only requires the collection of demographic data, as discussed above regarding § 38.41, Governors and/or recipients are expected to utilize whatever data are available to them, including performance data, to ensure nondiscrimination and equal opportunity in their WIOA Title I programs and activities. We expect that the availability of data may vary on a case-by-case basis. Therefore, we decline to modify the regulations to explain how equal opportunity and performance data should be integrated for analysis.

Comment: A State agency asked whether a ''desk review'' that includes data and statistical analysis be acceptable for annual monitoring.

Response: The rule does not use the specific term ''desk review.'' Recipients are expected to complete their monitoring obligations under § 38.51(b) in a manner that is consistent with the provisions of the Nondiscrimination Plan described at § 38.54 (which outlines the Governor's obligations for developing and implementing that Plan).

We recognize that annual monitoring can be accomplished through offsite review so long as all necessary data and information are collected and examined in relation to the Plan, including data on physical facilities. These data and information may be collected by the State-level EO officer directly or the State-level EO officer may obtain these data and information from other entities collecting it, such as monitoring officials for WIOA operations representing the State or local board, or the U.S. Department of Labor. To conduct the appropriate annual analysis, State-level EO Officers may wish to use quarterly participation data submitted to the Department, any findings or complaints on file for the program, any corrective actions taken in response to findings or complaints, and physical assessments of facilities, including those made by on-site personnel. With respect to physical assessments, for example, to determine physical and programmatic accessibility for individuals with disabilities and whether the equal opportunity notice has been properly posted, recipients retain the flexibility to decide who will conduct that assessment and how that information (measurements, pictures, data, other monitoring reviews, etc.) will be conveyed to the appropriate EO Officer by on-site personnel, or otherwise collected by the EO Officer.

Comment: Several commenters addressed the new data elements that must be collected by recipients—recording the limited English proficiency and preferred language of individuals. Several commenters did not support the collection of additional data elements by recipients. Commenters argued that the new data collection requirements were outside of the scope of WIOA because they are not mentioned in Section 188.

Some advocacy organizations, however, supported the collection of additional data. A local workforce agency stated that the addition of a language collection category will enable recipients to record the number of individuals that are enrolled in their WIOA program, record the number of language services needed for individuals seeking WIOA services, and produce comprehensive reports detailing the diversity of the recipient's workforce area. To help ascertain and analyze the quantity of language services needed to assist individuals, one commenter recommended that recipients establish a process for collecting periodic reports from their service providers to ensure data are recorded correctly and matches data in the recipient's system.

Response: We appreciate hearing about the commenter's experience with promising practices for data collection. We disagree with other commenters' characterization of the LEP collection requirements as outside of the scope of the statute. CRC has the authority to issue and enforce regulations that prohibit discrimination on the basis of national origin and, as discussed above regarding § 38.9, that prohibition includes discrimination against LEP individuals. It is well established that policies and practices that deny LEP individuals meaningful access to federally funded programs and activities may constitute unlawful national origin discrimination.[315] As supporters of the

[313] *See* 29 U.S.C. 3248(e).

[314] ETA WIOA Final Rule, *supra* note 309.

[315] *Lau* v. *Nichols,* 414 U.S. 563, 566 (1974); *Colwell* v. *Dep't of Health & Human Servs.,* 558 F.3d 1112, 1116–17 (9th Cir. 2009); *Cabrera* v. *Alvarez,* 977 F. Supp. 2d 969, 977–78 (N.D. Cal.

proposal stated, obtaining this information is critical in ensuring that LEP individuals are being serviced appropriately throughout each State. This requirement helps to ensure that States are properly carrying out their obligations in this subpart.

Governor's Liability for Actions of Recipients the Governor Has Financially Assisted Under Title I of WIOA § 38.52

Section 38.52(a)(1) proposed minor changes by replacing the phrase ''adhered to a Methods of Administration'' with ''implemented a Nondiscrimination Plan.'' We received one comment on proposed § 38.52.

Comment: A State agency commented that CRC should confirm acceptance of the Nondiscrimination Plan from the Governor and identify any discrepancies found by the Department, such as a noncompliant policy, process, or procedure adapted by the State.

Response: CRC declines to modify the proposed language in the final rule to require that CRC ''accept'' the Nondiscrimination Plan and/or identify any discrepancies in the plan. The Governor's monitoring and oversight responsibilities exist regardless of affirmative approval from CRC. States should not await validation to implement their Nondiscrimination Plan, although CRC is available to provide technical assistance as needed. Furthermore, in subpart D of this rule, CRC has adequately outlined the compliance procedures and the steps it will take if it determines that any State or recipient has not complied with any obligations under this rule.

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes proposed § 38.52 without modification.

Governor's Oversight Responsibility Regarding Recipients' Recordkeeping § 38.53

Proposed § 38.53 changed only the title of this section. CRC received no comments on this provision and adopts § 38.53 as proposed.

Governor's Obligations To Develop and Implement a Nondiscrimination Plan § 38.54

Proposed § 38.54 revised the title of this section and generally retained the language of the 1999 and 2015 rules, with the exception of the provisions that CRC moved to proposed § 38.51, discussed above. Proposed § 38.54(a)(1) replaced the phrase ''adhere to a Methods of Administration'' with ''implement a Nondiscrimination Plan'' in the first sentence, and replaced ''should'' with ''must'' in the second sentence to require that, in States in which one agency contains both WIOA Title I-financially assisted programs and either a State Workforce Agency (formerly an SESA) or unemployment insurance, the Governor must develop a combined Nondiscrimination Plan. The Governor is responsible for completion of the Nondiscrimination Plan in both instances. This change formalizes current practice in that every State submits one WIOA Methods of Administration. This provision also eliminates unnecessary duplication in that most components of the Plan would be the same for both types of entities, and both plans would be overseen by the State-level EO Officer identified in § 38.28(a).

The proposed rule made one minor change to paragraph (c)(1)(v) of this section: Changing the reference to proposed § 38.40 to reflect its new title. The NPRM added a new paragraph (c)(2)(iv) to require procedures for ensuring compliance with WIOA Section 188 and this part for protected categories other than disability. This revision was intended to correct an oversight from the previous rules that inadvertently did not require the Governor to include procedures to ensure compliance as to these protected categories. Finally, proposed § 38.54(c)(2)(v) added a provision requiring the procedures discussed in that paragraph to ensure that recipients comply not just with Section 504 and WIOA Section 188 and this part, but also with Title II of the ADA, as amended, if applicable to the recipient. Title II of the ADA applies only to ''public entities,'' which include State or local governments and any of their departments, agencies, or other instrumentalities.[316] We received four comments on § 38.54.

Comment: Several advocacy organizations supported the requirement that the Governor implement a Nondiscrimination Plan for State Programs. One advocacy organization recommended that additional language be added to § 38.54 to ensure that the Nondiscrimination Plan ''will be made available in alternative, accessible formats upon request.'' Another advocacy organization supported the proposed rule and stated that the new title and restatement of obligations on the part of States' chief executives for ensuring nondiscrimination in WIOA programs emphasize to States the importance of proper implementation of Section 188 of WIOA. Other advocacy organizations supported making the Nondiscrimination Plan publicly available on the Governor's or State Workforce Agency's Web site. They also recommended specific revisions to § 38.54(c)(2)(iii) to ensure that the plan includes a system for reviewing that recipients have demonstrated sufficient resources and program designs that will allow them to meet the needs of groups protected by these regulations, including LEP individuals. Finally, they recommended that § 38.54(c)(2)(viii) be revised to require that supporting documentation to show that commitments made in the Nondiscrimination Plan have been and/or are being carried out include ''a comparison of the race/ethnicity, sex, age, disability, limited English proficiency, and language spoken of the State and local workforce area populations with data on the number of applicants, registrants, participants and terminees in each group.''

Response: CRC appreciates commenters' suggestions to bolster the requirements included in the Nondiscrimination Plan, but finds the final rule sufficient to address the commenters' concerns. CRC disagrees that § 38.54(c)(2)(iii) should be revised to include a system for reviewing that recipients have ''demonstrate[ed] sufficient resources and program designs'' to comply with WIOA Section 188 and this part, because that requirement is already contemplated by other paragraphs in § 38.54(c), and by other sections in the final rule. For example, § 38.54(c)(1)(ii) requires the Nondiscrimination Plan to describe how recipients have satisfied certain requirements, including the requirement in §§ 38.28(a) and (b) and 38.29(e) that EO Officers have sufficient authority, staff, and resources to ensure compliance with WIOA Section 188 and this part; section 38.54(c)(2)(i) requires a system for determining whether grant recipients and training providers are likely to comply with this part; section 38.54(c)(2)(vi) requires a system to ensure that EO Officers and members of recipients' staff can effectively carry out their equal opportunity and nondiscrimination responsibilities; section 38.54(c)(2)(viii) requires supporting documentation to show that commitments made in the Nondiscrimination Plan are being carried out; and § 38.54(c)(2)(vii) requires procedures for obtaining prompt corrective action when noncompliance is found. Accordingly, the final rule already contemplates

2013); *Almendares* v. *Palmer,* 284 F. Supp. 2d 799, 807–08 (N.D. Ohio 2003).

[316] 42 U.S.C. 12131.

systems for reviewing that recipients have demonstrated sufficient resources and program designs to ensure compliance with WIOA Section 188 and this part.

The final rule also addresses the issue raised by the commenters regarding supporting documentation that compares demographic data to the number of applicants, registrants, participants and terminees in each group. Proposed § 38.54(c)(2)(viii)(A)–(F) lists several examples of the types of documents Governors must use to show that the commitments made in the Nondiscrimination Plan have been and/or are being carried out. The examples listed in paragraphs (c)(2)(viii)(A)–(F) are not exhaustive and generally capture the commenters' concerns about data comparisons. For example, § 38.54(c)(2)(viii)(B) requires copies of monitoring instruments and § 38.54(c)(2)(viii)(E) requires that reports of monitoring reviews and reports of follow-up actions taken where violations have been found be submitted with the Nondiscrimination Plan.

As a practical matter, such monitoring includes the Governor's required statistical or other quantifiable analyses of recipients' records and data under § 38.41, such as records on applicants, registrants, eligible applicants/registrants, participants, terminees, employees and applicants for employment by race/ethnicity, sex, limited English proficiency, preferred language, age and disability status.[317] CRC believes these provisions collectively result in the requirement to analyze comparison data that the commenters suggest. Moreover, CRC expects that in fulfilling their monitoring obligations under this part, State-level EO Officers will use whatever data are available to them, including population data and performance data, to ensure that State Programs comply with WIOA Section 188 and this part. Therefore, CRC declines to impose an additional requirement in this provision.

With regard to the commenters' request that Nondiscrimination Plans be publicly available on the Governor's or State Workforce Agency's Web site, CRC encourages publication as a best practice. However, CRC declines to impose this requirement at this time. CRC recognizes that some States currently post important excerpts of their Methods of Administration on their Web sites, and anticipates they will continue this practice with their Nondiscrimination Plans. CRC reminds the Governors that, if the Plan is available on the Governor's Web site, it must be in an accessible format for individuals with disabilities.[318]

Comment: A State agency asked whether § 38.54 required the State to have a combined plan where the agency with oversight over WIOA does not administer the employment service and unemployment insurance programs.

Response: Each State must submit one combined Nondiscrimination Plan that covers all State Programs, as defined in 38.4(kkk). As explained in the NPRM, this formalizes the practice under WIA that every State submitted one Methods of Administration. It also eliminates unnecessary duplication. To highlight this, the NPRM proposed changing the optional best practice listed in the 1999 and 2015 rules (that certain States ''should'' develop a combined plan), to a requirement (that those same States ''must'' develop a combined Plan). The commenter should note that the ''combined Nondiscrimination Plan'' referenced in § 38.54(a) is not a reference to the ''Combined Plan'' described in section 103 of WIOA.

Pursuant to § 38.31(g), State-level EO Officers must oversee the development and implementation of the State's Nondiscrimination Plan.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes § 38.54 as proposed.

Schedule of the Governor's Obligations Regarding the Nondiscrimination Plan § 38.55

Proposed § 38.55 revised the title of this section and generally retained the existing schedule that Governors follow for their Methods of Administration under the 2015 rule, and that they also followed under the 1999 rule. In proposed § 38.55, CRC intended to minimize the Governor's burden by allowing sufficient time to switch from the existing Methods of Administration to the new Nondiscrimination Plan. Therefore, proposed § 38.55 revised paragraph (a) to allow Governors an additional 180 days to develop and implement a Nondiscrimination Plan consistent with the requirements of this rule—either within 180 days of the date on which this final rule is effective or within 180 days of the date on which the Governor would have been required to review and update the Methods of Administration under the 2015 rule, whichever is later.

Proposed paragraph (b) also retained the previous requirement that the Governor promptly update the Nondiscrimination Plan whenever necessary and submit the changes made to the Director in writing at the time the updates are made.

Proposed paragraph (c) preserved the previous rule's requirement that the Governor review the plan every two years, determine whether changes are necessary, and, if so, make the changes and submit them to the Director. We received one comment on § 38.55.

Comment: A State agency stated that the Governor's administration and leadership in State workforce agencies often turn over quickly with little transitional training, resulting in loss of knowledge. The commenter noted that in the past CRC had not communicated with state-level staff to assure prompt compliance when State Methods of Administration plans were scheduled for updating. In order to ensure smooth transitions and communication between CRC and the States, the commenter proposed additional provisions that outline EO Officer obligations in the event of political transitions. The commenter stated that these provisions should include a transition plan so that when one EO Officer is outgoing, the new EO Officer is on notice of upcoming deadlines and immediate obligations. The commenter also recommended that CRC require and direct all communications, at least in carbon copy form, to recipients to the EO Officer as well.

Response: CRC appreciates the commenter's suggestions for effective communication between States and CRC during transition periods. While CRC strongly recommends that Governors create transition plans, as the commenter suggests, CRC does not require such plans in this rule. The obligation to comply with this part remains with the office of the Governor, regardless of turnover, and the Governor and the State-level EO Officer remain responsible for ensuring compliance in all State Programs. As stated in the discussion of § 38.28 in the preamble, we expect that State-level EO Officers will complete their required tasks, regardless of political turnover. For these reasons, we decline to create transition plans for States, to adopt a provision that explicitly requires Governors to develop transition plans, or to outline specific State-level EO Officer obligations during political transitions. We reiterate our commitment to provide technical assistance to both Governors and the State-level EO Officers to help them fulfill their obligations under this part.

[317] See § 38.41(b)(2). This provision excludes LEP and preferred language data for employees and applicants for employment.

[318] *See* § 38.15(a)(5).

CRC is committed to ensuring that State-level EO Officers, as the liaisons with CRC, are fully informed of their obligations regarding Nondiscrimination Plans, but decline to incorporate the suggestion that CRC carbon copy the EO Officer in all circumstances as unnecessary.

Subpart D—Compliance Procedures

Evaluation of Compliance § 38.60

Proposed § 38.60 modified the title of this section and retained its language, with the exception of a minor technical edit. The proposed rule added the phrase ''the ability to comply or'' in the first sentence to explain the standard of review for grant applicants regarding the nondiscrimination and equal opportunity provisions of WIOA Section 188 and this part. This language is parallel to the language in proposed § 38.25 regarding written assurances. CRC received no comments on this provision and makes one technical correction to § 38.60 as proposed. For the sake of clarity, CRC separates the reference to compliance reviews of grant recipients to determine their ability to comply from the reference to compliance reviews of recipients to determine their compliance. CRC makes this change to increase the ease of reading this provision and intends no substantive change.

Authority To Issue Subpoenas § 38.61

Proposed § 38.61 changed the title of this section and updated its citation to section 183(c) of WIOA, which authorizes the issuance of subpoenas.[319] CRC received no comments this section but is reorganizing it to clarify its parts. No substantive changes are intended by the reorganization.

Compliance Reviews

Authority and Procedures for Pre-Approval Compliance Reviews § 38.62

Proposed § 38.62 proposed several changes from the 1999 and 2015 rules, including adding a new provision to paragraph (b) that required Departmental grantmaking agencies to consult with the Director to determine if CRC had issued a Notice to Show Cause [320] or a Final Determination [321] against an applicant identified as a probable awardee for violating the nondiscrimination and equal opportunity provisions of WIOA and this part.

Proposed paragraph (c) added new language requiring that the grantmaking agency consider, in discussing with the Director, the information obtained through the consultation described in paragraph (b), as well as any other information provided by the Director, in determining whether to award the grant(s). We received no comments on this provision and adopt § 38.62 as proposed, with the exception of a technical modification to place paragraph (d)(2) on a new line.[322]

Authority and Procedures for Conducting Post-Approval Compliance Reviews § 38.63 and Procedures for Concluding Post-Approval Compliance Reviews § 38.64

Proposed §§ 38.63 and 38.64 retained the exact same language as in the parallel sections in the 1999 and 2015 rules, with the exception of the revisions made to their titles. We received no comments on these sections, and adopt §§ 38.63 and 38.64 as proposed.

Authority To Monitor the Activities of a Governor § 38.65

Proposed § 38.65 modified the title of this section and retained the language in paragraphs (a) and (b) from the 1999 and 2015 rules. Proposed paragraph (c) set out the enforcement actions that CRC may take as a result of Governors' failure to come into compliance with their monitoring obligations. We received seven comments on § 38.65.

Comment: Some State agencies and advocacy groups requested that CRC provide technical assistance if the Governor's performance is deemed inadequate or when a State asks for technical assistance to ensure compliance with the proposed rule. Similarly, another State agency stated that if a Governor has been issued a Letter of Findings, CRC should provide technical assistance to help the Governor become compliant. The commenter said the Governor should be given a timeframe in which CRC is required to respond to the Governor or designee's questions, requests, and results. Furthermore, the commenter suggested that CRC develop ''Good Practice or useful tools'' that States could use as a template. The commenter recommended that CRC review preliminary findings with States to give States the opportunity to provide additional information to rectify or resolve a proposed finding.

Response: CRC remains committed to ensuring that recipients comply with the nondiscrimination and equal opportunity provisions of this rule. As such, CRC's issuance of this final rule should provide clarity to States and other recipients in helping them meet their obligations. CRC also intends to issue guidance regarding this rule, and already has useful tools on its Web site, for example, the DOL LEP Guidance discussed regarding § 38.9 and Promising Practices in Achieving Universal Access and Equal Opportunity: A Section 188 Disability Reference Guide.[323] For States or other recipients that wish to request further help regarding compliance with the rule, CRC is available to provide technical assistance. For technical assistance, recipients are strongly encouraged to visit CRC's Web page at *https://www.dol.gov/oasam/programs/crc/external-compliance-assistance.htm* or contact CRC at U.S. Department of Labor, 200 Constitution Avenue NW., Room N–4123, Washington, DC 20210. *CivilRightsCenter@dol.gov*, telephone (202) 693–6501 (VOICE) or (202) 877–8339 (Federal Relay Service—for TTY). CRC declines to adopt a timeframe in this rule for such assistance, due to the fact-specific nature of technical assistance requests.

Regarding the commenter's request that CRC review preliminary findings with States to give States the opportunity to provide additional information to rectify or resolve a proposed finding, that is one of the purposes of issuing either a Letter of Findings or an Initial Determination under §§ 38.64 and 38.87, respectively. For recipients whose programs or activities have been found noncompliant, CRC routinely offers settlement or conciliation agreements that list the steps recipients need to follow to come into compliance. Once an agreement is in place, CRC does of course provide technical assistance regarding the agreement. Accordingly, the final rule addresses the commenters' concerns without modification.

Comment: One commenter stated that CRC could put more responsibility on Governors to assure federal funds are used to uphold civil rights for individuals with disabilities.

Response: CRC appreciates the commenter's concern and believes that this final rule appropriately sets forth the responsibility of Governors. These provisions are intended to strengthen the Governor's authority to monitor and ensure compliance with recipients' obligations as to individuals with disabilities and all other protected groups. Specifically, CRC also has strengthened its sections on disability,

[319] 29 U.S.C. 3243(c).

[320] Pursuant to § 38.66(b).

[321] Pursuant to §§ 38.95 and 38.96.

[322] *Cf.* CRC WIOA NPRM, supra note 70, at 4564 (incorrectly labeling § 38.62(d)(2) as ''[Reserved]'').

[323] Section 188 Disability Reference Guide, *supra* note 264.

including § 38.15 and related definitions, to increase accountability to ensure that civil rights for individuals with disabilities are well supported, including that individuals with disabilities have equal access to WIOA Title I-funded programs and that recipients communicate as effectively with them as with others. Because of the revisions already set forth in this final rule, CRC declines to modify the language in this provision.

Comment: Two advocacy organizations recommended that the Director be required to review the adequacy of the Governor's Nondiscrimination Plan, by replacing the term ''may'' with ''shall.''

Response: CRC understands the commenters' concerns but declines to make this modification. CRC will continue to review Nondiscrimination Plans submitted by States. However, CRC believes it critical that the Director maintain flexibility and discretion as to when to review the adequacy of the Nondiscrimination Plan based on enforcement priorities and resources. Moreover, the discretionary language in proposed paragraph § 38.65(c) is the same found in § 38.65(a) of the 2015 rule, and § 37.65(a) of the 1999 rule. Both provisions permit the Director to review the adequacy of the Plans and compliance with this subpart without restriction.

Comment: A State agency recommended that § 38.65 be deleted, claiming that neither WIOA nor Title VI gave the Department the authority over Governors found in § 38.65.

Response: CRC disagrees with the commenters' characterization of its authority under WIOA and Title VI. Both Title VI and WIOA Section 188 prohibit those who receive federal financial assistance from discriminating against individuals in the classes protected under these statutes. WIOA Section 188(b) authorizes the Secretary of Labor to take action whenever the Secretary finds that a State or other recipient has failed to comply with the nondiscrimination obligation in Section 188(a) or with the regulations prescribed to carry out those provisions. The Secretary has delegated enforcement and rule making authority under Section 188(e) to CRC. Because Governors receive federal financial assistance under WIOA Title I programs and services, CRC has the requisite authority over Governors to enforce the provisions in the final rule. For these reasons, CRC declines to delete this provision.

CRC makes one technical revision to § 38.65(b), removing the unnecessary modifier ''WIOA Title I'' from the term ''recipient,'' because this part applies to ''recipients'' as defined in § 38.44(zz). This change is made for the sake of clarity and consistency throughout the final rule, and no substantive change is intended.

Notice To Show Cause Issued to a Recipient § 38.66

Proposed § 38.66 merged the 2015 rule's §§ 38.66 and 38.67,[324] the latter of which outlined the contents of a notice to show cause. This section proposed to retain most of the language in the 2015 rule's § 38.66 and all of the language in the 2015 rule's § 38.67.

Proposed paragraph (a) provided that the Director may issue a Notice to Show Cause when a recipient's failure to comply with the requirements of this part results in the inability of the Director to make a finding. This section retained the three examples set forth in the prior rule, but renumbered them. Proposed paragraph (a)(1) replaced the 30-day requirement for recipients to submit the requested information, records, and/or data with ''the timeframe specified'' in the Notification letter. This minor change reflects CRC's common practice of including a timeframe for a response in the Notification Letter and eliminated its redundancy from the regulatory text.

Proposed paragraph (b) expanded the circumstances in which the Director may issue a Notice to Show Cause by allowing the Director to issue the Notice prior to issuing a Final Determination. Proposed paragraph (c) retained the same language found in the 2015 rule's § 38.67, and the 1999 rule's § 37.67. We received one comment in support of these revisions.

Comment: A State agency commented that the proposed rule would provide Governors and other recipients with an additional opportunity, as compared to the existing framework, to take corrective or remedial actions to come into compliance before enforcement proceedings were initiated. Furthermore, the commenter stated that the proposed rule would provide an additional opportunity for due process, allowing the Governor to come into compliance or enter into a conciliation agreement before a final determination is rendered.

Response: CRC agrees that the proposed rule gives Governors and recipients adequate time to come into compliance or negotiate a conciliation agreement regarding the violation(s) at issue before CRC issues a Final Determination. For the reasons set forth in the NPRM and considering the comments received, CRC finalizes proposed § 38.66 as proposed.

Methods by Which a Recipient May Show Cause Why Enforcement Proceedings Should Not Be Instituted § 38.67

Proposed § 38.67 changed the section title and removed reference to the letter of assurance because CRC proposed discontinuing use of that letter. This section also updated the cross-references for procedures related to correcting violations under §§ 38.91 through 38.93. CRC received no comments on this provision and adopts § 38.67 as proposed.

Failing to Show Cause § 38.68

Proposed § 38.68 retained the existing language from the 1999 and 2015 rules, with the slight modification of replacing the term ''must'' with ''may.'' This revision was intended to more accurately reflect the Director's prosecutorial discretion in bringing matters to enforcement. Nothing in Section 188 compels the Director to refer for enforcement every violation of Section 188 or this part. CRC received no comments on this provision and adopts § 38.68 as proposed.

Complaint Processing Procedures

Complaint Filing § 38.69

Proposed § 38.69 combined the 2015 rule's §§ 38.70, 38.71, and 38.72 into one section to improve readability.[325] We retained most of the language from these sections, with some revisions to the text.

Proposed paragraph (a) maintained the language from the 1999 and 2015 rules. Proposed paragraph (a)(1), however, added a list of the bases upon which a complaint may be filed—race, color, religion, sex (including pregnancy, childbirth, or related medical conditions, gender identity, and transgender status), national origin (including limited English proficiency), age, disability, political affiliation or belief, citizenship status, or participation in any WIOA Title I-financially assisted program or activity. Consistent with proposed § 38.19, proposed paragraph (a)(2) added retaliation as a basis for filing a complaint. Proposed paragraph (b) expanded the option for filing to include electronic filing. Proposed paragraph (c) removed the reference to the Director to eliminate redundancy[326] and added that the complaint must be filed within 180 days of the alleged

[324] 29 CFR 37.66, 37.67 (1999 rule).

[325] 29 CFR 37.70 through 37.72 (1999 rule).

[326] § 38.69(b) addresses with whom the complaint must be filed.

discrimination or retaliation. We received two substantive comments on these proposed changes.

Comment: A State agency proposed that the list of the bases upon which a complaint may be filed reflect the categories identified in applicable statutes. The commenter asserted that any bases beyond the statutory language reflect CRC's interpretation and may not be an accurate statement of the law to which recipients are subject.

Response: The commenter refers to the parenthetical language added to sex and national origin as prohibited bases for discrimination. As discussed previously, CRC's inclusion of the parentheticals is consistent with the current state of the law as to sex and national origin discrimination. Again, CRC believes that, by incorporating this language, complainants will be more knowledgeable about and aware of the protected bases under the statute for which they may file a complaint. To maintain consistency with other provisions in the final rule, including §§ 38.7 and 38.9, the inclusion of those categories are appropriate in § 38.69.

Comment: A disabilities advocacy group recommended that CRC add ''the designated EO Officer of the recipient'' to § 38.69(b) so that a person or the person's representative may file a complaint with either ''the recipient, *the designated EO [O]fficer of the recipient,* or the [D]irector.''

Response: CRC agrees that § 38.69(b) should more clearly identify with whom a complainant should file the complaint if proceeding with the recipient-level complaint process. Thus, CRC amends this provision to be consistent with the language in the equal opportunity notice.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes proposed § 38.69 with a modification in paragraph (b) stating that a complaint may be filed with, on the one hand, the recipient's EO Officer or the person the recipient has designated for that purpose or, on the other hand, the Director.

Required Contents of Complaint § 38.70

Proposed § 38.70 combined the 2015 rule's §§ 38.73 and 38.74 into one section and retained almost all of their provisions.[327] Proposed § 38.70 updated the language in this combined section to include the option of electronic filing and provided additional information on how to electronically access complaint forms. We received two comments on § 38.70.

Comment: A private citizen recommended that CRC coordinate local assistance for individuals who want to file a discrimination complaint. The commenter stressed that individuals need guidance on compliance with the rules, procedures, and bases for a complaint.

Response: We decline to provide in the final rule that CRC coordinate local assistance for individuals who want to file a discrimination complaint. While local assistance may be beneficial, CRC is able to offer assistance through the resources on our Web site, and by telephone and email. In local areas, we strongly encourage individuals to view the equal opportunity notice posted on recipients' premises (and published in this rule in § 38.35), which provides information on how to file a complaint with the recipient or CRC. The poster must be available on the recipient's Web site, posted in conspicuous physical locations and provided to each participant and employee. Individuals may also contact recipients' EO Officers for assistance. Recipients are required to make their EO Officers' contact information available to the public under § 38.29(c).

Those who need further assistance in filing a complaint may also visit CRC's Web site at *https://www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm*. CRC likewise invites members of the public to visit our Frequently Asked Questions page at *https://www.dol.gov/oasam/programs/crc/external-enforce-faq.htm*. For additional assistance, please contact CRC's External Enforcement division at the U.S. Department of Labor, 200 Constitution Avenue NW., Room N–4123, Washington, DC 20210. *CRCExternalComplaints@dol.gov*, telephone (202) 693–6502 (VOICE) or (202) 877–8339 (Federal Relay Service—for TTY).

Comment: A State agency commented that § 38.70 of the proposed rule would waive the ''signature'' requirement currently in place that makes a complaint a legally filed document. The commenter recommended that any hard copy filed should be required to have a signature.

Response: CRC disagrees with the commenter that electronic filing would waive the signature requirement. The purpose of electronic filing is to ease the filing process for complainants, not to eliminate the signature requirement. Proposed § 38.70(d) requires the ''written or electronic signature'' of the complainant or the complainant's representative. As mentioned in the discussion in § 38.35, CRC believes that a signature, including an electronic one, helps support the legitimacy of a complaint as it signifies that the contents of the complaint are grounded in fact, and to the best of the complainant's knowledge, the information is being presented in good faith.

Right to Representation § 38.71

Proposed § 38.71 revised the title and section number of the 2015 rule's § 38.75, but retained its language. CRC received no comments on this provision and adopts § 38.71 as proposed.

Required Elements of a Recipient's Complaint Processing Procedures § 38.72

Proposed § 38.72 revised the title and section number of the 2015 rule's § 38.76.[328] This section retained the requirements for recipients' complaint processing procedures from the 1999 and 2015 rules, but added paragraph (b)(1)(iii) obligating recipients to give complainants a copy of the equal opportunity notice in § 38.35.

Proposed paragraph (b)(1)(iv) also added the requirement that recipients provide notice that the complainant has the right to request and receive, at no cost, auxiliary aids and services, language assistance services, and that this notice will be translated into non-English languages, in accordance with proposed §§ 38.4(h) and (i), 38.34, and 38.36.

Proposed paragraph (c)(1) created a new provision that stated that alternative dispute resolution (ADR) may be attempted any time after a written complaint has been filed with the recipient.

Finally, proposed paragraph (c)(3)(ii) modified the language of the 2015 rule's § 38.76(c)(3)(ii), by providing in the last sentence that, ''If the Director determines that the agreement [reached under ADR] has been breached, the complaint will be reinstated and processed in accordance with the recipient's procedures.'' We received three comments on § 38.72.

Comment: An individual commenter stated that allowing ADR methods may give recipients too much power to coerce complainants. The commenter believed that if recipients are given the option to discipline themselves, the punishment will be as minute as possible. This could result in unresolved or unreported issues, which will allow the discriminating acts to continue or worsen.

[327] 29 CFR 37.73, 37.74 (1999 rule).

[328] 29 CFR 37.76 (1999 rule).

Response: CRC recognizes the commenters' concerns, but believes that ADR can be an effective tool for both recipients and complainants. First, CRC disagrees that ADR within the meaning of this part is a process in which the recipient may unilaterally decide the outcome of the complaint. Instead, under these regulations ADR is a process to reach a mutually satisfactory resolution.

Second, CRC highlights that, under proposed § 38.72(c)(2), ADR is voluntary and the choice whether to use ADR or the customary process rests with the complainant. This allows for the complainant to have vital input in the process used for resolving the dispute. Moreover, as proposed § 38.72(c)(3)(ii) requires, if the Director determines that there is a breach of an ADR agreement, the complaint will be reinstated. CRC believes that this approach enables the complainant to have a fair process in resolving the discrimination complaint.

Comment: A few commenters requested clarification on the proposed rule's complaint processing procedures. One State agency commented that § 38.72(c)(2) allows the complainant to choose ADR but § 38.85, which allows for ADR on the federal level, requires consent by both the complainant and the respondent. The commenter requested clarification on whether CRC could make ADR at the recipient level require mutual consent. The commenter reasoned that ADR would not be effective if both parties were not actively participating. The commenter also stated that § 38.72(c)(1) needs to clearly state that the issuance of a Notice of Final Action by the recipient ends the complaint and terminates the complainant's ability to request ADR. The commenter stated that CRC needs to clarify that, after a recipient issues a Notice of Final Action, their only remaining option is to appeal to the Department under § 38.75.

Response: CRC agrees with the commenter that ADR is effective when both parties consent to ADR and actively participate. However, CRC declines to remove the complainant's ability to compel ADR at the recipient level. In that case, ADR is designed to encourage the complainant to resolve the complaint informally with the recipient, thus, the recipient cannot block the ADR process by withholding consent.

Regarding the timing of ADR, CRC agrees with the commenter that a written Notice of Final Action by the recipient ends the complainant's ability to compel ADR during the recipient-level complaint process. CRC's goal is to encourage prompt resolution of complaints at the earliest possible stage of the process, however, CRC has always contemplated that recipient-level complaint processing procedures, including election of ADR, would be completed within 90 days.[329] To clarify that expectation, CRC revises § 38.72(c)(1) to reflect that the recipient's issuance of a Notice of Final Action ends the complainant's ability to compel ADR during the recipient-level process. CRC notes that the parties are encouraged to reach settlement at any time.

If the complainant files with CRC, CRC may offer the opportunity for both parties to engage in ADR under proposed § 38.85. In this instance, mutual consent is necessary because CRC is neither the complainant nor the respondent to the complaint. Again though, the parties are encouraged to conduct voluntary settlement discussions at any time in the complaint process.

Comment: A disabilities advocacy group made numerous recommendations for additional language to improve the clarity and efficiency of the complaint processing procedures. The commenter suggested that CRC ''draft language that forwards 'reasonable accommodations' into the entire complaint process,'' and recommended that all communications related to proposed § 38.72 between the recipient and complaint be done in a format that is acceptable to the complainant and at a level reflective of the complainant's ability to understand all materials presented.

The commenter's recommendations also included creating a time frame the Director must follow in the complaint process, adding language that defines the relationship between specific types of entities and what federal protections govern them so that individuals and recipients have a clear understanding of the federal governance for individual protection. The commenter suggested creating comprehensive standards for investigations, including language to ensure due diligence on behalf of the recipient investigating a complaint. The commenter stated it is imperative that all complaint investigations conducted by the recipient have a strict conflict of interest component that protects the complainant's rights to a full and unbiased investigation, including strict protections against a recipient's influence over any investigation such as providing for an independent facilitator to investigate complaints. This should be available to both small and large recipients.

Further, the commenter encouraged outlining procedures for the complaint process from the perspective of the complainant, suggesting the outline should be as detailed as that of the recipient outline with dates, procedures, how to check the progress of your complaint, contact information of the entity investigating the complaint, as well as all other related information.

Response: CRC appreciates the commenter's suggestions for fair, impartial, and effective complaint processing procedures at the recipient and federal level. We decline to implement the commenter's recommendations, however, because the regulations already provide adequate safeguards to ensure such a fair, impartial, and effective procedure. Regarding the commenter's first recommendation, complainants are of course free to request reasonable accommodations and auxiliary aids and services from recipients or CRC with respect to the complaint process. This may include requests for information in accessible formats or at a reading level understandable to the complainant. The availability of such accommodations is addressed in § 38.14 and need not be repeated in § 38.72. Moreover, § 38.15 requires recipients to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. This requirement includes the recipient's complaint processing procedures under § 38.72. It would be contrary to the ADA, however, for recipients or CRC to make assumptions about a complainant's literacy abilities on the basis of a disability in advance of a request for accommodation.

As to the request for time frames for the Director, CRC recognizes that each discrimination complaint filed, including those concerning individuals with disabilities, presents its own set of unique facts. This variability means that the Director and CRC staff need flexibility to investigate and analyze each complaint in a timeframe that allows for the full consideration of the allegations and defenses presented. The regulations set forth in this part provide clear complaint processing procedures for both recipients and complainants. For these reasons CRC declines to set a time frame for the Director to resolve complaints.

Next, the request that the rule include a discussion of the federal protections that govern specific types of entities is beyond the scope of this rule, which only addresses recipient and Governor obligations under Section 188 of WIOA. CRC also declines to implement the commenter's suggested changes

[329] *See* § 38.76.

regarding comprehensive investigation standards, including an independent facilitator to investigate complaints, to prevent conflicts of interest and undue influence, and to ensure recipients' due diligence and a full and unbiased investigation. CRC believes those safeguards already exist in the final rule, and that recipients' EO Officers must serve as the type of independent facilitator to which the commenter refers. Under § 38.31(d), recipients' EO Officers are charged with overseeing the recipient-level complaint process, and must do so without any conflict of interest, pursuant to § 38.30. Small recipients must also establish complaint procedures under § 38.32. As an additional safeguard, complainants may appeal to CRC from the recipient's final action on the complaint.

Finally, the rule gives the complainant sufficient notice of how to check the progress of a complaint, the contact information of the entity investigating the complaint, as well as other related information. As stated above, EO Officers' information is public and complainants may use that information and the contact information in the equal opportunity notice to check on the status of complaints. Sections 38.69 through 38.85 provide comprehensive information about complaint procedures for both complainants and recipients.

Summary of Regulatory Changes

For the reasons set forth above and in the NPRM, and in consideration of the comments received, CRC finalizes proposed § 38.72, with two modifications. First, CRC makes a technical correction by changing ''issued'' to ''received'' in paragraph (b)(5)(ii) to be consistent with the standard in §§ 38.74 and 38.75. Second, CRC revises § 38.72(c)(1) to reflect that a complainant may attempt ADR only until the recipient has issued a Notice of Final Action.

Responsibility for Developing and Publishing Complaint Processing Procedures for Service Providers § 38.73

Proposed § 38.73 modified the title and section number of the 2015 rule's § 38.77 but retained the same language. CRC received no comments on this provision and adopts § 38.73 as proposed.

Recipient's Obligations When It Determines That It Has No Jurisdiction over a Complaint § 38.74

Proposed § 38.74 modified the title and section number of the 2015 rule's § 38.79 and retained most of its language with one modification.[330] The proposed rule changed the term ''immediate'' to ''within five business days of making such determination'' as the time frame in which a recipient must notify the complainant in writing that it does not have jurisdiction. CRC proposed this change to reduce ambiguity and provide a more definite timeframe within which the recipient must notify a complainant about the recipient's lack of jurisdiction so that the complainant may timely pursue the allegations with CRC. We received one comment on § 38.74.

Comment: One advocacy group commented that, in addition to notifying the complainant of the right to file with CRC, the notice should also provide guidance on the steps required to file with CRC, including ''steps and procedures, required forms, addresses, phone numbers, etc.''

Response: We understand the commenter's concern but believe that the new obligation in § 38.72(b)(1)(iii) to provide each complainant the equal opportunity notice contained in § 38.35 will provide individuals with adequate information on how to file a complaint with CRC and how to contact CRC directly if they need additional assistance in filing a complaint. That notice contains CRC's physical and Web site addresses, and instructions for complaint filing.

If the Complainant Is Dissatisfied After Receiving a Notice of Final Action § 38.75

Proposed § 38.75 retained most of the language of the 1999 and 2015 rules, but changed ''his/her'' to ''the complainant's,'' and clarified that this section applies whenever a recipient issues a Notice of Final Action before the end of the 90-day period for recipients to resolve a complaint. CRC received no comments on this provision and adopts § 38.75 as proposed.

If a Recipient Fails To Issue a Notice of Final Action Within 90 Days After the Complaint Was Filed § 38.76 and Extension of Deadline To File Complaint § 38.77

Proposed §§ 38.76 and 38.77 retained the same language as in the 1999 and 2015 rules, with the exception of the revisions made to their titles and corresponding section numbers. CRC received no comments on these sections and adopts §§ 38.76 and 38.77 as proposed.

[330] 29 CFR 37.79 (1999 rule).

Determinations Regarding Acceptance of Complaints § 38.78

Proposed § 38.78 retained the language from the 2015 rule's § 38.82, with minor modifications including changing the word ''determine'' to ''decide'' in the introductory sentence to distinguish the Director's decision whether to accept a complaint from the Director's Initial and Final Determinations. CRC received no comments on this provision and adopts § 38.78 as proposed.

When a Complaint Contains Insufficient Information § 38.79

Proposed § 38.79 retained the language from the 2015 rule's § 38.83, except for removing and replacing gender-specific pronouns and revising its title. Proposed paragraph (a) added language explaining that if the complaint does not contain enough information ''to identify the respondent or the basis of the alleged discrimination, the timeliness of the complaint, or the apparent merit of the complaint,'' the Director must try to get the needed information from the complainant. Proposed paragraph (c) added that the Director must send a written notice of complaint closure to the complainant's last known address, ''email address (or other known method of contacting the complainant in writing.'' This change was intended to update the methods of written communication that are available. CRC received no comments on this provision and adopts § 38.79 as proposed.

Lack of Jurisdiction § 38.80, Complaint Referral § 38.81, Notice That Complaint Will Not Be Accepted § 38.82, Notice of Complaint Acceptance § 38.83, and Contacting CRC About a Complaint § 38.84

Proposed §§ 38.80–38.84 retained the language of the 2015 rule's §§ 38.84–38.88, with the exception of their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.80–38.84 as proposed.

Alternative Dispute Resolution § 38.85

Proposed § 38.85 retained most of the language from the 2015 rule's § 38.89, with some modifications. This section replaced the reference to ''mediation'' with ''alternative dispute resolution (ADR)'' to encompass a broader array of procedures that may be used to resolve a complaint.

Proposed paragraph (a) replaced the reference to ''the parties,'' with ''the complainant and respondent'' to clarify that the actual parties in an enforcement action that arises from a complaint filed under Section 188 or this part are the

recipient/respondent and CRC. WIOA Section 188 provides no private right of action. Proposed paragraph (b) removed the word ''issued'' from the 2015 rule's § 38.89(b), which stated, ''The mediation will be conducted under guidance issued by the Director.'' This change was intended to allow guidance from the Director on ADR to be provided informally. Proposed paragraph (c) added that ADR may take place at any time after a complaint has been filed to maximize the opportunity for resolution of complaints through the ADR process. Proposed paragraph (d) created a new provision to notify recipients and complainants that ADR does not suspend CRC's investigation. CRC plans to continue to process and investigate complaints during ADR so that the complaint and its evidence will not become stale.

CRC received no comments on this provision and adopts § 38.85 as proposed.

Notice at Conclusion of Complaint Investigation § 38.86

Proposed § 38.86 retained the provisions in the 2015 rule's § 38.90, but modified the title and section number. The proposed rule also added language at the end of paragraph (b) so that the recipient, complainant and grantmaking agency are aware of the procedural steps that CRC will follow under §§ 38.87 and 38.88. CRC received no comments on this provision and adopts § 38.86 as proposed.

Director's Initial Determination That Reasonable Cause Exists To Believe That a Violation Has Taken Place § 38.87 and Director's Final Determination That No Reasonable Cause Exists To Believe That a Violation Has Taken Place § 38.88

Proposed §§ 38.87 and 38.88 retained all of the existing language in the 2015 rule's §§ 38.87 and 38.88, and only updated their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.91 and 38.92 as proposed.

When the Recipient Fails or Refuses To Take Corrective Action Listed in the Initial Determination § 38.89

Proposed § 38.89 retained most of the language from the 2015 rule's § 38.93 with some modifications. Proposed § 38.89 replaced the mandatory language regarding enforcement actions the Director could take to allow for CRC's prosecutorial discretion, in accordance with Section 188(b) of WIOA.[331] CRC received no comments on this provision and adopts § 38.89 as proposed.

Corrective or Remedial Action That May Be Imposed When the Director Finds a Violation § 38.90

In proposed § 38.90, we retained the language from the 2015 rule's § 38.94 and only updated its section number and title. CRC received no comments on this provision and adopts § 38.90 as proposed, with the exception of a technical edit to paragraph (b) to change ''must'' to ''may'' to make it consistent with the title of § 38.90. CRC intends no substantive change with this revision.

Post-Violation Procedures § 38.91

Proposed § 38.91 retained most of the existing language from the 2015 rule's § 38.95, with a few modifications. The proposed rule updated the section number and changed the title. Additionally, we proposed to delete the paragraphs (b)(1)(iii)(C) and (b)(3)(iii), which referred to using ''both'' a written assurance and a conciliation agreement as closing documents for the same set of violations. As discussed in § 38.92 of the final rule, this deletion reflects revisions to the circumstances under which a written assurance may be used. Finally, we proposed removing the inadvertent reference to a nonexistent paragraph (d) at the end of paragraph (a).

CRC received no comments on this provision and adopts § 38.91 as proposed.

Written Assurance § 38.92

Proposed § 38.92 clarified the corresponding provisions from the 1999 and 2015 rules to better explain when a written assurance rather than a conciliation agreement would be the appropriate resolution document. CRC received no comments on this provision and adopts § 38.92 as proposed.

Required Elements of a Conciliation Agreement § 38.93

Proposed § 38.93 retained the language in the 1999 and 2015 rules,[332] with some changes. We updated the section number and revised its title. Proposed paragraph (a) retained all of the language from the 1999 and 2015 sections. We added to the list of required elements of a conciliation agreement by creating a new provision in proposed paragraph (b) stating that the agreement ''[a]ddress the legal and contractual obligations of the recipient''; we renumbered the paragraphs; and we proposed a new paragraph (g) to require that a conciliation agreement provide that nothing in the agreement prohibits CRC from sending it to the complainant, making it available to the public, or posting it on the CRC or the recipient's Web site. The NPRM also inserted a new paragraph (h) to require that a conciliation agreement provide that in any proceeding involving an alleged violation of the conciliation agreement, CRC may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement. CRC believed that these revisions would more accurately reflect its current practice and align with the rules issued by other nondiscrimination enforcement agencies in the Department.[333] We received one comment on proposed § 38.93.

Comment: A State agency commented that § 38.93(g) would allow CRC to publish conciliation agreements in the media as leverage against the State. The commenter argued that CRC should only be allowed to publish the agreement after all negotiating has been completed and the parties have signed the conciliation agreement.

Response: CRC does not publish conciliation agreements that have not been fully negotiated and executed. The purpose of § 38.93(g) is to ensure that all parties to the agreement understand that the agreement may be made public. For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes proposed § 38.93 without modification.

When Voluntary Compliance Cannot Be Secured § 38.94

In proposed § 38.94, we retained the language in the 1999 and 2015 rules,[334] but updated its section number and revised its title. The only change to this section was adding ''the Governor'' to the list of other entities in paragraphs (a) and (b)(1), because the Governor may also be a recipient in violation of this part. We received one comment on proposed § 38.94.

Comment: A State agency commented that neither WIOA nor Title VI support the new authority that CRC seeks to assert over State Governors. The commenter suggested that the word ''Governor'' be removed from paragraphs (a) and (b)(1) in § 38.94.

Response: CRC disagrees. The Governors assume the obligations under Section 188 when they accept WIOA funds. Moreover, as mentioned earlier,

[331] 29 U.S.C. 3248(b).

[332] 29 CFR 37.97 (1999 rule); 29 CFR 38.97 (2015 rule).

[333] For example, OFCCP has incorporated similar language into its conciliation agreements pursuant to its regulations at 41 CFR 60–1.34(d).

[334] 29 CFR 37.98 (1999 rule); 29 CFR 38.98 (2015 rule).

CRC has the requisite authority to enforce the nondiscrimination and equal opportunity provisions of Section 188 of WIOA and this part as applied to Governors. As contemplated in subparts B and C, the Governor serves a unique role, sometimes serving as both the entity responsible for oversight and monitoring of all State Programs and as a recipient, and violations may occur in either role under Section 188.

For the reasons set forth above and in the NPRM and considering the comments received, CRC finalizes § 38.94 as proposed, with a grammatical correction to paragraph (b)(1) to change ''be'' to ''been.''

Enforcement When Voluntary Compliance Cannot Be Secured § 38.95, Contents of a Final Determination of a Violation § 38.96, and Notification of Finding of Noncompliance § 38.97

Proposed §§ 38.95, 38.96, and 38.97 retained all of the existing language in the 2015 rule's §§ 38.99, 38.100, and 38.101, and only updated their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.95, 38.96, and 38.97 as proposed.

Notification of Breach of Conciliation Agreement § 38.98

Proposed § 38.98 merged the 2015 rule's §§ 38.102 and 38.103 into one section. CRC received no comments on this provision and adopts § 38.98 as proposed, with a technical correction to the title of the section to match the term used in the text.

Contents of Notification of Breach of Conciliation Agreement § 38.99 and Notification of an Enforcement Action Based on Breach of Conciliation Agreement § 38.100

Proposed §§ 38.99 and 38.100 retained all of the existing language in the 2015 rule's §§ 38.104 and 38.105, and only updated their titles and section numbers. CRC received no comments on these sections and adopts §§ 38.99 and 38.100 as proposed, with a technical correction to the title of § 38.99 to match the term used in the text.

Subpart E—Federal Procedures for Effecting Compliance

Enforcement Procedures § 38.110

Proposed § 38.110 generally retained the language in the 1999 and 2015 rules and made one additional update, adding language at the end of paragraph (a)(3) stating that the Secretary may take such action as may be provided by law ''which may include seeking injunctive relief.'' We added this provision to advise recipients that the Secretary may seek corrective actions that go beyond make-whole relief, and provided injunctive relief as an example of such other actions.

Comment: Two individual commenters supported the proposal but questioned how it would be enforced.

Response: CRC is committed to enforcing the equal opportunity and nondiscrimination provisions of WIOA Section 188 and this part using the detailed enforcement procedures set forth in the final rule.

For the reasons set forth above and in the NPRM, and in consideration of the comments received, CRC finalizes proposed § 38.110 without modification.

Hearing Procedures § 38.111

Proposed § 38.111 retained the same requirements of the 1999 and 2015 rules, but made minor changes to their provisions. Proposed § 38.111(b)(3) only updated the current title and location of the Office of the Solicitor's Division with which grant applicants or recipients must serve a copy of their filings under this section. Proposed § 38.111(d)(2) deleted the word ''Uniform'' as used in the 2015 rule's § 38.111 (d)(2), ''Uniform Rules of Evidence issued by the Department of Labor's Office of Administrative Law Judges'' to reflect the current title of that rule at 29 CFR part 18.

CRC received no comments on this provision and adopts § 38.111 as proposed.

Initial and Final Decision Procedures § 38.112

Proposed § 38.112 generally contained the same requirements as the 1999 and 2015 rules, but made a few modifications to its provisions. This proposed section replaced the word ''Secretary'' with the phrase ''Administrative Review Board'' (ARB) as it appears in various parts of § 38.112(b)(1) and (2). This replacement accurately reflects the ARB's role in issuing final agency decisions in cases brought to enforce WIOA Section 188. As stated in the NPRM, the Secretary's Order 2–96, issued in 1996, created the ARB and delegated to the ARB the Secretary's authority to issue final agency decisions under 38 enumerated statues, including the Comprehensive Employment and Training Act, 29 U.S.C. 801 *et seq.,* and the Job Training Partnership Act, 20 U.S.C. 1576, predecessor statutes to WIA and WIOA. Additionally, Secretary's Order 1–2002 included a delegation to the ARB for matters arising under Section 188 of the Workforce Investment Act,[335] as did Secretary's Order 02–2012.[336] These delegation orders also contain a catch-all provision to extend the delegation to subsequently enacted statues or rules, including: ''Any laws or regulations subsequently enacted or promulgated that provide for final decisions by the Secretary of Labor upon appeal or review of decisions, or recommended Decisions, issued by ALJs.'' [337] Thus, absent a new delegation order, the ARB issues final agency decisions under Section 188 of WIOA.

Proposed paragraph (b) retained the procedures for filing exceptions to the Administrative Law Judge's initial decision and order and issuance of a Final Decision and Order by the Department, but included some modifications. Specifically, proposed paragraph (b)(1)(iii) deleted the sentence ''[a]ny exception not specifically urged is waived'' from this paragraph. The prior provisions did not accurately describe the ARB's scope of review of initial decisions under the Administrative Procedure Act (APA). The APA provides that, on appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule.[338] Where, as here, the applicable rule does not specify the standard of review, ''the Board is not bound by either the ALJ's findings of fact or conclusions of law, but reviews both de novo.'' [339]

Finally, as noted in the preamble to the NPRM, we retained all of the 1999 and 2015 rules' requirements in proposed paragraph (b)(2)(ii), and proposed adding ''the Governor'' as one of the listed entities to which this provision applied. Proposed § 38.112(b)(2)(ii) stated that, when a Final Determination or Notification of a Breach of Conciliation Agreement becomes the Final Decision, the ARB may, within 45 days, issue an order terminating or denying the grant or continuation of assistance or imposing appropriate sanctions for failure of the grant applicant or recipient to comply

[335] 67 FR 64272, Oct. 17, 2002.

[336] 77 FR 69376, Nov.16, 2012.

[337] *Id.* at 63279.

[338] 5 U.S.C. 557(b).

[339] *Masek* v. *The Cadle Co.,* ARB No.97–069, ALJ No. 1995–WPC–1, at 7 (ARB Apr. 25, 2000) (citations omitted). *See also Jones* v. *U.S. Dep't of Labor,* 148 F.App'x 490, 2005 WL 2173769 (6th Cir Sept. 8, 2005) (ARB acted within its authority in drawing its own conclusions based on its independent review of the evidence); *Phillips* v. *Stanley Smith Sec., Inc.,* ARB No. 98–020, ALJ No. 1996–ERA–30 (ARB Jan. 31, 2001) (ARB reviews ALJ decisions under the ERA *de novo* but accords special weight to an ALJ's demeanor-based credibility determinations); *Berkman* v. *U.S. Coast Guard Acad.,* ARB No. 98–056, ALJ No. 1997–CAA–2, at 9 (ARB Feb. 29, 2000).

with the required corrective and/or remedial actions. We announced in the preamble to the NPRM that the imposition of appropriate sanctions should also be applicable to Governors for their failure to comply. The regulatory text of the NPRM inadvertently did not insert the Governor into the list of other entities—grant applicants and recipients—to which these provisions apply. However, we have corrected that oversight in this final rule. We received one comment regarding this revision.

Comment: A State agency commented that neither WIOA nor Title VI support the new authority that the Department seeks to assert over State Governors. The commenter suggested that the word ''Governor'' be removed from § 38.112.

Response: For the reasons provided above, CRC has the requisite authority to enforce the nondiscrimination and equal opportunity provisions of Section 188 of WIOA and this part as applied to Governors. As contemplated in subparts B and C, the Governor serves a unique role, sometimes serving as both the one responsible for oversight and monitoring of all State Programs and as a recipient. Again, the Governor may be found in violation under Section 188 and this part in either role. Thus, we decline to adopt the commenter's suggestion to exclude the Governor from this provision.

For the reasons stated in the proposed rule and considering the comments received, CRC finalizes § 38.112 as proposed, with the following modifications: Adding ''Governor's'' to paragraph (b)(2)(ii) and changing ''applicant'' to ''applicant's'' in the same paragraph for the sake of grammatical correctness and consistency.

Suspension, Termination, Withholding, Denial, or Discontinuation of Financial Assistance § 38.113

Proposed § 38.113 generally retained the language in this section and revised its title. The proposed rule included a small technical update in paragraph (c) and replaced the term ''Secretary'' with ''Administrative Review Board,'' consistent with the reason set forth in § 38.112. CRC received no comments on this provision and adopts § 38.113 as proposed.

Distribution of WIOA Title I Financial Assistance to an Alternate Recipient § 38.114

Proposed § 38.114 retained the language in this section and changed its title. CRC received no comments on this provision and adopts § 38.114 as proposed.

Post-Termination Proceedings § 38.115

Proposed § 38.115 retained the language in this section and changed its title. CRC received no comments on this provision and adopts § 38.115 as proposed.

III. Rulemaking Analyses and Notices

A. Executive Orders 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order (E.O.) 12866 directs agencies, in deciding whether and how to regulate, to assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. E.O. 13563 is supplemental to and reaffirms E.O. 12866. It emphasizes the importance of quantifying present and future benefits and costs; directs that regulations be adopted with public participation; and, where relevant and feasible, directs that regulatory approaches be considered that reduce burdens, harmonize rules across agencies, and maintain flexibility and freedom of choice for the public. Costs and benefits shall be understood to include both quantifiable measures and qualitative assessments of possible impacts that are difficult to quantify. If regulation is necessary, agencies should select regulatory approaches that maximize net benefits. The Office of Management and Budget (OMB) determines whether a regulatory action is significant and, therefore, subject to review.

Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as any action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 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, 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 novel legal or policy issues arising from legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

Summary of the analysis. The Department provides the following summary of the regulatory impact analysis:

(1) This final rule is a ''significant regulatory action'' under Section 3(f)(4) of E.O. 12866; therefore, OMB has reviewed this final rule.

(2) This final rule would have a negligible net direct cost impact on small entities beyond the baseline of the current costs required by the Workforce Innovation and Opportunity Act (WIOA) program as it is currently implemented in regulation.

(3) This final rule would not impose an unfunded mandate on Federal, state, local, or tribal governments as defined by the Unfunded Mandates Reform Act.

The total undiscounted cost of this final rule is estimated to be $120.0 million over the 10-year analysis period, which is equivalent to $106.86 million at a discount rate of 3 percent or $93.1 million at a discount rate of 7 percent. The Department estimates that this final rule will have an undiscounted first-year cost of $21.0 million, second-year cost of $10.2 million, and third-year cost of $13.8 million. In the fourth through the tenth years, average annual costs will be $10.7 million. The annualized cost of the proposed rule is estimated to be $12.2 million at a discount rate of 3 percent or $12.4 million at a discount rate of 7 percent. The annual burden hours are detailed in Table 3 and Table 4 presents a summary of the costs of this final rule. This final rule will not create significant new costs for Governors, recipients, or beneficiaries.

The primary cost burden created for affected entities by this final rule will be the cost of Governors' oversight and monitoring responsibilities for State Programs. Over the 10-year analysis timeframe, the Department estimates this provision to cost $57.3 million (undiscounted). The next two provisions with the highest costs over the 10-year analysis are the recipients' obligation to publish the equal opportunity notice ($31.2 million) and the required elements of a recipient's complaint procedures ($12.7 million). All provisions are discussed in the subject-by-subject analysis.

The Department was unable to quantify the benefits of this final rule due to data limitations or lack of existing data or evaluation findings. Many of the revisions to 29 CFR part 38 contained in this final rule, however, will improve readability and provide additional guidance to Governors, other recipients, and beneficiaries, in several instances in response to feedback from stakeholders, to their benefit. For example, additional clarifying language in §§ 38.28–38.31 regarding the obligations of Equal Opportunity Officers (EO Officers) and recipients' obligations regarding their EO Officers provides detailed direction that benefits recipients by providing better

programmatic guidance. Similarly, § 38.92 provides detail regarding the use of written assurances in the enforcement of nondiscrimination and equal opportunity requirements that resolves confusion that recipients raised about their use.

In addition, by including updates to the nondiscrimination provisions in Subpart A, this final rule makes it easier for Governors and recipients to meet their equal opportunity and nondiscrimination obligations under Section 188 of WIOA because the implementing regulations contain provisions consistent with requirements with which they are already required to comply under Federal laws such as Title VI and Title VII of the Civil Rights Act of 1964, as amended; Title IX of the Education Amendments of 1972; the Americans with Disabilities Act of 1990, as amended; and Section 504 of the Rehabilitation Act.

1. The Need for the Regulation

Signed by President Obama on July 22, 2014, WIOA supersedes the Workforce Investment Act of 1998 (WIA) as the Department's primary mechanism for providing financial assistance for a comprehensive system of job training and placement services for adults and eligible youth. Section 188 of WIOA prohibits the exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, because of citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. Section 188(e) of WIOA requires that the Department issue regulations implementing Section 188. WIOA contains identical provisions of Section 188 as appeared in WIA.

2. Technical Update of Section 188 Versus Publication of a Simultaneous Final Rule

The Department considered two possible alternatives: (1) To publish a final rule as 29 CFR part 38 implementing Section 188 of WIOA with only technical updates to the regulations at 29 CFR 37, which implemented Section 188 of WIA; or (2) To do (1) and publish an additional final rule that updates part 38 consistent with current law and addresses its application to current workforce development and workplace practices and issues.

The Department considered these options in accordance with the provisions of E.O. 12866 and chose to publish in July 2015 a technically updated final rule implementing Section 188 of WIOA, as required, and additionally publish this final rule consistent with current nondiscrimination law that addresses its application to current workforce development and workplace practices and issues (*i.e.,* alternative (2)). The Department concluded that the 2015 rule, which only technically updated the 1999 rule, did not reflect recent developments in equal opportunity and nondiscrimination jurisprudence. Moreover, procedures and processes for enforcement of the nondiscrimination and equal opportunity provisions of Section 188 have not been revised to reflect changes in the practices of recipients since 1999, including the use of computer-based and internet-based systems to provide aid, benefits, services, and training through WIOA Title I financially assisted programs and activities. Thus, only reissuing the existing regulations with technical updates (*i.e.,* alternative (1)) would have the negative effect of continuing to impose ongoing compliance costs on recipients while not providing the full protections to which beneficiaries are entitled under current law.

3. Analysis Considerations

The Department derived its estimates by comparing the existing program baseline, that is, the program benefits and costs of the 1999 and 2015 rules to the benefits and costs of the final rule.[340] For a proper evaluation of the benefits and costs of this final rule, the Department has explained how the newly required actions by States and recipients under the regulations at part 38 are linked to the expected benefits and estimated costs.

The Department made every effort, when feasible, to quantify and monetize the benefits and costs of this final rule. When the Department was unable to quantify them—for example, due to data limitations—the Department described the benefits and costs qualitatively. In accordance with the regulatory analysis guidance contained in OMB Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the benefits and costs that accrue to citizens and residents of the United States associated with this final rule.

Table 1 presents the estimated annual number of recipients expected to experience an increase in level of effort (workload) due to this final rule. These estimates are used extensively throughout this document to estimate the costs of each provision. Note that several recipients are counted under multiple categories because they receive more than one source of WIOA Title I financial assistance, that is, they receive funds under multiple programs. For example, the Texas Workforce Commission is both a recipient of a Senior Community Service Employment Program Grant and an Adult WIOA Title I grantee. However, the Department included it in both categories in an effort to be overinclusive, rather than risking underestimating the costs of this final rule.

[340] As previously noted, the 2015 rule (the original regulations implementing Section 188 of WIOA at 29 CFR part 38) made no substantive changes to the 1999 rule (the regulations implementing Section 188 of WIA at 29 CFR part 37).

TABLE 1—ESTIMATED ANNUAL NUMBER OF RECIPIENTS, BENEFICIARIES, AND NON-FEDERAL, FULL-TIME EMPLOYEES OF RECIPIENTS

	Recipients	Beneficiaries	Non-federal full-time employees of recipients
States [341]	[342] 57		
Adult Program (Title I of WIOA)	([345])		[343] 65,655
Dislocated Worker Program (Title I of WIOA)	([345])		([346])
Youth Program (Title I of WIOA)	([345])	[344] 193,130	([346])
Wagner-Peyser Act Program (Wagner-Peyser Act, as amended by Title III of WIOA)	([345])	[345] 16,619,943	([346])
Adult Education and Literacy Program (Title II of WIOA)	([345])	[346] 2,012,163	[347] 67,293
Vocational Rehabilitation Program	([345])	[348] 573,086	[349] 68,000
Trade Adjustment Assistance Program	([345])	[350] 51,133	([346])
Unemployment Compensation Program	([345])	[351] 2,451,464	[352] 62,138
Local Veterans' Employment Representatives and Disabled Veterans' Outreach Program	([345])	[353] 450,843	[354] 2,700
Career and Technical Education (Perkins)	([345])	[355] 12,052,217	([346])
Community Service Block Grants	([345])	[356] 16,000,000	([346])
Temporary Assistance for Needy Families (TANF)	([345])	[357] 4,417,000	([346])
State and Local Workforce Development Boards	[358] 580		[359] 9,280
Service Providers, Including Eligible Training Providers and On-the-Job Training Employers [360]	[361] 11,400	[362] 122,693	[363] 439,936
One-Stop Career Centers [364]	[365] 2,481	[366] 864,936	[367] 2,481
National Programs Include:			
Job Corps Operators (*i.e.,* national contractors)	[368] 18	[369] [370] 109,523	[371] [372] 3,050
Job Corps Outreach and Admissions Operators	[373] 24	([374])	([376])
Job Corps National Training Contractors/Career Transition Services Operators	[374] 21	([374])	([376])
Senior Community Service Employment Grants	[375] 71	[376] 67,123	([346])
National Emergency Grants [377]	[378] 125	[379] 26,221	[380] 9,280
Reintegration of Ex-Offenders—Adult Grants [381]	[382] 28	[383] 6,800	[384] 555
H–1B Technical Skills Training Grants [385]	[386] 36	[387] 22,543	[388] 774
H–1B Jobs and Innovation Accelerator Challenge Grants [389]	[390] 30	[391] 3,500	[392] 183
Indian and Native American Programs	[393] 178	[394] 35,735	[395] 994
National Farmworker Jobs Program	[396] 69	[397] 41,300	[398] 60,965
YouthBuild	[399] 82	[400] 36,997	[401] 2,408
Registered Apprenticeship Program	[402] 19,259	[403] 197,500	[404] 85,317
Total	34,459	56,355,850	881,009

Table 2 presents the compensation rates for the occupational categories expected to experience an increase in level of effort (workload) due to this final rule. The Department used median hourly wage rates from the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) program for private, State, and local employees [405] as well as the federal

[341] The 57 state entities are the recipients for the twelve programs below.

[342] This number includes the 50 states as well as the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, Palau, and U.S. Virgin Islands. These 57 entities are the recipients for the following programs and are thus counted only once: Adult Program (Title I of WIOA), Dislocated Worker Program (Title I of WIOA), Youth Program (Title I of WIOA), Wagner-Peyser Act Program (Wagner-Peyser Act, as amended by Title III of WIOA), Adult Education and Literacy Program (Title II of WIOA), Vocational Rehabilitation Program, Trade Adjustment Program, Unemployment Compensation Program, Local Veterans' Employment Representatives and Disabled Veterans' Outreach Program, Career and Technical Education (Perkins), Community Service Block Grants, and Temporary Assistance for Needy Families (TANF).

[343] This number is an estimate based on the average number of employees at State-level Department of Labor equivalents. These same 65,655 employees account for the non-federal full-time employees in the following programs and are thus counted only once: Adult Program (Title I of WIOA), Dislocated Worker Program (Title I of WIOA), Wagner-Peyser Act Program (Wagner Peyser Act, as amended by Title III of WIOA), Trade Adjustment Assistance Program, Career and Technical Education (Perkins), Community Service Block Grants, Temporary Assistance for Needy Families (TANF), and Senior Community Service Employment Grants.

[344] U.S. Department of Labor, Employment and Training Administration, *Workforce System Results: For the Quarter ending June 30, 2015, https://www.doleta.gov/performance/results/pdf/DOL_Workforce_Rprt_JUN_2015.pdf.* (hereinafter ''*Workforce SystemResults*'').

[345] U.S. Department of Labor, Employment and Training Administration, *National—Wagner-Peyser: Program Year 2013, http://www.doleta.gov/performance/results/pdf/WagnerPeyserPY2013.pdf.*

[346] U.S. Department of Education, Office of Vocational and Adult Education, *Adult Education and Family Literacy Act of 1998: Annual Report to Congress Program Year 2010–2011* (May 2013), *http://www2.ed.gov/about/offices/list/ovae/resource/aefla-report-to-congress-2010.pdf.*

[347] National Reporting System, *Adult Education Personnel, http://www.nrsweb.org/docs/NRS_Fast_Facts_508_rev.pdf.*

[348] U.S. Department of Education, Office of Special Education and Rehabilitative Services, *Annual Report Fiscal Year 2012* (2014), *http://www2.ed.gov/about/reports/annual/rsa/2012/rsa-2012-annual-report.pdf.*

[349] This is an estimate based on the average number of employees at state-level Department of Labor equivalents.

[350] *Workforce System Results, supra* note 344, at 3.

[351] *Id.*

[352] This is an estimate based on the average number of employees at state-level Department of Labor equivalents.

[353] U.S. Department of Labor, Veterans' Employment & Training Service, *Annual Report to Congress: Fiscal Year 2013, http://www.dol.gov/vets/media/DOL-VETS-FY2013_ANNUAL_REPORT-OMB-CLEARED_10-16-14.pdf.* This number is for PY 2012. *Id.*

[354] U.S. Department of Veterans Affairs, *LVER and DVOP Fact Sheet, http://www.benefits.va.gov/VOW/docs/LVER_DVOP_Factsheet.pdf.*

[355] U.S. Department of Education, *Carl D. Perkins Career and Technical Education Act of 2006: Report to Congress on state Performance Program Year 2010–2011*, 2014, *https://s3.amazonaws.com/PCRN/docs/Rpt_to_Congress/Perkins_RTC_2010-11.pdf.*

[356] U.S. Department of Health and Human Services, Administration for Children & Families, *Fiscal Year 2015: Justification of Estimates for Appropriations Committees, https://www.acf.hhs.gov/sites/default/files/olab/fy_2015_congressional_budget_justification.pdf.*

[357] U.S. Department of Health and Human Services, *Welfare Indicators and Risk Factors: Thirteenth Report to Congress* (March 2014), *http://aspe.hhs.gov/hsp/14/indicators/rpt_indicators.pdf.*

[358] From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

[359] This number is an estimate based on the average number of full-time employees from fourteen local boards multiplied by the number of recipients. The fourteen local boards include three from North Carolina, three from West Virginia, one from Virginia, three from Washington, three from Wisconsin, and one from Illinois.

[360] U.S. Department of Labor, Employment and Training Administration, *PY 2012 WIA Trends Over Time* (December 2013), *http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf.* (hereinafter ''*WIA Trends over Time*'').

[361] From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

[362] *WIA Trends over Time, supra* note 360, at 26.

[363] This number is an estimate based on the average number of employees at five different community colleges multiplied by 57 (the 50 states, the District of Columbia, and American Samoa, Guam, Northern Mariana Islands, Puerto Rico, Palau, and U.S. Virgin Islands). One college each came from the following states: Alabama, North Carolina, Virginia, Kentucky, and Colorado.

[364] *WIA Trends over Time, supra* note 360, at 26.

[365] From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

[366] *WIA Trends over Time, supra* note 360, at 26.

[367] This is an estimate based on the assumption that there is usually one point of contact per one-stop. U.S. Department of Labor, Employment and Training Administration, *Regional, State, and Local Contacts* (updated February 2016), *http://wdr.doleta.gov/contacts/.*

[368] U.S. Department of Labor, Job Corps, *PY 08: U.S. Department of Labor Job Corps Annual Report, http://www.jobcorps.gov/Libraries/pdf/py08report.sflb* (hereinafter ''*PY 08*'').

[369] *Workforce System Results, supra* note 344, at 3.

[370] Job Corps Operators, Job Corps Outreach and Admissions Operators, and Job Corps national training contractors/Career Transition Services Operators serve the same beneficiaries, so they are only counted once.

[371] This number is an estimate based on the assumption that there twenty-five employees at each of the Job Corps centers.

[372] Job Corps Operators, Job Corps Outreach and Admissions Operators, and Job Corps national training contractors/Career Transition Services Operators utilize the same employees, so they are only counted once.

[373] *PY 08, supra* note 368, at 13.

[374] *PY 08, supra* note 368, at 13.

[375] U.S. Department of Labor, Employment and Training Administration, *Senior Community Service Employment Program* (updated March 2016), *http://www.doleta.gov/seniors/.*

[376] *Workforce System Results, supra* note 344, at 3.

[377] *WIA Trends over Time, supra* note 360, at 26.

[378] This number was calculated based on the total active National Emergency Grant Awards by state (as of August 2014) obtained from the Workforce Investment Act Standardized Record Data (WIASRD) system by the Employment and Training Administration of the U.S. Department of Labor.

[379] *WIA Trends over Time, supra* note 360, at 26.

[380] This number is an estimate based on the average number of full-time employees from fourteen boards. The fourteen boards include three from North Carolina, three from West Virginia, one from Virginia, three from Washington, three from Wisconsin, and one from Illinois.

[381] U.S. Department of Labor, Employment and Training Administration, *Notice of Availability of Funds and Solicitation for Grant Applications for Reintegration of Ex-Offenders (RExO) Adult Generation 5* (January 2012), *http://www.doleta.gov/grants/pdf/sga_dfa_py_11_02_final_1_11_2012.pdf* (hereinafter ''*PY 2011*'').

[382] U.S. Department of Labor, Employment and Training Administration, *Reentry Employment Opportunities (REO)* (updated April 2015), *http://www.doleta.gov/REO/trainingtowork_grantees.cfm.*

[383] *PY 2011, supra* note 381, at 6.

[384] This number is an estimate based on the average number of full-time employees at grantee organizations (17) multiplied by the average number of full-time employees at 11 Training to Work 2 grantees (32.64).

[385] U.S. Department of Labor, Employment and Training Administration, *Overview of the H–1B Technical Skills Training (TST) Grants* (May 2012), *http://www.doleta.gov/business/pdf/H-1B_TST_R1-R2_Grant_Summaries_Final.pdf.*

[386] U.S. Department of Labor, Employment and Training Administration, *Overview of the H–1B Technical Skills Training (TST) Grants* (May 2012), *http://www.doleta.gov/business/pdf/H-1B_TST_R1-R2_Grant_Summaries_Final.pdf.* This is the most recent data available and assumes no variation from year to year of total national programs, although the names of the individual grant programs may shift from year to year. Similar grant activities continue from year to year, even if they are not these same grants.

[387] *Id.* This number is an estimate based on the total number of each grantee's projections.

[388] This number is an estimate based on the average number of full-time employees at six grantees (21.5) multiplied by the number of recipients (36).

[389] Mathematica Policy Research, *Evaluation of the Jobs and Innovation Accelerator Challenge Grants: Interim Findings on Multiagency Collaboration and Cluster Process* (August 2015), *https://www.mathematica-mpr.com/our-publications-and-findings/publications/evaluation-of-the-jobs-and-innovation-accelerator-challenge-grants-interim-findings-on-multiagency* (hereinafter ''*Mathematica JIAC*'').

[390] U.S. Department of Labor Employment and Training Administration, *Overview of the H–1B Jobs and Innovation Accelerator Challenge (Jobs Accelerator) Grants, http://www.doleta.gov/business/pdf/H-1B_Jobs_Accelerator_R1-R2_Project_Summaries_FINAL.pdf.*

[391] Mathematica JIAC, *supra* note 389, at x.

[392] This number is an estimate based on the average number of full-time employees at six grantees.

[393] U.S. Department of Labor, Employment and Training Administration, *FY 2015 Congressional Budget Justification, http://www.dol.gov/dol/budget/2015/PDF/CBJ-2015-V1-04.pdf.*

[394] *Workforce System Results, supra* note 344, at 3. This number was derived from adding the number of beneficiaries of the Indian and Native American Adult Program and the program for Indian and Native American Youth.

[395] This number is an estimate based on the assumption that American Indian and Alaskan Natives make up 1.6 percent of the total number of non-Federal full-time employees as with the total population.

[396] U.S. Department of Labor, Employment and Training Administration, *National Farmworker Jobs Program* (updated February 2016), *http://www.doleta.gov/Farmworker/html/NFJP_factsheet.cfm.*

[397] *Workforce System Results, supra* note 344, at 3.

[398] This number is an estimate based on the average number of full-time employees at state-level Department of Labor equivalents multiplied by the number of grantees.

[399] U.S. Department of Labor, Employment and Training Administration, *FY 2016 Department of Labor Budget in Brief, http://www.dol.gov/dol/budget/2016/PDF/FY2016BIB.pdf.*

[400] *Workforce System Results, supra* note 344, at 3.

minimum wage. The Department adjusted the wage rates using a loaded wage factor to reflect total compensation, which includes health and retirement benefits. For these State and local sectors, the Department used a loaded wage factor of 1.57, which represents the ratio of average total compensation to average wages in 2015.[406] The Department multiplied the loaded wage factor by each occupational category's median wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Table 2 extensively throughout this document to estimate the labor costs of each provision. The Department assumes that beneficiaries would be paid at least the federal minimum wage and therefore, we used the Federal minimum wage rate to calculate the estimated costs to beneficiaries throughout this analysis.[407] However, the Department did not multiply the loaded wage factor by the federal minimum wage to calculate an hourly compensation rate for beneficiaries because they are not considered to be employed.

The Department assumes Equal Opportunity Officers are managers as a proxy for their specific wage rates. This

[401] This number is based on the average number of employees at twenty-three grantees multiplied by the number of grantees.

[402] This number was provided by the Apprenticeship Program Office at the Department of Labor.

[403] U.S. Department of Labor, Employment and Training Administration, *Registered Apprenticeship National Results: Fiscal Year 2015* (updated December 2016), *http://doleta.gov/oa/data_statistics.cfm.* In FY 2015, more than 197,500 individuals nationwide entered the apprenticeship system. We estimate in FY 2015, 7.1 percent (14,023 active female apprentices/197,500 total active apprentices in the Registered Apprenticeship Partners Information Management Data System (RAPIDS) database) of active apprentices were women.

[404] U.S. Census Bureau, *Statistics about Business Size (including Small Business) from the U.S. Census Bureau* (updated August 2015), *http://www.census.gov/econ/smallbus.html.* This number is an estimate based on the average number of paid employees per firm (4.43) multiplied by the number of recipients.

[405] Department of Labor, Bureau of Labor Statistics, *May 2015 National Occupational Employment and Wage Estimates* (updated March 2016), *http://www.bls.gov/oes/current/oes_nat.htm.*

[406] Discerning the number of State and local-sector employees and private-sector employees at the local level is difficult; therefore, the Department used the State and local-sector loaded wage factor (1.57) instead of the private-sector wage factor (1.43) for all the employees to avoid underestimating the costs. For the State and local multiplier see Department of Labor, Bureau of Labor Statistics, *Employer Cost and Employee Compensation* (June 2016), *http://www.bls.gov/news.release/ecec.nr0.htm.*

[407] The cost to beneficiaries may be underestimated because some of beneficiaries are in the States that have a higher State minimum wage than the federal minimum wage.

assumption is based on our experience with recipients combined with the language in this final rule in which the Department states that the EO Officer must report directly to the Governor or the chief operating officer or equivalent of the recipient.[408] Furthermore, the Department is aware that administrative support workers may perform some of the functions where the need for computer programmers is indicated. However, because there are currently no data to indicate the proportion of computer programmer versus administrative support staff that would be used for the various functions, this analysis uses the wages of computer programmers in estimating this final rule costs, thereby providing an upper bound of cost for these functions.

TABLE 2—HOURLY COMPENSATION RATES

[2015 Dollars]

Position	Median hourly wage	Loaded wage factor	Hourly compensation rate
	A	B	C = A × B
Managers [409]	$46.99	1.57	$73.77
Computer Programmers [410]	38.24	.....	60.04
Beneficiaries [411]	7.25	.....	7.25

4. Subject-by-Subject Benefit-Cost Analysis

The Department derives its estimates below by comparing the existing program baseline, that is, the program benefits and costs estimated as a part of the 1999 and 2015 rules to the new requirements of the final rule.[412] Calculated cost estimates may not replicate or sum due to rounding.

The Department emphasizes that many of this final rule provisions are also existing requirements under WIOA. For example, 29 CFR 38.5 prohibits recipients from excluding an individual from participation in, denial of the benefits of, discrimination in or denial of employment in the administration of or in connection with, any WIOA Title I financially assisted program or activity on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship status or participation in any WIOA Title I-financially assisted program or activity. This final rule retains these requirements, but revises the language to make it easier to read, and also provides separate sections in the rule defining discrimination based on national origin, sex, pregnancy and citizenship status to aid recipients in meeting their obligations.[413] Accordingly, this regulatory analysis focuses on ''new'' costs that can be attributed to revisions of existing obligations and new requirements contained in this final rule.

Discussion of Impacts

In this section, the Department presents the costs associated with the new requirements of the regulations. This final rule revises 29 CFR part 38, issuing new regulations that set forth the requirements that recipients must meet in fulfilling their obligations under Section 188 of WIOA to ensure nondiscrimination and equal opportunity in WIOA Title I federally assisted programs, services, aid, and activities. There will be approximately 34,459 recipients annually who will serve approximately 56,355,850 beneficiaries annually with approximately 881,009 non-federal employees of recipients annually based on our informed estimates.[414]

Cost of Regulatory Familiarization

Agencies are required to include in the burden analysis the estimated time it takes for recipients to review and understand the instructions for compliance.[415] Based on its experience with recipients' compliance with the laws the Civil Rights Center enforces, and the mandate of the existing and revised regulations that each recipient has an EO Officer,[416] the Department believes that EO Officers at each recipient will be responsible for understanding or becoming familiar with the new requirements. Therefore, the Department estimates that it will take 4 hours for each EO Officer to read the rule. The Department estimates that each recipient will have one EO Officer that will become familiar with the new requirements. Consequently, the estimated burden for rule familiarization for these EO Officers is 137,836 hours (34,459 × 4 hours).[417] The Department calculates the total estimated cost as $10,168,754 (137,836 × $73.77/hour, difference due to rounding).[418]

The following is a description of additional costs and burdens resulting from this final rule. It follows the organization of this final rule for ease of reference.

Subpart A—General Provisions

Discrimination Prohibited Based on Pregnancy § 38.8

The final rule includes § 38.8 titled ''Discrimination prohibited based on pregnancy.'' One of the requirements of this section is—in addition to requiring that recipients not discriminate against an individual based on pregnancy, childbirth or related medical conditions—to require that recipients in certain situations provide reasonable accommodations or modifications to a pregnant applicant or participant or employee who is temporarily unable to participate in some portions of a WIOA Title I-financially assisted training

[408] *See* §§ 38.28–38.31.

[409] U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics* (May 2015), 11–1021 General and Operations Managers, *http://www.bls.gov/oes/current/oes111021.htm.*

[410] U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics* (May 2015), 15–1131 Computer Programmers, *http://www.bls.gov/oes/current/oes151131.htm.*

[411] This is the current federal minimum wage. 29 U.S.C. 206(a)(1)(C).

[412] As previously noted, the 2015 rule (the original regulations implementing Section 188 of WIOA at 29 CFR part 38) made no substantive changes to the 1999 rule (the regulations implementing Section 188 of WIA at 29 CFR part 37).

[413] *See* §§ 38.9, 38.7, and 38.11.

[414] *See* Table 1 for a breakdown of these numbers.

[415] *See* 5 CFR 1320.3(b)(1)(i).

[416] *See* 29 CFR 38.23 (2015 rule); § 38.28 (this final rule).

[417] This estimate is high because there are some exceptions to the EO Officer requirement. *See, e.g.,* § 38.33 (service providers are not required to designate a recipient-level EO Officer, but are instead monitored by the EO Officer of the Governor or local area grant recipient).

[418] Throughout this final rule, the Department assumes that EO Officers are managers.

program or activity because of pregnancy, childbirth, or related medical conditions, when such accommodations or modifications are provided, or are required to be provided, by a recipient's policy or by other relevant laws.

To determine the burden of this accommodation provision, the Department estimated the number of beneficiaries and the number of employees of recipients who may need an accommodation during pregnancy in a given year. No specific data sets detail the characteristics of these beneficiaries and employees relating to pregnancy.

Thus, the Department relied on the data sets available from the Employment and Training Administration (ETA) for beneficiaries of WIOA Title I financially assisted training programs, including the Job Corps Program, and estimated the number of recipients' employees based on data sets available for the general population and general labor force. The Department concluded that the characteristics of the general labor force are similar to the WIOA Title I financially assisted workforce.

Not every pregnant employee of a recipient in the WIOA Title I financially assisted workforce will require an accommodation that might involve more than a *de minimis* cost. In fact, the Department concluded that most will not. Many will have no medical condition associated with their pregnancies that require such accommodation. Providing light duty or accommodations for pregnancy generally involves adjusting work schedules or allowing more frequent breaks, both of which the Department concluded will incur little to no additional cost in most cases.

For those who do have such conditions, however, the positions held by employees or training opportunities that beneficiaries may participate in that require such accommodation generally involve physical exertion or standing; such positions are likely to be found in the occupational categories of craft workers, operatives, laborers, and service workers. The majority of employees of recipients and beneficiaries of WIOA Title I financial assistance will not be undertaking employment or training requiring accommodations for pregnancy-related medical conditions. As stated above, providing light duty or accommodation for pregnancy typically involves adjusting schedules or allowing more frequent breaks at little or no additional cost. However, a small percentage of the adult women who will annually receive training from eligible training providers, on-the-job training programs or Registered Apprenticeship programs and a small percentage of the female students who will receive Job Corps Center services annually may need accommodations.

The Department estimates that, of the women who are employees of recipients or participants in training programs or in Job Corps Centers, 21 percent work in or are in training for job categories likely to require accommodations that might involve more than a *de minimis* cost.[419]

Because these data about employees of recipients or participants in training programs do not indicate gender demographics, the Department used data from the BLS that indicate that about 47 percent of the workforce is female.[420] Therefore, the Department estimates that 57,666 (122,693 × .47) adult women are beneficiaries of eligible training providers and on the job training employers annually.[421] In addition, the Department estimates that 7.1 percent of active beneficiaries in Registered Apprenticeship programs are female, for a total of 14,023 (197,500 × .071) adult women in program year 2015.[422] Moreover, the Department estimates that there are 43,809 girls and women who are annual beneficiaries of the Job Corps program (109,523 × .40).[423]

In addition, the Department estimates the number of individuals employed by recipients to be 528,303 non-federal employees of eligible training providers and on-the-job training programs, Registered Apprenticeship programs, and Job Corps Centers (439,936 + 85,317 + 3,050). Because these data do not indicate gender demographics, the Department again used data from the Bureau of Labor Statistics that indicate that 47 percent of the workforce is female. Using these assumptions, there are 248,302 (528,303 × .47) adult women non-federal employees of recipients.

Based on these data, the Department estimates the approximate number of female beneficiaries and employees in (1) eligible training provider programs and on-the-job training programs, (2) Job Corps Centers and (3) Registered Apprenticeship Programs who are pregnant in a given year. Following the analysis adopted by the Office of Federal Contract Compliance Programs (OFCCP) to estimate similar costs, the Department turned to data from the U.S. Census. The U.S. Census American Fact Finder does not report on pregnancy, but does report on births. Census data also show whether the mother was in the labor force. The definition of labor force used by the Census includes individuals in the civilian labor force who are employed or unemployed, and the term unemployed, as used by the Census, includes those who were actively looking for work during the last four weeks and were available to accept a job. The Department determined that this number would be the best data available to use to estimate the percentage of female participants in programs and activities receiving financial assistance from Title I of WIOA as well as employees of WIOA Title I financially assisted programs and activities who are pregnant in a given year.

As the Department concludes these are the best data available, the Department used the ratio of women in the labor force who gave birth within the last year to the total female labor force as an approximate pregnancy rate of women in the workforce. Based on this approach, the Department estimates that the pregnancy rate for women in the workforce is approximately 4.7 percent.[424]

Training Program Beneficiaries

As calculated above, approximately 57,666 women annually participate in eligible training provider or on-the-job training provider programs that receive WIOA title I financial assistance. Of this number, using the pregnancy rate data above, 2,710 women might be pregnant annually (57,666 × .047). The Department estimates that no more than 21 percent, or 569 women (2,710 × .21), would be participating in job training categories likely to require

[419] This analysis is similar to that conducted by OFCCP in its final sex discrimination rule. OFCCP based this estimate on data from the Employer Information Report EEO–1. *See* OFCCP Sex Discrimination Final Rule, *supra* note 19, at 39145–46.

[420] U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (updated February 2016), *http://www.bls.gov/cps/cpsaat11.htm.*

[421] From the burden analysis contained in the ETA WIOA Final Rule, *supra* note 309.

[422] In 2015, 7.1 percent of active beneficiaries in the Registered Apprenticeship program were female. Registered Apprenticeship Partners Information Management Data System (RAPIDS) managed by Department of Labor staff only.

[423] Forty percent of the students benefiting from Job Corps programs annually are girls and young women. See Department of Labor, Job Corps, Student Outcomes/Who Job Corps Serves (August 2015), *http://www.jobcorps.gov/libraries/pdf/who_job_corps_serves.sflb.*

[424] U.S. Census Bureau, American Fact Finder, *Women 16 to 50 Years Who Had a Birth in the Past 12 Months by Marital Status and Labor Force Status, 2011 to 2013 American Community Survey 3-Year Estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_3YR_B13012&prodType=table#.* The data table reports birth rates for women in the labor force at 4.7 percent.

accommodations that might involve more than a *de minimis* cost.

Registered Apprenticeship Beneficiaries

As calculated above, approximately 14,023 women benefit annually from Registered Apprenticeship programs. Of this number, using the pregnancy rate data above, 659 (14,023 × .047) women might be pregnant in a given year. Of this number, the Department estimates that no more than 21 percent, or 138 women (.21 × 659), would participate in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

Job Corps Program Participants

Job Corps serves youth and young adults between the ages of 16 and 24.[425] Forty percent of Job Corps students (approximately 43,809) are female.[426] Applying the .047 rate of pregnancies used above to all female Job Corps students indicates that approximately 2,059 of them may become pregnant in a given year (43,809 × .047). The Job Corps Program has three stages through which participants move: Career Preparation Period, Career Development Period, and Career Transition Period. Not all of those students will be in the Career Development Period of their Job Corps Center experience, which is the stage when they will participate in technical training and will be most likely to need accommodations that might involve more than *de minimis* costs.[427]

At any given time, no more than a third of students are in the Career Development Period; thus, approximately 679 (2,059 × .33) pregnant young women are in this part of their educational experience annually. Of this number, the Department estimates that no more than 21 percent participate in job training that requires physical exertion or standing for long periods of time, so at most 143 (679 × .21) Job Corps students may be participating in jobs training categories likely to require accommodation that might involve more than *de minimis* cost.

Non-Federal Employees of Recipients

The Department determined that there are approximately 528,303 non-federal employees who work for recipients that operate or otherwise provide training programs, Job Corps Programs, and Registered Apprenticeship programs. Because these data do not indicate gender demographics, the Department used data from the BLS that indicate that 47 percent of the workforce is female.[428] Because approximately 248,302 of the employees of recipients are women, 11,670 (248,302 × .047) may be pregnant annually based on the data described above. The Department anticipates that no more than 21 percent,[429] or 2,451 women (.21 × 11,670) of these pregnant employees who are trainers at one-stop career centers or at Job Corps Centers, may be participating in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

Therefore, a total of 3,301 women (569 + 138 + 143 + 2,451, difference due to rounding) who are beneficiaries or non-federal employees of WIOA Title I financially assisted programs may be participating in job training categories likely to require accommodations that might involve more than a *de minimis* cost.

Limited Need for Accommodations

Reports by the National Institutes of Health indicate that the incidence of medical conditions during pregnancy that require accommodations ranges from 0.5 percent (placenta previa) to 50 percent (back issues).[430] Thus, the Department estimates that of the approximately 3,301 (569 job training beneficiaries + 138 Registered Apprenticeship beneficiaries + 143 Job Corps beneficiaries + 2,451 non-federal employees of recipients, difference due to rounding) women beneficiaries and employees in positions that may require physical exertion or standing according to our previous estimations, 50 percent (1,651) may require some type of an accommodation or light duty.[431]

The types of accommodations needed during pregnancy also vary. They range from time off for medical appointments and more frequent breaks to stools for sitting and assistance with heavy lifting.[432] Reports by the W.K. Kellogg Foundation on women's child bearing experiences and the National Women's Law Center on accommodating pregnant workers show that the costs associated with accommodating pregnant workers are minimal and generally involve schedule adjustments or modified work duties.[433]

One study found that, when faced with a pregnancy-related need for accommodation, between 62 percent to 74 percent of pregnant women asked their employers to address their needs. The study further found that 87 percent to 95 percent of the pregnant women who requested an adjustment to their work schedule or job duties worked for employers that attempted to address those requests. The study specifically found that 63 percent of pregnant women who needed a change in duties, such as less lifting or more sitting, asked their employers to address that need, and 91 percent of those women worked for employers that sought to address their needs.[434] Based on this study, the Department concluded that most employers and training providers do provide some form of accommodation to employees and participants when requested.

To determine the cost of accommodation or light duty associated with this final rule, the Department considered the types of light duty or accommodations needed for both participants in WIOA Title I programs and activities, and employees of recipients. Generally, providing light duty or accommodation for pregnancy involves adjusting work schedules or allowing more frequent breaks. The Department concludes that providing these accommodations will result in little to no additional cost.

[425] U.S. Department of Labor, Job Corps, *Eligibility Information* (June 2013), *http://www.jobcorps.gov/AboutJobCorps/program_design.aspx.*

[426] U.S. Department of Labor, Employment & Training Administration, Workforce System Results for the Quarter Ending June 30, 2013, *available at https://www.doleta.gov/performance/results/pdf/workforcesystemresultsjune20_2013.pdf.* Annual data for the four quarters ending in June 2013. Includes the number of students active on the start date, students enrolled during the timeframe, graduates separated before the start date and in the placement service window during the time frame, and former enrollees separated before the start date and in the placement service window during the period.

[427] Therefore, we focused on estimating the cost of providing accommodations during the Job Corps Career Development Period. Although participants may need accommodations during the Career Preparation and Career Transition Periods as well, we expect most substantial accommodation requests in the Career Development Period.

[428] U.S. Department of Labor, Bureau of Labor Statistics, *Women in the Labor Force: A Databook* (Feb. 2013), *http://www.bls.gov/cps/wlf-databook-2012.pdf.*

[429] See OFCCP Sex Discrimination NPRM, *supra* note 102, at 5262.

[430] S. Malmqvist et al., *Prevalence of low back and pelvic pain during pregnancy (Abstract), J. Manipulative Physiological Therapy,* National Center for Biotechnology Information (2012), *http://www.ncbi.nlm.nih.gov/pubmed/22632586.*

[431] These are the same data used in the OFCCP Sex Discrimination NPRM, *supra* note 102.

[432] Stephen Bernard, Professor of Sociology, Indiana University, *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Employment Opportunity Commission* (February 15, 2012), *http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm.*

[433] National Women's Law Center & A Better Balance, *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* (2013), *http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf.*

[434] Eugene Declerq et al., W.K. Kellogg Foundation, Listening to Mothers III: New Mothers Speak Out, 36 (2013).

Additional accommodations may involve either modifications to work and training environments (*e.g.,* providing a stool for sitting rather than standing) or to job duties (*e.g.,* lifting restrictions). In making such accommodations, recipients have discretion regarding how they would make such modifications. For example, a recipient may provide an employee or participant with an existing stool, or a recipient may have others assist when heavy lifting is required. To determine the cost of such accommodations, the Department referred to the Job Accommodation Network (JAN), which reports that the average cost of accommodation is $500.[435]

As stated above, 63 percent of pregnant women who needed a change in duties related to less lifting or more sitting requested such an accommodation from their employers. Thus, the Department estimates that 1,040 women (1,651 × .63) who may require accommodations would have made such a request, and 91 percent, or 946 of those requests (1,040 × .91) would have been addressed. Thus, this final rule requires recipients to accommodate the remaining 9 percent of pregnant women whose needs were not addressed. The Department calculates that the cost, accounting for pregnant women who made requests and the additional women who could make requests, will be $47,000 ((1,040 − 946 = 94) = 94 × $500, difference due to rounding). This is a first-year cost and a recurring cost.

The Department concludes that this cost estimate may be an overestimate because recipients with 15 or more employees are covered by a similar requirement in Title VII of the Civil Rights Act; because 36 States have requirements that apply to employers with fewer than 15 employees;[436] and because only employees employed in the administration of or in connection with WIOA Title I programs or activities are covered by this rule.[437] Moreover, to the extent a pregnancy-related medical condition is a disability, recipients with 15 or more employees are also already covered by similar requirements in the ADA, as amended by the ADAAA.

CRC received one comment that addressed the economic analysis of this provision in the NPRM. A coalition of eighty-six women's, workers', and civil rights organizations agreed with the Department's estimation of the burdens on recipients of accommodating pregnant applicants, participants, and employees.

Discrimination Prohibited Based on National Origin, Including Limited English Proficiency § 38.9

This final rule includes language regarding the limited circumstances when limited English proficient (LEP) individuals may elect to use their own interpreters and how that choice must be documented by the recipient. In § 38.9(f)(2)(ii), this final rule states that an accompanying adult may interpret or facilitate communication when ''the information conveyed is of minimal importance to the services to be provided or when the LEP individual specifically requests that the accompanying adult provides language assistance, the accompanying adult agrees to provide assistance, and reliance on that adult for such assistance is appropriate under the circumstances.'' This final rule goes on to state that ''[w]hen the recipient permits the accompanying adult to provide such assistance, it must make and retain a record of the LEP individual's decision to use their own interpreter.''

There are currently no data available regarding the number of LEP individuals who are beneficiaries of recipients and the Department was unable to determine how often an LEP individual will request that an accompanying adult provide language assistance, the accompanying adult agrees to provide it, and when reliance on that adult is appropriate. However, the Department concludes that all of these conditions will be met infrequently, creating a *de minimis* cost.

In addition, provisions are included in § 38.9(g) regarding a recipient's obligations to provide translation of vital information. Section 38.9(g)(1) addresses that obligation for languages spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, stating that ''a recipient must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site.''

Importantly, written training materials offered or used within employment-related training programs as defined under this part are excluded from these requirements. Section 38.9(g)(2) addresses the obligations of recipients for languages not spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, stating that ''a recipient must take reasonable steps to meet the particularized language needs of LEP individuals who seek to learn about, participate in, and/or access the aid, benefit, service, or training that the recipient provides.'' This section also allows that vital information may be conveyed orally if not translated. The requirement to take reasonable steps to provide services and information in appropriate languages was contained in the DOL LEP Guidance issued in 2003[438] and was also required by the 1999 and 2015 rules, which addressed a recipient's language access obligations.[439]

The Department was unable to assess what information each recipient will determine is vital, and thus needs to be translated, or what languages they would be translated into, because both factors are based on individual recipient assessments. Furthermore, as discussed in the preamble to § 38.9, the Department has not defined ''significant number or portion of the population.''

The Department received several public comments that addressed the economic analysis of this provision in the NPRM. The NPRM requested comment on the potential burden of the requirement to provide language services for LEP individuals in their preferred language based on a threshold (*e.g.,* 5 percent of the population or 1,000 speakers). Several State government commenters indicated that depending on what threshold is selected, it could result in a significant cost burden. However, the commenters did not provide any specific cost

[435] Beth Loy, Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact* (updated September 2015), *http://askjan.org/media/lowcosthighimpact.html.* Given that there are not accommodation cost data for pregnancy, the Department uses this as an approximation because it involves modification to work environments including lifting restrictions and other relevant factors.

[436] The following States have laws that cover employers with one employee: Alaska, Colorado, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, and Wisconsin. One State has laws that cover employers with two employees: Wyoming. One State has laws that cover employers with three employees: Connecticut. The following States have laws that cover employers with four employees: Delaware, Iowa, Kansas, New Mexico, New York, Ohio, Pennsylvania, and Rhode Island. The following States have laws that cover employers with five employees: California and Idaho. The following States have laws that cover employers with six employees: Indiana, Massachusetts, Missouri, New Hampshire, and Virginia. The following States have laws that cover employers with eight or more employees: Kentucky, Tennessee, and Washington. One State has laws that cover employers with nine or more employees: Arkansas. One State has laws that cover employers with 12 or more employees: West Virginia. In addition, the District of Columbia and Puerto Rico's laws cover employers with one employee.

[437] *See* § 38.2(a)(3).

[438] DOL LEP Guidance, *supra* note 28.

[439] *See* 29 CFR 37.35 (1999 rule); 29 CFR 38.35 (2015 rule).

information as they indicated that the cost would significantly vary with the level of language assistance services provided and the frequency with which languages would be encountered.

As discussed in the preamble to § 38.9 above, CRC considered setting thresholds which would trigger a requirement to translate standardized vital documents into particular languages but has not adopted such thresholds in this final rule. Although thresholds may improve access for some national origin populations, the approach does not comprehensively effectuate WIOA's prohibition of national origin discrimination affecting LEP individuals. Setting thresholds would be both under-inclusive and over-inclusive, given the diverse range, type, and sizes of entities covered by Section 188 and the diverse national origin populations within the service areas of recipients' respective programs and activities. For instance, a threshold requiring all covered entities, regardless of type or size, to provide language assistance services in languages spoken by 5 percent of a county's LEP population could result in the provision of language assistance services in more languages than the entity would otherwise be required to provide under its obligation in § 38.9(g). This threshold would apply regardless of the number of individuals with limited English proficiency who are eligible to be served or likely to be encountered by the recipient's programs or activities and regardless of the recipient's operational capacity. Similarly, this threshold could leave behind significant numbers of individuals with limited English proficiency served by the recipient's programs or activities, who communicate in a language that constitutes less than 5 percent of the county's limited English proficient population.

Although some federal regulations set thresholds, those regulations address entities or programs of similar sizes and types. [440] In comparison, WIOA and this part regulate more diverse types of recipients with potentially more diverse limited English proficient populations. CRC is concerned that significant limited English proficient populations might receive no or inadequate language assistance services under a threshold-based regulation. CRC is also concerned about the burden an across-the-board translation threshold might place on small covered entities.

Moreover, we value the flexibility inherent in the contextualized approach we have chosen to assess compliance with the requirement to take reasonable steps to provide meaningful access. This provision is intended to be a flexible standard specific to the facts of each situation. CRC could not determine what information each recipient will determine is vital, and thus needs to be translated, or what languages they would be translated into, because both factors are based on individual recipient assessments. Providing additional specificity, at least in this final rule, would apply rigid standards across-the-board to all recipients and thus jeopardize that very goal. Accordingly, this rule imposes no new obligations in this regard.

The NPRM proposed that recipients take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with other individuals. One commenter suggested that this requirement may impose additional costs and result in providers not listing their training programs.

Although proposed § 38.15 revised the title of § 38.9 in the 2015 rule to ''Communications with individuals with disabilities'' and revised paragraph (a) and (b) to be consistent with DOJ's ADA Title II regulations, no new substantive requirements were outlined from those contained in the 1999 and 2015 rules. As with WIA Section 188, a recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. A recipient must furnish appropriate auxiliary aids and services where necessary to accomplish this. The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what type of auxiliary aid and service is necessary, a recipient must give primary consideration to the request of an individual with a disability. Thus, the provision of auxiliary aids and services is always individually based and depends on a number of factors.

The Department recognizes changes to WIOA expanded the applicability of CRC's requirements to cover additional entities, and that there may be new entities not previously covered. However, the requirements of this final rule with respect to auxiliary aids and services are generally not new to these entities. Other federal statutes such as the ADA and the Rehabilitation Act already contain the same requirements regarding the provision of auxiliary aids and services for individuals with disabilities. Consequently, CRC does not agree that it imposes any additional costs.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

Equal Opportunity Officers

Designation of Equal Opportunity Officers § 38.28

Every Governor must designate an individual as a State-level Equal Opportunity Officer (EO Officer), who reports directly to the Governor and is responsible for State Program-wide coordination of compliance with the equal opportunity and nondiscrimination requirements.

Several commenters indicated this requirement would not only increase monitoring efforts, but also require increases in staffing. They also indicated that the requirement to designate an individual who reports directly to the Governor is an unfunded mandate.

The Department disagrees with the assertion that this requirement would result in an increase in staffing or that it is an unfunded mandate. Governors retain flexibility as to whom to designate as the State-level EO Officer, which includes the ability to restructure the current EO Officer position to meet the requirements of §§ 38.28 through 38.31. The requirement that recipients, including Governors, designate an EO Officer is longstanding and exists under the 2015 rule, just as it existed under the 1999 rule. In practice, most Governors have empowered a designee, typically, the director(s) of a State cabinet agency or agencies that oversee(s) labor and workforce programs, to appoint an EO Officer often times referred to as the State EO Officer. That EO Officer reported to the State agency cabinet director and, in practice, often limited oversight to the EO Officer's own specific agency. However, the Governor has obligations beyond the duties of a recipient to ensure nondiscrimination and equal opportunity across all State Programs including State Workforce Agencies. Indeed, under certain circumstances the Governor can be held jointly and severally liable for all violations of these nondiscrimination and equal opportunity provisions under § 38.52, which includes State Workforce Agencies as defined in § 38.4(lll), and

[440] *See* 45 CFR 155.205(c)(2)(iii), (iv) (regarding HHS's regulation of health care exchanges); 26 CFR 1.501(r)–4(b)(5)(ii) (Department of the Treasury's regulation regarding hospital organizations and financial assistance policies); 7 CFR 272.4(b) (Department of Agriculture's Supplemental Nutrition Assistance Program).

State Programs as defined in § 38.4(kkk). The final rule's requirement serves to emphasize the importance of the Governor's obligations, and ensure that a State-level EO Officer can carry out those obligations—with authority flowing from the Office of the Governor and with the staff and resources sufficient to carry out those requirements.

The changes in the rule do not impede the flexibilities available for a Governor to determine how the equal opportunity program works in the State, and is described in the Governor's Nondiscrimination Plan. For example, the Governor can designate a new State-level EO Officer or restructure the current EO Officer position as the Governor's State-level EO Officer. As noted above, the rule does not change the definition of ''Governor,'' and an individual designated to act on the Governor's behalf may also carry out the responsibilities of the Governor under this part. In that case, the Governor's authority to ensure equal opportunity would flow to the Governor's designee and, in turn, to the State-level EO Officer. The State-level EO Officer would then have the authority necessary to carry out the Governor's equal opportunity obligations.

Recipients' Obligations To Publish an Equal Opportunity Notice § 38.36

This final rule includes changes to the specific language provided by the Department for recipients to use in the equal opportunity notice and poster that they are required to post prominently in physical locations and on the recipient's Web site.[441] The changes include notice that communications with individuals with disabilities must be as effective as communications with others and of the right to request auxiliary aids and services at no cost; a statement that discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth and related medical conditions, sex stereotyping, transgender status, and gender identity; and that discrimination on the basis of national origin may include discrimination on the basis of limited English proficiency.[442] Because this notice and other notices throughout this final rule are required to be provided in English as well as appropriate languages other than English, the Department will make translations of this notice available to recipients in the ten most frequently spoken languages in the U.S. other than English. This final rule also requires the inclusion of language in the poster stating that the CRC will accept complaints via U.S. mail and email at an address provided on the CRC Web site.[443]

This final rule requires that the notice be placed in employee and participant handbooks, including electronic and paper forms if both are available, provided to each employee and placed in each employee's file (both paper and electronic, if both are available).[444]

The Department estimates that it would take each EO Officer approximately 15 minutes to print out the notices and another 15 minutes to ensure that new notices and posters are disseminated. Dissemination includes posting the notice in conspicuous locations in the physical space of the recipient and posting it on appropriate Web pages on the recipient's Web site. Consequently, the estimated first-year dissemination burden is 17,230 hours (34,459 recipients × 1 EO Officer × .5 hours). The Department calculates the total estimated first-year and dissemination cost for the EO Officers as $1,271,094 (17,230 hours × $73.77/hour). The Department also estimates that each EO Officer will make 30 copies of the notice (assuming 10 copies each in three languages) for posting in the EO Officer's establishment for a first-year operational and maintenance cost of $82,702 (34,459 × $.08 × 30).

Additionally, the Department assumes it will take a computer programmer 30 minutes to place the notice on appropriate Web pages of the recipient's Web site. The Department assumes that each recipient has one Web site. The Department calculates the first-year burden to update recipients' Web sites to be an additional 17,230 hours (34,459 × 1 programmer × .5 hours) and the first-year costs for recipients to update their Web sites to be an additional $1,034,404 (17,230 × $60.04/hour, difference due to rounding). The Department also assumes that it will take an EO Officer 30 minutes to disseminate to all employees of recipients a copy of the notice and place a copy in the employee files. The Department calculates an additional first-year burden for dissemination to be 17,230 hours (34,459 × .5 hours) and an additional first-year cost of $1,271,094 (17,230 × $73.77/hour, difference due to rounding).

Moreover, there is a recurring burden each time an employee is hired. The Department assumes an 18.9 percent[445] employee hires rate per year for a total of 166,511 new employees in the second and future years (881,009 (total number of recipients' employees) × .189). The Department estimates that it will take an EO Officer 15 minutes to disseminate the notice to recipients' new employees each year, which equates to a burden of 41,628 hours (166,511 × .25 hours) and the total recurring cost to be $3,070,879 (41,628 hours × $73.77, difference due to rounding). The first-year operation and maintenance cost for printing the two copies of the notice (one to disseminate to the employee and one to place in their file) for the first year is $140,961 (881,009 (total number of recipients' employees) × $0.08 × 2 copies) and the second and future years' operation and maintenance cost is $26,642 (166,511 new employees × $0.08 × 2 copies) for copies made for new employees each year.

Data and Information Collection, Analysis, and Maintenance § 38.41

Paragraph (a)(2) adds ''limited English proficiency'' and ''preferred language'' to the list of categories of information that each recipient must collect about each applicant, registrant, participant, and terminee. The rule does not apply these data collection obligations to applicants for employment and employees of recipients because the obligation regarding limited English proficient (LEP) individuals does not apply to those categories of individuals. This change is intended to ensure that recipients collect information related to serving LEP individuals. The Department concludes that these terms best capture this information as to LEP individuals and are also used by several States with language access laws.[446]

The Department calculates the cost of adding this category to the list of categories of information that each recipient must collect about each applicant and participant as *de minimis* for the recipient because they are already collecting demographic data from beneficiaries in several other categories and these additions will be added to this existing process. Furthermore, the Department estimates that, on average, it will take beneficiaries 5 seconds to provide LEP information including preferred language, where applicable, voluntarily. This equates to an annual cost of $567,472 (56,355,850 × 5 seconds = 281,779,250/60 = 4,696,320 minutes/60 = 78,272 hours × $7.25/hour). This provision will go into effect in the third year.

[441] §§ 38.35, 38.36(a)(1).

[442] § 38.35.

[443] *Id.*

[444] § 38.36(b).

[445] U.S. Department of Labor, Bureau of Labor Statistics, *state and local government ''hires'' data for annual average* (2015), *http://www.bls.gov/jlt/#news.*

[446] *See supra* note 228 and accompanying text.

For recipients that are not already collecting this information,[447] the Department estimates that there will be a one-time cost in the third year to each recipient of 1.5 hours of a computer programmer's time to incorporate these new categories into an online form for data collection. The Department concludes that all recipients use computer-based data collection methods, and the one-time burden is $3,103,212 (34,459 recipients × 1 programmer × 1.5 hours × $60.04/hour, difference due to rounding).

Required Maintenance of Records by Recipients § 38.43

This final rule includes language that specifies the types of records that need to be retained by a recipient when a complaint has been filed, and also requires that records be kept if a compliance review has been initiated. Records that must be kept include any type of hard-copy or electronic record related to the complaint or the compliance review.

The Department assumes that the only additional burden and associated cost will be to identify additional files that a recipient must retain beyond 3 years if they receive notice of a complaint or are under a compliance review. The Department further assumes this cost to be *de minimis.*

Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of the Workforce Innovation and Opportunity Act (WIOA)

Governor's Oversight and Monitoring Responsibilities for State Programs § 38.51

Section 38.51(b) of the final rule requires the Governor to monitor on an annual basis the compliance of State Programs with WIOA Section 188 and this part. Under the 2015 rule, Governors were required to ''periodically'' monitor compliance of recipients. The new annual monitoring requirement is intended to: (1) Enable the timely identification and elimination of discriminatory policies and practices, thereby reducing the number of individuals impacted by discrimination; (2) be consistent with the Department's regulations requiring annual oversight of one-stop career centers;[448] and (3) establish a consistent state-level practice nationwide. It is anticipated that this change will represent a burden to some Governors who are not already interpreting the term ''periodically'' in the current regulations to require annual oversight. The Department anticipates that this change will not impose a burden on all States because approximately half of them are currently conducting this monitoring annually, pursuant to their Methods of Administration.[449] Thus, the Department estimates that the burden will be imposed on 29 of the 57 States subject to this requirement that currently do not annually monitor their recipients for compliance with Section 188 of WIOA. Of the States that do not conduct annual monitoring, the Department is aware that the monitoring is conducted every 3 years on average. Thus, 29 States will need to increase their monitoring from once every 3 years to yearly.

Based on the Department's experience and interaction with several States with varying populations and geographic sizes, the average amount of time that it takes each State's EO Officer and similar managers to conduct this annual monitoring is approximately 4,000 hours in total carried out by multiple people. The additional burden on each of the 29 States that previously conducted monitoring every 3 years versus every year is estimated to be 2,680 hours (4,000 hours × .67) [450] per State annually or 77,720 for all 29 States (2,680 hours × 29 States) annually. The Department calculates the total estimated annual cost for States at $5,733,739 (29 States × 2,680 hours × $73.77/hour, difference due to rounding).

Governor's Obligation To Develop and Implement a Nondiscrimination Plan § 38.54

This rule changes the name ''Methods of Administration'' for the document described in § 38.54 to ''Nondiscrimination Plan,'' but retains the definition and contents of the document. Since the contents of the Plan did not change, the change of the title of the document was presumed to be incurred in the total cost of the issuance of the Plan.

Subpart D—Compliance Procedures

Notice To Show Cause Issued to a Recipient § 38.66

The new language in § 38.66(b), states that the Director may issue a Notice to Show Cause to a recipient ''after a Letter of Findings and/or an Initial Determination has been issued, and after a reasonable period of time has passed within which the recipient refuses to negotiate a conciliation agreement with the Director regarding the violation(s).'' The Department made this change to expand the circumstances in which the Director may issue a Notice to Show Cause. This final rule seeks to use the Notice to Show Cause at this later stage because it has been the Department's experience that, after issuing a letter of findings or initial determination, the Governor or other recipients may agree in principle to enter into a conciliation agreement that resolves the identified violations, but then frequently fail to respond to correspondence from the CRC regarding finalizing and signing the agreement.

With § 38.66(b), the Director could issue a Notice to Show Cause prior to issuing a final Determination, providing Governors and other recipients another opportunity to take the corrective or remedial actions required by the Director to bring the recipient into compliance before enforcement proceedings are initiated. Recipients are already familiar with the Notice to Show Cause because it is currently described and contained in the implementing regulations found at 29 CFR 38.67, so these changes are slight, and the language is clear in terms of the new circumstances under which the Director can issue them. The Department estimates that it will issue at most two additional Show Cause Notices per year on average as a result of this change. Based on this, the Department estimates the burden incurred to be *de minimis.*

Required Elements of a Recipient's Complaint Processing Procedures § 38.72

This final rule adds a paragraph obligating recipients to give complainants a copy of the equal opportunity notice in § 38.35, along with other notices already required by the 1999 and 2015 rules, including written acknowledgement that the recipient has received a complaint and notice of the complainant's right to representation. This new requirement is designed to ensure that complainants are aware of their rights, including that they have the option of filing with the recipient or with CRC, and that they are

[447] Programs providing core and intensive services through the one-stop delivery system currently collect information regarding LEP status and some may be doing so voluntarily; however, we have no way of knowing how many recipients overall are currently collecting information from beneficiaries regarding LEP status, so we are including the cost to all recipients for this analysis.

[448] ETA WIOA Final Rule, *supra* note 309.

[449] This is based on CRC's records of reporting and discussions with EO Officers for the States over the past few years.

[450] This is based on information from CRC's experience working with the States and asking several EO Officers these questions.

aware of the deadlines applicable to filing a subsequent complaint with CRC if they file initially with the recipient.

The Department anticipates that this requirement, which has recipients provide complainants a copy of the notice of rights contained in § 38.35, is limited to the operational costs of making additional copies of the notice for this purpose, and the first-year personnel cost of 30 minutes of the EO Officer's time, who is most likely to be responsible for implementing this requirement, to include it in the documents routinely provided to complainants. Based on complaint log data from 2003 to 2008, the Department estimates that, on average, each recipient will receive one Section 188 complaint each year. The Department assumes that EO Officers will handle the complaints for recipients and that it will take them approximately 30 additional minutes to process each complaint. This burden is calculated at 17,230 hours (34,459 recipients × .5 hours) for a first-year total cost of $1,271,094 (17,230 hours × $73.77/hour, difference due to rounding). Additionally, the Department calculates that there are first-year and recurring operation and maintenance costs of $2,757 ($0.08 × 34,459) to copy the equal opportunity notice for complainants.

TABLE 3—ANNUAL BURDEN HOURS

Provision	Year 1	Year 2	Year 3	Year 4–10 (annual average)
Cost of regulatory familiarization	137,836	0	0	0
Discrimination prohibited based on pregnancy (§ 38.8)	0	0	0	0
Recipients' obligations to publish equal opportunity notice (§ 38.36)	51,689	41,628	41,628	41,628
Data and information collection, analysis, and maintenance (§ 38.41)	0	0	129,961	78,272
Governor's oversight and monitoring responsibilities for state programs (§ 38.51)	77,720	77,720	77,720	77,720
Required elements of a recipient's complaint processing procedures (§ 38.72)	17,230	17,230	17,230	17,230
Operation and maintenance costs	NA	NA	NA	NA
Total	284,474	136,577	266,538	214,849

TABLE 4—ANNUAL COSTS

Provision	Year 1	Year 2	Year 3	Year 4–10 (annual average)	10 Year total	Annualized with 3%	Annualized with 7%
Cost of regulatory familiarization	$10,168,754	$0	$0	$0	$10,168,754	$1,157,367	$1,353,86
Discrimination prohibited based on pregnancy (§ 38.8)	47,000	47,000	47,000	47,000	47,000	47,000	47,000
Recipients' obligations to publish equal opportunity notice (§ 38.36)	3,576,593	3,071,053	3,071,053	3,071,053	31,216,066	3,128,591	3,138,321
Data and information collection, analysis, and maintenance (§ 38.41)	0	0	3,670,684	567,472	7,642,989	773,099	782,056
Governor's oversight and monitoring responsibilities for state programs (§ 38.51)	5,733,739	5,733,739	5,733,739	5,733,739	57,337,386	5,733,739	5,733,739
Required elements of a recipient's complaint processing procedures (§ 38.72)	1,271,094	1,271,094	1,271,094	1,271,094	1,271,094	1,271,094	1,271,094
Operation and maintenance costs	226,420	29,398	29,398	29,398	491,006	51,823	55,615
Total (Undiscounted)	21,023,600	10,152,284	13,822,968	10,719,756	120,037,144	12,162,713	12,380,910
Total with 3% discounting	21,023,600	9,856,586	13,029,473	8,993,323	106,862,919	.....	.....
Total with 7% discounting	21,023,600	9,488,116	12,073,516	7,208,598	93,045,418	.....	.....

B. Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing the information collection for public comment.

As part of continuing efforts to reduce paperwork and respondent burden, the Department conducts preclearance consultation activities to provide the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA.[451] This activity helps to ensure that: (1) The public understands the collection instructions; (2) respondents can provide the requested data in the desired format; (3) reporting burden (time and financial resources) is minimized; (4) respondents clearly understand the collection instruments; and (5) the Department can properly assess the impact of collection requirements on respondents. Furthermore, the PRA requires all federal agencies to analyze proposed regulations for potential burdens on the regulated community created by provisions in the proposed regulations, which require the submission of information. The information collection requirements must also be submitted to the OMB for approval.

The Department notes that 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 it is approved by the OMB under the PRA 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

[451] *See* 44 U.S.C. 3506(c)(2)(A).

collection of information that does not display a valid Control Number.[452] The Department obtains approval for Nondiscrimination Compliance Information Reporting under Control Number 1225–0077.

The information collections in this final rule are summarized in the section-by-section discussion of this final rule in Section II. The Department has identified that the following proposed sections contain information collections: 29 CFR 38.14, 38.16(f), 38.25, 38.27, 38.29, 38.34–38.36, 38.38, 38.39–38.43, 38.51, 38.52–38.54, 38.55, 38.69, 38.70, 38.72, 38.73, 38.74, and 38.77. Additional information collections approved under Control Number 1225–0077 appear in part 37, encompassing similar nondiscrimination requirements under the Workforce Investment Act (WIA), of this title; they will be maintained on a temporary basis while existing WIA grants remain in effect.

Concurrent with the publication of this final rule, the Department is submitting an associated information collection request to the Office of Management and Budget for approval. Interested parties may obtain a copy free of charge of one or more of the information collection requests submitted to the OMB on the reginfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain*. From the *Information Collection Review* tab, select *Information Collection Review.* Then select the *Department of Labor* from the *Currently Under Review* dropdown menu, and lookup Control Number 1225–0077. A free copy of the requests may also be obtained by contacting the person named in the **ADDRESSES** section of this preamble.

The information collections are summarized as follows:

Agency: DOL-OASAM.

Title of Collection: Nondiscrimination Compliance Information Reporting.

OMB Control Number: 1225–0077.

Affected Public: Individuals or Households and Private Sector—businesses or other for profits and not for profit institutions.

Total Estimated Number of Respondents: 105,259.

Total Estimated Number of Responses: 56,324,784.

Total Estimated Annual Time Burden: 315,339.

Total Estimated Annual Other Costs Burden: $0.

C. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' This 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.''

D. Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does not include any federal mandate that may result in excess of $100 million in increased expenditures by State, local, and tribal governments in the aggregate, or by the private sector of $100 million or more.

E. Plain Language

The Department drafted this final rule in plain language.

F. Effects on Families

The undersigned hereby certifies that the final rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act of 1999. To the contrary, by better ensuring that beneficiaries, including job seekers and applicants for unemployment insurance, do not suffer illegal discrimination in accessing programs, services, and activities financially assisted by the Department, the final rule would have a positive effect on the economic well-being of families.

G. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (RFA), 5 U.S.C. 603, requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. The Small Business Administration (SBA) defines a small business as one that is ''independently owned and operated and which is not dominant in its field of operation.'' The definition of small business varies from industry to industry to the extent necessary to reflect industry size differences properly. An agency must either use the SBA definition for a small entity or establish an alternative definition, in this instance, for the workforce industry.

The Department has adopted the SBA definition for the purposes of this certification. The Department has notified the Chief Counsel for Advocacy, SBA, under the RFA at 5 U.S.C. 605(b), and proposes to certify that this rule will not have a significant economic impact on a substantial number of small entities. This finding is supported, in large measure, by the fact that small entities are already receiving financial assistance under the WIOA program and will likely continue to do so as articulated in this final rule. Having made these determinations and pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. In making this determination, the agency used the SBA definition of small business, found at 13 CFR 121.201.

Affected Small Entities

This final rule can be expected to impact small one-stop center operators. One-stop operators can be a single entity (public, private, or nonprofit) or a consortium of entities. The types of entities that might be a one-stop operator include: (1) An institution of higher education; (2) an employment service State agency established under the Wagner-Peyser Act; (3) a community-based organization, nonprofit organization, or workforce intermediary; (4) a private for-profit entity; (5) a government agency; (6) a Local Workforce Development Board, with the approval of the local CEO and the Governor; or (7) another interested organization or entity that can carry out the duties of the one-stop operator. Examples include, but are not limited to, a local chamber of commerce or other business organization, or a labor organization.

Impact on Small Entities

The Department indicates that transfer payments are a significant aspect of this analysis in that the majority of WIOA program cost burdens on State and local workforce development boards will be fully financed through federal transfer payments to States. The Department has highlighted costs that are new to implementation of this final rule. Therefore, the Department expects that

[452] *See* 44 U.S.C. 3512; 5 CFR 1320.5(a), 1320.6.

this final rule will have negligible net cost impact on small entities.

H. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

I. Executive Order 13175 (Indian Tribal Governments)

This rule does not have tribal implications under Executive Order 13175 that require a tribal summary impact statement. The rule would 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.

J. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)

This rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

K. Executive Order 12988 (Civil Justice Reform)

The rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the federal court system. The final rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

L. Executive Order 13211 (Energy Supply)

This rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 29 CFR Part 38

Civil rights, Discrimination in employment, Equal opportunity, Nondiscrimination, Workforce development.

Edward C. Hugler,

Acting Assistant Secretary for Administration and Management, U.S. Department of Labor.

■ For reasons set forth in the preamble, the Department revises 29 CFR part 38 to read as follows:

Title 29—Labor

PART 38—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY PROVISIONS OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Subpart A—General Provisions

Sec.
38.1 Purpose.
38.2 Applicability.
38.3 Effect on other obligations.
38.4 Definitions.
38.5 General prohibitions on discrimination.
38.6 Specific discriminatory actions prohibited on bases other than disability.
38.7 Discrimination prohibited based on sex.
38.8 Discrimination prohibited based on pregnancy.
38.9 Discrimination prohibited based on national origin, including limited English proficiency.
38.10 Harassment prohibited.
38.11 Discrimination prohibited based on citizenship status.
38.12 Discrimination prohibited based on disability.
38.13 Accessibility requirements.
38.14 Reasonable accommodations and reasonable modifications for individuals with disabilities.
38.15 Communications with individuals with disabilities.
38.16 Service animals.
38.17 Mobility aids and devices.
38.18 Employment practices covered.
38.19 Intimidation and retaliation prohibited.
38.20 Administration of this part.
38.21 Interpretation of this part.
38.22 Delegation of administration and interpretation of this part.
38.23 Coordination with other agencies.
38.24 Effect on other laws and policies.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients Assurances

38.25 A grant applicant's obligation to provide a written assurance.
38.26 Duration and scope of the assurance.
38.27 Covenants.

Equal Opportunity Officers

38.28 Designation of Equal Opportunity Officers.
38.29 Recipients' obligations regarding Equal Opportunity Officers.
38.30 Requisite skill and authority of Equal Opportunity Officer.
38.31 Equal Opportunity Officer responsibilities.
38.32 Small recipient Equal Opportunity Officer obligations.
38.33 Service provider Equal Opportunity Officer obligations.

Notice and Communication

38.34 Recipients' obligations to disseminate equal opportunity notice.
38.35 Equal Opportunity notice/poster.
38.36 Recipients' obligations to publish equal opportunity notice.
38.37 Notice requirement for service providers.
38.38 Publications, broadcasts, and other communications.
38.39 Communication of notice in orientations.
38.40 Affirmative outreach.

Data and Information Collection and Maintenance

38.41 Collection and maintenance of equal opportunity data and other information.
38.42 Information to be provided to the Civil Rights Center (CRC) by grant applicants and recipients.
38.43 Required maintenance of records by recipients.
38.44 CRC access to information and information sources.
38.45 Confidentiality responsibilities of grant applicants, recipients, and the Department.

Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of the Workforce Innovation and Opportunity Act (WIOA)

38.50 Subpart application to State Programs.
38.51 Governor's oversight and monitoring responsibilities for State Programs.
38.52 Governor's liability for actions of recipients the Governor has financially assisted under Title I of WIOA.
38.53 Governor's oversight responsibility regarding recipients' recordkeeping.
38.54 Governor's obligations to develop and implement a Nondiscrimination Plan.
38.55 Schedule of the Governor's obligations regarding the Nondiscrimination Plan.

Subpart D—Compliance Procedures

38.60 Evaluation of compliance.
38.61 Authority to issue subpoenas.

Compliance Reviews

38.62 Authority and procedures for pre-approval compliance reviews.
38.63 Authority and procedures for conducting post-approval compliance reviews.
38.64 Procedures for concluding post-approval compliance reviews.
38.65 Authority to monitor the activities of a Governor.
38.66 Notice to Show Cause issued to a recipient.
38.67 Methods by which a recipient may show cause why enforcement proceedings should not be instituted.
38.68 Failing to show cause.

Complaint Processing Procedures

38.69 Complaint filing.
38.70 Required contents of complaint.

38.71 Right to representation.
38.72 Required elements of a recipient's complaint processing procedures.
38.73 Responsibility for developing and publishing complaint processing procedures for service providers.
38.74 Recipient's obligations when it determines that it has no jurisdiction over a complaint.
38.75 If the complainant is dissatisfied after receiving a Notice of Final Action.
38.76 If a recipient fails to issue a Notice of Final Action within 90 days after the complaint was filed.
38.77 Extension of deadline to file complaint.
38.78 Determinations regarding acceptance of complaints.
38.79 When a complaint contains insufficient information.
38.80 Lack of jurisdiction.
38.81 Complaint referral.
38.82 Notice that complaint will not be accepted.
38.83 Notice of complaint acceptance.
38.84 Contacting CRC about a complaint.
38.85 Alternative dispute resolution.

Complaint Determinations

38.86 Notice at conclusion of complaint investigation.
38.87 Director's Initial Determination that reasonable cause exists to believe that a violation has taken place.
38.88 Director's Final Determination that no reasonable cause exists to believe that a violation has taken place.
38.89 When the recipient fails or refuses to take corrective action listed in the Initial Determination.
38.90 Corrective or remedial action that may be imposed when the Director finds a violation.
38.91 Post-violation procedures.
38.92 Written assurance.
38.93 Required elements of a conciliation agreement.
38.94 When voluntary compliance cannot be secured.
38.95 Enforcement when voluntary compliance cannot be secured.
38.96 Contents of a Final Determination of a violation.
38.97 Notification of finding of noncompliance.

Breaches of Conciliation Agreements

38.98 Notification of Breach of Conciliation Agreement.
38.99 Contents of Notification of Breach of Conciliation Agreement.
38.100 Notification of an enforcement action under based on breach of conciliation agreement.

Subpart E—Federal Procedures for Effecting Compliance

38.110 Enforcement procedures.
38.111 Hearing procedures.
38.112 Initial and final decision procedures.
38.113 Suspension, termination, withholding, denial, or discontinuation of financial assistance.
38.114 Distribution of WIOA Title I financial assistance to an alternate recipient.
38.115 Post-termination proceedings.

Authority: 29 U.S.C. 3101 *et seq.*; 42 U.S.C. 2000d *et seq.*; 29 U.S.C. 794; 42 U.S.C. 6101 *et seq.*; and 20 U.S.C. 1681 *et seq.*

Subpart A—General Provisions

§ 38.1 Purpose.

The purpose of this part is to implement the nondiscrimination and equal opportunity provisions of the Workforce Innovation and Opportunity Act (WIOA), which are contained in section 188 of WIOA (29 U.S.C. 3248). Section 188 prohibits discrimination on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship status or participation in a WIOA Title I-financially assisted program or activity. This part clarifies the application of the nondiscrimination and equal opportunity provisions of WIOA and provides uniform procedures for implementing them.

§ 38.2 Applicability.

(a) *Applicability.* This part applies to:

(1) Any recipient, as defined in § 38.4;

(2) Programs and activities that are part of the one-stop delivery system and that are operated by one-stop partners listed in section 121(b) of WIOA, to the extent that the programs and activities are being conducted as part of the one-stop delivery system; and

(3) As provided in § 38.18, the employment practices of a recipient and/or one-stop partner, to the extent that the employment is in the administration of or in connection with programs and activities that are being conducted as a part of WIOA Title I or the one-stop delivery system.

(b) *Limitation of application.* This part does not apply to:

(1) Programs or activities that are financially assisted by the U.S. Department of Labor (Department) exclusively under laws other than Title I of WIOA, and that are not part of the one-stop delivery system (including programs or activities implemented under, authorized by, and/or financially assisted by the Department under the Workforce Investment Act of 1998 (WIA));

(2) Contracts of insurance or guaranty;

(3) The ultimate beneficiary to a program of Federal financial assistance; and

(4) Federal procurement contracts, with the exception of contracts to operate or provide services to Job Corps Centers.

§ 38.3 Effect on other obligations.

(a) A recipient's compliance with this part will satisfy any obligation of the recipient to comply with 29 CFR part 31, the Department's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI), and with subparts A, D, and E of 29 CFR part 32, the Department's regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended (Section 504).

(b) 29 CFR part 32, subparts B and C and appendix A, the Department's regulations which implement the requirements of Section 504 pertaining to employment practices and employment-related training, program accessibility, and reasonable accommodation, are hereby adopted by this part. Therefore, recipients must comply with the requirements set forth in those regulatory sections as well as the requirements listed in this part.

(c) This part does not invalidate or limit the obligations, remedies, rights, and procedures under any Federal law, or the law of any State or political subdivision, that provides greater or equal protection for the rights of persons as compared to this part:

(1) Recipients that are also public entities or public accommodations, as defined by Titles II and III of the Americans with Disabilities Act of 1990 (ADA), should be aware of obligations imposed by those titles.

(2) Similarly, recipients that are also employers, employment agencies, or other entities covered by Title I of the ADA should be aware of obligations imposed by that title.

(d) Compliance with this part does not affect, in any way, any additional obligations that a recipient may have to comply with applicable federal laws and their implementing regulations, such as the following:

(1) Executive Order 11246, as amended;

(2) Executive Order 13160;

(3) Sections 503 and 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793 and 794);

(4) The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212);

(5) The Equal Pay Act of 1963, as amended (29 U.S.C. 206d);

(6) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*);

(7) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101);

(8) The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621);

(9) Title IX of the Education Amendments of 1972, as amended (Title IX) (20 U.S.C. 1681);

(10) The Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*); and

(11) The anti-discrimination provision of the Immigration and Nationality Act, as amended (8 U.S.C. 1324b).

§ 38.4 Definitions.

For the purpose of this part:

(a) *Administrative Law Judge* means a person appointed as provided in 5 U.S.C. 3105 and 5 CFR 930.203, and qualified under 5 U.S.C. 557, to preside at hearings held under the nondiscrimination and equal opportunity provisions of WOIA and this part.

(b) *Aid, benefit, service, or training* means WIOA Title I-financially assisted services, financial or other aid, training, or benefits provided by or through a recipient or its employees, or by others through contract or other arrangements with the recipient. ''Aid, benefit, service, or training'' includes, but is not limited to:

(1) Career Services;

(2) Education or training;

(3) Health, welfare, housing, social service, rehabilitation, or other supportive services;

(4) Work opportunities;

(5) Cash, loans, or other financial assistance to individuals; and

(6) Any aid, benefits, services, or training provided in or through a facility that has been constructed, expanded, altered, leased, rented, or otherwise obtained, in whole or in part, with Federal financial assistance under Title I of WIOA.

(c) *Applicant* means an individual who is interested in being considered for any WIOA Title I-financially assisted aid, benefit, service, or training by a recipient, and who has signified that interest by submitting personal information in response to a request by the recipient. *See also* the definitions of ''application for benefits,'' ''eligible applicant/registrant,'' ''participant,'' ''participation,'' and ''recipient'' in this section.

(d) *Applicant for employment* means a person or persons who make(s) an application for employment with a recipient of Federal financial assistance under WIOA Title I.

(e) *Application for benefits* means the process by which information, including but not limited to a completed application form, is provided by applicants or eligible applicants before and as a condition of receiving any WIOA Title I-financially assisted aid, benefit, service, or training from a recipient.

(f) *Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(g) *Assistant Secretary* means the Assistant Secretary for Administration and Management, United States Department of Labor.

(h) *Auxiliary aids or services* includes:

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective means of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services, devices, and actions.

(i) *Babel notice* means a short notice included in a document or electronic medium (*e.g.,* Web site, ''app,'' email) in multiple languages informing the reader that the communication contains vital information, and explaining how to access language services to have the contents of the communication provided in other languages.

(j) *Beneficiary* means the individual or individuals intended by Congress to receive aid, benefits, services, or training from a recipient.

(k) *Citizenship* See ''Discrimination prohibited based on citizenship status.'' in § 38.11.

(l) *CRC* means the Civil Rights Center, Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor.

(m) *Department* means the U.S. Department of Labor, including its agencies and organizational units.

(n) *Departmental grantmaking agency* means a grantmaking agency within the U.S. Department of Labor.

(o) *Director* means the Director, Civil Rights Center, Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor, or a designee authorized to act for the Director.

(p) *Direct threat* means a significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by auxiliary aids and services, reasonable accommodations, or reasonable modifications in policies, practices and/or procedures. The determination whether an individual with a disability poses a direct threat must be based on an individualized assessment of the individual's present ability safely to either:

(1) Satisfy the essential eligibility requirements of the program or activity (in the case of aid, benefits, services, or training); or

(2) Perform the essential functions of the job (in the case of employment). This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(i) The duration of the risk;

(ii) The nature and severity of the potential harm;

(iii) The likelihood that the potential harm will occur; and

(iv) The imminence of the potential harm.

(q) *Disability*—(1) *General.* ''Disability'' means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (q)(7) of this section.

(2) *Rules of construction.* (i) The definition of ''disability'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by Federal disability nondiscrimination law and this part.

(ii) An individual may establish coverage under any one or more of the three prongs of the general definition of disability in paragraph (q)(1) of this section, the ''actual disability'' prong in paragraph (q)(1)(i) of this section, the ''record of'' prong in paragraph (q)(1)(ii) of this section, or the ''regarded as''

prong in paragraph (q)(1)(iii) of this section.

(iii) Where an individual is not challenging a recipient's failure to provide reasonable accommodations or reasonable modifications under § 38.14(a) or (b), it is generally unnecessary to proceed under the ''actual disability'' or ''record of'' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the ''regarded as'' prong of the definition of ''disability,'' which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ''actual disability'' or ''record of'' prong regardless of whether the individual is challenging a recipient's failure to provide reasonable accommodations, or reasonable modifications.

(3) *Physical or mental impairment.* (i) ''Physical or mental impairment'' means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(B) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) ''Physical or mental impairment'' includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: Orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, pregnancy-related medical conditions, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) ''Physical or mental impairment'' does not include homosexuality or bisexuality.

(4) *Major life activities.* (i) Major life activities include, but are not limited to:

(A) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(B) The operation of a ''major bodily function,'' such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(ii) *Rules of construction.* (A) In determining whether an impairment substantially limits a major life activity, the term ''major'' shall not be interpreted strictly to create a demanding standard.

(B) Whether an activity is a ''major life activity'' is not determined by reference to whether it is of central importance to daily life.

(5) *Substantially limits*—(i) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(A) The term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by Federal disability nondiscrimination law and this part. ''Substantially limits'' is not meant to be a demanding standard.

(B) The primary object of attention in disability cases brought under WIOA Section 188 should be whether recipients have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(C) An impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(F) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ''substantially limits'' applied prior to the ADA Amendments Act of 2008 (ADAAA).

(G) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (q)(5)(i)(G) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(H) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(I) The six-month ''transitory'' part of the ''transitory and minor'' exception in paragraph (q)(7)(ii) of this section does not apply to the ''actual disability'' or ''record of'' prongs of the definition of ''disability.'' The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this paragraph (q)(5)(i) for establishing an actual disability or a record of a disability.

(ii) *Predictable assessments.* (A) The principles set forth in paragraph (q)(5)(i) of this section are intended to provide for more generous coverage and application of the prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and recipients with rights and responsibilities with respect to avoiding discrimination on the basis of disability.

(B) Applying these principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of

coverage under paragraph (q)(1)(i) of this section (the ''actual disability'' prong) or paragraph (q)(1)(ii) (the ''record of'' prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(C) For example, applying these principles, it should easily be concluded that the types of impairments set forth in paragraphs (q)(5)(ii)(C)(*1*) through (*11*) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in paragraphs (q)(5)(ii)(C)(*1*) through (*11*) may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (q)(5)(ii)(C)(*1*) through (*11*).

(*1*) Deafness substantially limits hearing;

(*2*) Blindness substantially limits seeing;

(*3*) Intellectual disability substantially limits brain function;

(*4*) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(*5*) Autism substantially limits brain function;

(*6*) Cancer substantially limits normal cell growth;

(*7*) Cerebral palsy substantially limits brain function;

(*8*) Diabetes substantially limits endocrine function;

(*9*) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;

(*10*) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(*11*) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(iii) *Condition, manner, or duration.* (A) At all times taking into account the principles in paragraph (q)(5)(i) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(B) Consideration of facts such as condition, manner or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(C) In determining whether an individual has a disability under the ''actual disability'' or ''record of'' prongs of the definition of ''disability,'' the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning, because of the additional time or effort the individual must spend to read, write, speak, or learn compared to most people in the general population.

(D) Given the rules of construction set forth in paragraph (q)(5)(i) of this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (q)(5)(ii)(C) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(iv) *Mitigating measures* include, but are not limited to:

(A) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(B) Use of assistive technology;

(C) Reasonable modifications of policies, practices, and procedures, or auxiliary aids or services;

(D) Learned behavioral or adaptive neurological modifications; or

(E) Psychotherapy, behavioral therapy, or physical therapy.

(6) *Has a record of such an impairment.* (i) An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(ii) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by Federal disability nondiscrimination law and this part and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of ''disability'' if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (q)(5)(i) of this section apply.

(iii) *Reasonable accommodation or reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable accommodation or reasonable modification if needed and related to the past disability.

(7) *Is regarded as having such an impairment.* The following principles apply under the ''regarded as'' prong of the definition of ''disability'' (paragraph (q)(1)(iii) of this section):

(i) Except as set forth in paragraph (q)(7)(ii) of this section, an individual is ''regarded as having such an impairment'' if the individual is subjected to an action prohibited by WIOA Section 188 and this part because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the recipient asserts, or may or does ultimately establish, a defense to the action prohibited by WIOA Section 188 and this part.

(ii) An individual is not ''regarded as having such an impairment'' if the recipient demonstrates that the impairment is, objectively, both ''transitory'' and ''minor.'' A recipient may not defeat ''regarded as'' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the recipient must demonstrate that the impairment is (in

the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both ''transitory'' and ''minor.'' For purposes of this section, ''transitory'' is defined as lasting or expected to last six months or less.

(iii) Establishing that an individual is ''regarded as having such an impairment'' does not, by itself, establish liability. Liability is established only when an individual proves that a recipient discriminated on the basis of disability within the meaning of federal nondiscrimination law and this part.

(r) *Eligible applicant/registrant* means an individual who has been determined eligible to participate in one or more WIOA Title I-financially assisted programs or activities.

(s) *Employment practices* of a recipient include, but are not limited to:

(1) Recruitment or recruitment advertising;

(2) Selection, placement, layoff or termination of employees;

(3) Upgrading, promotion, demotion or transfer of employees;

(4) Training, including employment-related training;

(5) Participation in upward mobility programs;

(6) Deciding rates of pay or other forms of compensation;

(7) Use of facilities; or

(8) Deciding other terms, conditions, benefits, and/or privileges of employment.

(t) *Employment-related training* means training that allows or enables an individual to obtain skills, abilities and/or knowledge that are designed to lead to employment.

(u) *Entity* means any person, corporation, partnership, joint venture, sole proprietorship, unincorporated association, consortium, Native American tribe or tribal organization, Native Hawaiian organization, and/or entity authorized by State or local law; any State or local government; and/or any agency, instrumentality or subdivision of such a government.

(v) *Facility* means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, rolling stock or other conveyances, or other real or personal property or interest in such property, including the site where the building, property, structure, or equipment is located. The phrase ''real or personal property'' in the preceding sentence includes indoor constructs that may or may not be permanently attached to a building or structure. Such constructs include, but are not limited to, office cubicles, computer kiosks, and similar constructs.

(w) *Federal grantmaking agency* means a Federal agency that provides financial assistance under any Federal statute.

(x) *Financial assistance* means any of the following:

(1) Any grant, subgrant, loan, or advance of funds, including funds extended to any entity for payment to or on behalf of participants admitted to that recipient for training, or extended directly to such participants for payment to that recipient;

(2) Provision of the services of grantmaking agency personnel, or of other personnel at the grantmaking agency's expense;

(3) A grant or donation of real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of property for less than fair market value or for reduced consideration;

(ii) Proceeds from a subsequent sale, transfer, or lease of such property, if the grantmaking agency's share of the fair market value of the property is not returned to the grantmaking agency; and

(iii) The sale, lease, or license of, and/or the permission to use (other than on a casual or transient basis), such property or any interest in such property, either:

(A) Without consideration;

(B) At a nominal consideration; or

(C) At a consideration that is reduced or waived either for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to or use by the recipient;

(4) Waiver of charges that would normally be made for the furnishing of services by the grantmaking agency; and

(5) Any other agreement, arrangement, contract or subcontract (other than a procurement contract or a contract of insurance or guaranty), or other instrument that has as one of its purposes the provision of assistance or benefits under the statute or policy that authorizes assistance by the grantmaking agency.

(y) *Financial assistance under Title I of WIOA* means any of the following, when authorized or extended under WIOA Title I:

(1) Any grant, subgrant, loan, or advance of federal funds, including funds extended to any entity for payment to or on behalf of participants admitted to that recipient for training, or extended directly to such participants for payment to that recipient;

(2) Provision of the services of Federal personnel, or of other personnel at Federal expense;

(3) A grant or donation of Federal real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of property for less than fair market value or for reduced consideration;

(ii) Proceeds from a subsequent sale, transfer, or lease of such property, if the Federal share of the fair market value of the property is not returned to the Federal Government; and

(iii) The sale, lease, or license of, and/or the permission to use (other than on a casual or transient basis), such property or any interest in such property, either:

(A) Without consideration;

(B) At a nominal consideration; or

(C) At a consideration that is reduced or waived either for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to or use by the recipient;

(4) Waiver of charges that would normally be made for the furnishing of Government services; and

(5) Any other agreement, arrangement, contract or subcontract (other than a Federal procurement contract or a contract of insurance or guaranty), or other instrument that has as one of its purposes the provision of assistance or benefits under WIOA Title I.

(z) *Fundamental alteration* means:

(1) A change in the essential nature of a program or activity as defined in this part, including but not limited to an aid, service, benefit, or training; or

(2) A cost that a recipient can demonstrate would result in an undue burden. Factors to be considered in making the determination whether the cost of a modification would result in such a burden include:

(i) The nature and net cost of the modification needed, taking into consideration the availability of tax credits and deductions, and/or outside financial assistance, for the modification;

(ii) The overall financial resources of the facility or facilities involved in the provision of the modification, including:

(A) The number of persons aided, benefited, served, or trained by, or employed at, the facility or facilities; and

(B) The effect the modification would have on the expenses and resources of the facility or facilities;

(iii) The overall financial resources of the recipient, including:

(A) The overall size of the recipient;

(B) The number of persons aided, benefited, served, trained, or employed by the recipient; and

(C) The number, type and location of the recipient's facilities;

(iv) The type of operation or operations of the recipient, including:

(A) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient; and

(B) Where the modification sought is employment-related, the composition, structure and functions of the recipient's workforce; and

(v) The impact of the modification upon the operation of the facility or facilities, including:

(A) The impact on the ability of other participants to receive aid, benefit, service, or training, or of other employees to perform their duties; and

(B) The impact on the facility's ability to carry out its mission.

(aa) *Governor* means the chief executive of a State or an outlying area, or the Governor's designee.

(bb) *Grant applicant* means an entity that submits required documentation to the Governor, recipient, or Department, before and as a condition of receiving financial assistance under Title I of WIOA.

(cc) *Grantmaking agency* means an entity that provides Federal financial assistance.

(dd) *Guideline* means written informational material supplementing an agency's regulations and provided to grant applicants and recipients to provide program-specific interpretations of their responsibilities under the regulations.

(ee) *Illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as amended (21 U.S.C. 812). ''Illegal use of drugs'' does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(ff) *Individual with a disability* means a person who has a disability as previously defined in this section.

(1) The term ''individual with a disability'' does not include an individual on the basis of:

(i) Transvestism, transsexualism, or gender identity disorders not resulting from physical impairments;

(ii) Pedophilia, exhibitionism, voyeurism, or other sexual behavior disorders;

(iii) Compulsive gambling, kleptomania, or pyromania; or

(iv) Psychoactive substance use disorders resulting from current illegal use of drugs.

(2) The term ''individual with a disability'' does not include an individual who is currently engaging in the illegal use of drugs, when a recipient acts on the basis of such use. This limitation does not exclude as an individual with a disability an individual who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use, except that it is not a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (ff)(2)(i) or (ii) of this section is no longer engaging in the illegal use of drugs.

(3) With regard to employment, the term ''individual with a disability'' does not include any individual who:

(i) Is an alcoholic if:

(A) The individual's current use of alcohol prevents such individual from performing the duties of the job in question; or

(B) The individual's employment, by reason of such current alcohol abuse, would constitute a direct threat to the individual or the safety of others; or

(ii) Has a currently contagious disease or infection, if:

(A) That disease or infection prevents the individual from performing the essential functions of the job in question; or

(B) The individual's employment, because of that disease or infection, would constitute a direct threat to the health or safety of the individual or others.

(gg) *Labor market area* means an economically integrated geographic area within which individuals can reside and find employment within a reasonable distance or can readily change employment without changing their place of residence. Such an area must be identified in accordance with either criteria used by the Bureau of Labor Statistics of the Department of Labor in defining such areas, or similar criteria established by a Governor.

(hh) *Limited English proficient (LEP) individual* means an individual whose primary language for communication is not English and who has a limited ability to read, speak, write, and/or understand English. LEP individuals may be competent in English for certain types of communication (*e.g.,* speaking or understanding), but still be LEP for other purposes (*e.g.,* reading or writing).

(ii) *LWDA (Local Workforce Development Area) grant recipient* means the entity that receives WIOA Title I financial assistance for a local area directly from the Governor and disburses those funds for workforce development activities.

(jj) *National Programs* means:

(1) Job Corps; and

(2) Programs receiving Federal financial assistance under Title I, Subtitle D of WIOA directly from the Department. Such programs include, but are not limited to, the Migrant and Seasonal Farmworkers Programs, Native American Programs, National Dislocated Worker Grant Programs, and YouthBuild programs.

(kk) *Noncompliance* means a failure of a grant applicant or recipient to comply with any of the applicable requirements of the nondiscrimination and equal opportunity provisions of WIOA and this part.

(ll) *Nondiscrimination Plan* means the written document and supporting documentation developed under § 38.54.

(mm) *On-the-Job Training (OJT)* means training by an employer that is provided to a paid participant while the participant is engaged in productive work that:

(1) Provides knowledge or skills essential to the full and adequate performance of the job;

(2) Provides reimbursement to the employer of up to 50 percent of the wage rate of the participant (or up to 75 percent as provided in WIOA section 134(c)(3)(H)), for the extraordinary costs of providing the training and additional supervision related to the training; and

(3) Is limited in duration as appropriate to the occupation for which the participant is being trained, taking into account the content of the training, the prior work experience of the participant, and the service strategy of the participant, as appropriate.

(nn) *Other power-driven mobility device* means any mobility device powered by batteries, fuel, or other engines or by similar means—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section.

(oo) *Participant* means an individual who has been determined to be eligible to participate in, and who is receiving any aid, benefit, service, or training under, a program or activity financially assisted in whole or in part under Title I of WIOA. ''Participant'' includes, but is not limited to, individuals receiving any service(s) under State Employment Service programs, and claimants receiving any service(s) or benefits under State Unemployment Insurance programs.

(pp) *Participation* is considered to commence on the first day, following determination of eligibility, on which the participant began receiving subsidized aid, benefit, service, or training provided under Title I of WIOA.

(qq) *Parties to a hearing* means the Department and the grant applicant(s), recipient(s), or Governor.

(rr) *Population eligible to be served* means the total population of adults and eligible youth who reside within the labor market area that is served by a particular recipient, and who are eligible to seek WIOA Title I-financially assisted aid, benefits, services, or training from that recipient. See the definition of ''labor market area'' in this section.

(ss) *Program or activity,* see ''WIOA Title I-financially assisted program or activity'' in this section.

(tt) *Programmatic accessibility* means policies, practices, and procedures providing effective and meaningful opportunity for persons with disabilities to participate in or benefit from aid, benefits, services, and training.

(uu) *Prohibited basis* means any basis upon which it is illegal to discriminate under the nondiscrimination and equal opportunity provisions of WIOA or this part, *i.e.,* race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, citizenship status or participation in a WIOA Title I-financially assisted program or activity.

(vv) *Public entity* means:

(1) Any State or local government; and

(2) Any department, agency, special purpose district, workforce development board, or other instrumentality of a State or States or local government.

(ww) *Qualified individual with a disability* means:

(1) With respect to employment, an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position;

(2) With respect to aid, benefits, services, or training, an individual who, with or without auxiliary aids and services, reasonable accommodations, and/or reasonable modifications in policies, practices and procedures, meets the essential eligibility requirements for the receipt of such aid, benefits, services, or training.

(xx) *Qualified interpreter* means an interpreter who is able to interpret effectively, accurately, and impartially, either for individuals with disabilities or for individuals who are limited English proficient. The interpreter must be able to interpret both receptively and expressively, using any necessary specialized vocabulary, either in-person, through a telephone, a video remote interpreting (VRI) service, or via internet, video, or other technological methods.

(1) *Qualified interpreter for an individual with a disability* includes, for example, a sign language interpreter, oral transliterator, and cued-language transliterator. When an interpreter is provided to a person with a disability, the qualified interpreter must be able to sign or otherwise communicate effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(2) *Qualified interpreter for an individual who is limited English proficient* means an individual who demonstrates expertise and ability to communicate information effectively, accurately, and impartially, in both English and the other language, and identifies and employs the appropriate mode of interpreting (*e.g.,* consecutive, simultaneous, or sight translation).

(yy) *Reasonable accommodation.* (1) The term ''reasonable accommodation'' means:

(i) Modifications or adjustments to an application/registration process that enables a qualified applicant/registrant with a disability to be considered for the aid, benefits, services, training, or employment that the qualified applicant/registrant desires; or

(ii) Modifications or adjustments that enable a qualified individual with a disability to perform the essential functions of a job, or to receive aid, benefits, services, or training equal to that provided to qualified individuals without disabilities. These modifications or adjustments may be made to:

(A) The environment where work is performed or aid, benefits, services, or training are given; or

(B) The customary manner in which, or circumstances under which, a job is performed or aid, benefits, services, or training are given; or

(iii) Modifications or adjustments that enable a qualified individual with a disability to enjoy the same benefits and privileges of the aid, benefits, services, training, or employment as are enjoyed by other similarly situated individuals without disabilities.

(2) ''Reasonable accommodation'' includes, but is not limited to:

(i) Making existing facilities used by applicants, registrants, eligible applicants/registrants, participants, applicants for employment, and employees readily accessible to and usable by individuals with disabilities; and

(ii) Restructuring of a job or a service, or of the way in which aid, benefits, services, or training is/are provided; part-time or modified work or training schedules; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation, it may be necessary for the recipient to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A recipient is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the ''actual disability'' prong (paragraph (q)(1)(i) of this section) or the ''record of'' a disability prong (paragraph (q)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the ''regarded as'' prong (paragraph (q)(1)(iii) of this section).

(zz) *Recipient* means entity to which financial assistance under Title I of WIOA is extended, directly from the Department or through the Governor or another recipient (including any successor, assignee, or transferee of a recipient). The term excludes any ultimate beneficiary of the WIOA Title I-financially assisted program or activity. In instances in which a Governor operates a program or activity, either directly or through a State agency,

using discretionary funds apportioned to the Governor under WIOA Title I (rather than disbursing the funds to another recipient), the Governor is also a recipient. In addition, for purposes of this part, one-stop partners, as defined in section 121(b) of WIOA, are treated as ''recipients,'' and are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the one-stop delivery system. ''Recipient'' includes, but is not limited to:

(1) State-level agencies that administer, or are financed in whole or in part with, WIOA Title I funds;

(2) State Workforce Agencies;

(3) State and Local Workforce Development Boards;

(4) LWDA grant recipients;

(5) One-stop operators;

(6) Service providers, including eligible training providers;

(7) On-the-Job Training (OJT) employers;

(8) Job Corps contractors and center operators;

(9) Job Corps national training contractors;

(10) Outreach and admissions agencies, including Job Corps contractors that perform these functions;

(11) Placement agencies, including Job Corps contractors that perform these functions;

(12) Other National Program recipients.

(aaa) *Registrant* means the same as ''applicant'' for purposes of this part. *See also* the definitions of ''application for benefits,'' ''eligible applicant/registrant,'' ''participant,'' ''participation,'' and ''recipient'' in this section.

(bbb) *Respondent* means a grant applicant or recipient (including a Governor) against which a complaint has been filed under the nondiscrimination and equal opportunity provisions of WIOA or this part.

(ccc) *Secretary* means the Secretary of Labor, U.S. Department of Labor, or the Secretary's designee.

(ddd) *Sectarian activities* means religious worship or ceremony, or sectarian instruction.

(eee) *Section 504* means Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, which forbids discrimination against qualified individuals with disabilities in federally-financed and conducted programs and activities.

(fff) *Service animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship, without more, do not constitute work or tasks for the purposes of this definition.

(ggg) *Service provider* means:

(1) Any operator of, or provider of aid, benefits, services, or training to:

(i) Any program or activity that receives WIOA Title I financial assistance from or through any State or LWDA grant recipient; or

(ii) Any participant through that participant's Individual Training Account (ITA); or

(2) Any entity that is selected and/or certified as an eligible provider of training services to participants.

(hhh) *Small recipient* means a recipient who:

(1) Serves a total of fewer than 15 beneficiaries during the entire grant year; and

(2) Employs fewer than 15 employees on any given day during the grant year.

(iii) *Solicitor* means the Solicitor of Labor, U.S. Department of Labor, or the Solicitor's designee.

(jjj) *State* means the individual states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau.

(kkk) *State Programs* means programs financially assisted in whole or in part under Title I of WIOA in which either:

(1) The Governor and/or State receives and disburses the grant to or through LWDA grant recipients; or

(2) The Governor retains the grant funds and operates the programs, either directly or through a State agency.

(3) ''State Programs'' also includes State Workforce Agencies, State Employment Service agencies, and/or State unemployment compensation agencies.

(lll) *State Workforce Agency* (SWA) means the State agency that, under the State Administrator, contains both State agencies with responsibility for administering programs authorized under the Wagner-Peyser Act, and unemployment insurance programs authorized under Title III of the Social Security Act.

(mmm) *Supportive services* means services, such as transportation, child care, dependent care, housing, and needs-related payments, that are necessary to enable an individual to participate in WIOA Title I-financially assisted programs and activities, as consistent with the provisions of WIOA Title I.

(nnn) *Terminee* means a participant whose participation in the program or employee whose employment with the program ends voluntarily or involuntarily, during the applicable program year.

(ooo) *Title VI* means Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.,* as amended, which forbids recipients of federal financial assistance from discriminating on the basis of race, color, or national origin.

(ppp) *Transferee* means a person or entity to whom or to which real or personal property, or an interest in such property, is transferred.

(qqq) *Ultimate beneficiary,* see the definition of ''beneficiary'' in this section.

(rrr) *Undue burden or undue hardship* has different meanings, depending upon whether it is used with regard to reasonable accommodation of individuals with disabilities, or with regard to religious accommodation.

(1) *Reasonable accommodation of individuals with disabilities.* (i) In general, ''undue hardship'' means significant difficulty or expense incurred by a recipient, when considered in light of the factors set forth in paragraph (rrr)(1)(ii) of this section.

(ii) Factors to be considered in determining whether an accommodation would impose an undue hardship on a recipient include:

(A) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding, for the accommodation;

(B) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, including:

(*1*) The number of persons aided, benefited, served, or trained by, or employed at, the facility or facilities; and

(*2*) The effect the accommodation would have on the expenses and resources of the facility or facilities;

(C) The overall financial resources of the recipient, including:

(*1*) The overall size of the recipient;

(*2*) The number of persons aided, benefited, served, trained, or employed by the recipient; and

(*3*) The number, type and location of the recipient's facilities;

(D) The type of operation or operations of the recipient, including:

(*1*) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient; and

(*2*) Where the individual is seeking an employment-related accommodation, the composition, structure and functions of the recipient's workforce; and

(E) The impact of the accommodation upon the operation of the facility or facilities, including:

(*1*) The impact on the ability of other participants to receive aid, benefits, services, or training, or of other employees to perform their duties; and

(*2*) The impact on the facility's ability to carry out its mission.

(2) *Religious accommodation.* For purposes of religious accommodation only, ''undue hardship'' means anything more than a *de minimis* cost or operational burden that a particular accommodation would impose upon a recipient.

(sss) *Video remote interpreting (VRI) service* means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images, as provided in § 38.15.

(ttt) *Vital information* means information, whether written, oral or electronic, that is necessary for an individual to understand how to obtain any aid, benefit, service, and/or training; necessary for an individual to obtain any aid, benefit, service, and/or training; or required by law. Examples of documents containing vital information include, but are not limited to applications, consent and complaint forms; notices of rights and responsibilities; notices advising LEP individuals of their rights under this part, including the availability of free language assistance; rulebooks; written tests that do not assess English language competency, but rather assess competency for a particular license, job, or skill for which English proficiency is not required; and letters or notices that require a response from the beneficiary or applicant, participant, or employee.

(uuu) *Wheelchair* means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor and/or outdoor locomotion.

(vvv) *WIOA* means the Workforce Innovation and Opportunity Act.

(www) *WIOA Title I financial assistance,* see the definition of ''Financial assistance under WIOA'' in this section.

(xxx) *WIOA Title I-financially assisted program or activity* means:

(1) A program or activity, operated by a recipient and financially assisted, in whole or in part, under Title I of WIOA that provides either:

(i) Any aid, benefit, service, or training to individuals; or

(ii) Facilities for furnishing any aid, benefits, services, or training to individuals;

(2) Aid, benefit, service, or training provided in facilities that are being or were constructed with the aid of Federal financial assistance under WIOA Title I; or

(3) Aid, benefit, service, or training provided with the aid of any non-WIOA Title I financial assistance, property, or other resources that are required to be expended or made available in order for the program to meet matching requirements or other conditions which must be met in order to receive the WIOA Title I financial assistance. See the definition of ''aid, benefit, service, or training'' in this section.

§ 38.5 General prohibitions on discrimination.

No individual in the United States may, on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship or participation in any WIOA Title I-financially assisted program or activity, be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any WIOA Title I-financially assisted program or activity.

§ 38.6 Specific discriminatory actions prohibited on bases other than disability.

(a) For the purposes of this section, prohibited bases for discrimination are race, color, religion, sex, national origin, age, and political affiliation and belief, and, for beneficiaries, applicants, and participants only, citizenship and participation in any WIOA Title I-financially assisted program or activity.

(b) A recipient must not, directly or through contractual, licensing, or other arrangements, on a prohibited basis:

(1) Deny an individual any aid, benefit, service, or training provided under a WIOA Title I-financially assisted program or activity;

(2) Provide to an individual any aid, benefit, service, or training that is different, or is provided in a different manner, from that provided to others under a WIOA Title I-financially assisted program or activity;

(3) Subject an individual to segregation or separate treatment in any matter related to receipt of any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity;

(4) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity;

(5) Treat an individual differently from others in determining whether the individual satisfies any admission, enrollment, eligibility, membership, or other requirement or condition for any aid, benefit, service, or training provided under a WIOA Title I-financially assisted program or activity;

(6) Deny or limit an individual with respect to any opportunity to participate in a WIOA Title I-financially assisted program or activity, or afford the individual an opportunity to do so that is different from the opportunity afforded others under a WIOA Title I-financially assisted program or activity;

(7) Deny an individual the opportunity to participate as a member of a planning or advisory body that is an integral part of the WIOA Title I-financially assisted program or activity; or

(8) Otherwise limit an individual enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any WIOA Title I-financially assisted aid, benefit, service, or training.

(c) A recipient must not, directly or through contractual, licensing, or other arrangements:

(1) Aid or perpetuate discrimination by providing significant assistance to an agency, organization, or person that discriminates on a basis prohibited by WIOA Section 188 or this part in providing any aid, benefit, service, or training, to registrants, applicants or

participants in a WIOA Title I-financially assisted program or activity; or

(2) Refuse to accommodate an individual's religious practices or beliefs, unless to do so would result in undue hardship, as defined in § 38.4(rrr)(2).

(d)(1) In making any of the determinations listed in paragraph (d)(2) of this section, either directly or through contractual, licensing, or other arrangements, a recipient must not use standards, procedures, criteria, or administrative methods that have any of the following purposes or effects:

(i) Subjecting individuals to discrimination on a prohibited basis; or

(ii) Defeating or substantially impairing, on a prohibited basis, accomplishment of the objectives of either:

(A) The WIOA Title I-financially assisted program or activity; or

(B) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(2) The determinations to which this paragraph (d) applies include, but are not limited to:

(i) The types of aid, benefit, service, training, or facilities that will be provided under any WIOA Title I-financially assisted program or activity;

(ii) The class of individuals to whom such aid, benefit, service, training, or facilities will be provided; or

(iii) The situations in which such aid, benefit, service, training, or facilities will be provided.

(3) Paragraph (d) of this section applies to the administration of WIOA Title I-financially assisted programs or activities providing any aid, benefit, service, training, or facilities in any manner, including, but not limited to:

(i) Outreach and recruitment;

(ii) Registration;

(iii) Counseling and guidance;

(iv) Testing;

(v) Selection, placement, appointment, and referral;

(vi) Training; and

(vii) Promotion and retention.

(4) A recipient must not take any of the prohibited actions listed in paragraph (d) of this section either directly or through contractual, licensing, or other arrangements.

(e) In determining the site or location of facilities, a grant applicant or recipient must not make selections that have any of the following purposes or effects:

(1) On a prohibited basis:

(i) Excluding individuals from a WIOA Title I-financially assisted program or activity;

(ii) Denying them the benefits of such a program or activity; or

(iii) Subjecting them to discrimination; or

(2) Defeating or substantially impairing the accomplishment of the objectives of either:

(i) The WIOA Title I-financially assisted program or activity; or

(ii) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(f)(1) 29 CFR part 2, subpart D, governs the circumstances under which Department support, including under WIOA Title I financial assistance, may be used to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. See also 20 CFR 683.255 and 683.285. 29 CFR part 2, subpart D, also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty for Department of Labor social service providers and beneficiaries.

(2) Except under the circumstances described in paragraph (f)(3) of this section, a recipient must not employ participants to carry out the construction, operation, or maintenance of any part of any facility that is used, or to be used, for religious instruction or as a place for religious worship.

(3) A recipient may employ participants to carry out the maintenance of a facility that is not primarily or inherently devoted to religious instruction or religious worship if the organization operating the facility is part of a program or activity providing services to participants.

(g) The exclusion of an individual from programs or activities limited by Federal statute or Executive Order to a certain class or classes of individuals of which the individual in question is not a member is not prohibited by this part.

§ 38.7 Discrimination prohibited based on sex.

(a) In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, discriminate on the basis of sex. An individual may not be excluded from participation in, denied the benefits of, or subjected to discrimination under any WIOA Title I-financially assisted program or activity based on sex. The term sex includes, but is not limited to, pregnancy, childbirth, and related medical conditions, transgender status, and gender identity.

(b) Recipients may not make any distinction based on sex in providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity. Such unlawful sex-based discriminatory practices include, but are not limited to, the following:

(1) Making a distinction between married and unmarried persons that is not applied equally to both sexes;

(2) Denying individuals of one sex who have children access to any aid, benefit, service, or training that is available to individuals of another sex who have children;

(3) Adversely treating unmarried individuals of one sex, but not unmarried individuals of another sex, who become parents;

(4) Distinguishing on the basis of sex in formal or informal job training and/or educational programs, other opportunities such as networking, mentoring, individual development plans, or on the job training opportunities;

(5) Posting job announcements for jobs that recruit or advertise for individuals for certain jobs on the basis of sex;

(6) Treating an individual adversely because the individual identifies with a gender different from that individual's sex assigned at birth, or the individual has undergone, is undergoing, or is planning to undergo, any processes or procedures designed to facilitate the individual's transition to a sex other than the individual's sex assigned at birth;

(7) Denying individuals who are pregnant, who become pregnant, or who plan to become pregnant opportunities for or access to any aid, benefit, service, or training on the basis of pregnancy (see also § 38.8);

(8) Making any facilities associated with WIOA Title I-financially assisted program or activities available only to members of one sex, except that if the recipient provides restrooms or changing facilities, the recipient may provide separate or single-user restrooms or changing facilities; and

(9) Denying individuals access to the restrooms, locker rooms, showers, or similar facilities consistent with the gender with which they identify.

(c) A recipient's policies or practices that have the effect of discriminating on the basis of sex and that lack a

substantial legitimate justification constitute sex discrimination in violation of WIOA and this part. Such unlawful sex-based discriminatory practices include, but are not limited to, the following:

(1) Height or weight qualifications that lack a substantial legitimate justification and that negatively affect women substantially more than men.

(2) Strength, agility, or other physical requirements that lack a substantial legitimate justification and that negatively affect women substantially more than men.

(d) Discrimination on the basis of sex stereotypes, such as stereotypes about how persons of a particular sex are expected to look, speak, or act, is a form of unlawful sex discrimination. Examples of sex stereotyping include, but are not limited to:

(1) Denying an individual access to, or otherwise subjecting the individual to adverse treatment in accessing, any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity because of that individual's failure to comply with gender norms and expectations for dress, appearance and/or behavior, including wearing jewelry, make-up, high-heeled shoes, suits, or neckties.

(2) Harassment or other adverse treatment of a male applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because he is considered effeminate or insufficiently masculine.

(3) Adverse treatment of an applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because of the individual's actual or perceived gender identity.

(4) Adverse treatment of an applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity based on sex stereotypes about caregiver responsibilities. For example, adverse treatment of a female participant because of a sex-based assumption that she has (or will have) family caretaking responsibilities, and that those responsibilities will interfere with her ability to access any aid, benefit, service, or training, is discrimination based on sex.

(5) Adverse treatment of a male applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because he has taken, or is planning to take, care of his newborn or recently adopted or fostered child, based on the sex-stereotyped belief that women, and not men, should care for children.

(6) Denying a woman access to, or otherwise subjecting her to adverse treatment in accessing, any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, based on the sex-stereotyped belief that women with children should not work long hours, regardless of whether the recipient is acting out of hostility or belief that it is acting in her or her children's best interest.

(7) Denying an individual access to, or otherwise subjecting the individual to adverse treatment in accessing, any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, based on sex stereotyping including the belief that a victim of domestic violence would disrupt the program or activity and/or may be unable to access any aid, benefit, service, or training.

(8) Adverse treatment of a woman applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity because she does not dress or talk in a feminine manner.

(9) Denying an individual access to, failing to provide information about, or otherwise subjecting the individual to adverse treatment in accessing, any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, because the individual does not conform to a sex stereotype about individuals of a particular sex working in a specific job, sector, or industry.

(10) Adverse treatment of an applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

§ 38.8 Discrimination prohibited based on pregnancy.

Discrimination on the basis of pregnancy, childbirth, or related medical conditions, including childbearing capacity, is a form of sex discrimination and a violation of the nondiscrimination provisions of WIOA and this part. Recipients may not treat persons of childbearing capacity, or those affected by pregnancy, childbirth, or related medical conditions, adversely in accessing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity. In their covered employment practices, recipients must treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe-benefit programs, as other persons not so affected but similar in their ability or inability to work. Related medical conditions include, but are not limited to: Lactation; disorders directly related to pregnancy, such as preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery. A pregnancy-related medical condition may also be a disability. See § 38.4(q)(3)(ii). Examples of unlawful pregnancy discrimination may include:

(a) Refusing to provide any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity to a pregnant individual or an individual of childbearing capacity, or otherwise subjecting such individuals to adverse treatment on the basis of pregnancy or childbearing capacity;

(b) Limiting an individual's access to any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity based on her pregnancy, or requiring a doctor's note in order for a pregnant woman to begin or continue participation while pregnant when doctors' notes are not required for participants who are similarly situated;

(c) Denying an individual access to any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity or requiring the individual to terminate participation in any WIOA Title I-financially assisted program or activity when the individual becomes pregnant or has a child; and

(d) Denying reasonable accommodations or modifications of policies, practices, or procedures to a pregnant applicant or participant who is temporarily unable to participate in some portions of a WIOA Title I-financially assisted program or activity because of pregnancy, childbirth, and/or related medical conditions, when such accommodations or modifications are provided, or are required to be provided, by a recipient's policy or by other relevant laws, to other similarly situated applicants or participants.

§ 38.9 Discrimination prohibited based on national origin, including limited English proficiency.

(a) In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not, directly or through contractual, licensing, or other arrangements, discriminate on the basis of national origin, including limited English proficiency. An individual must not be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under, any WIOA Title I-financially assisted program or activity based on national

origin. National origin discrimination includes treating individual beneficiaries, participants, or applicants for any aid, benefit, service, or training under any WIOA Title I-financially assisted program or activity adversely because they (or their families or ancestors) are from a particular country or part of the world, because of ethnicity or accent (including physical, linguistic, and cultural characteristics closely associated with a national origin group), or because the recipient perceives the individual to be of a certain national origin, even if they are not.

(b) A recipient must take reasonable steps to ensure meaningful access to each limited English proficient (LEP) individual served or encountered so that LEP individuals are effectively informed about and/or able to participate in the program or activity.

(1) Reasonable steps generally may include, but are not limited to, an assessment of an LEP individual to determine language assistance needs; providing oral interpretation or written translation of both hard copy and electronic materials, in the appropriate non-English languages, to LEP individuals; and outreach to LEP communities to improve service delivery in needed languages.

(2) Reasonable steps to provide meaningful access to training programs may include, but are not limited to, providing:

(i) Written training materials in appropriate non-English languages by written translation or by oral interpretation or summarization; and

(ii) Oral training content in appropriate non-English languages through in-person interpretation or telephone interpretation.

(c) A recipient should ensure that every program delivery avenue (*e.g.,* electronic, in person, telephonic) conveys in the appropriate languages how an individual may effectively learn about, participate in, and/or access any aid, benefit, service, or training that the recipient provides. As a recipient develops new methods for delivery of information or assistance, it is required to take reasonable steps to ensure that LEP individuals remain able to learn about, participate in, and/or access any aid, benefit, service, or training that the recipient provides.

(d) Any language assistance services, whether oral interpretation or written translation, must be accurate, provided in a timely manner and free of charge. Language assistance will be considered timely when it is provided at a place and time that ensures equal access and avoids the delay or denial of any aid, benefit, service, or training at issue.

(e) A recipient must provide adequate notice to LEP individuals of the existence of interpretation and translation services and that these language assistance services are available free of charge.

(f)(1) A recipient shall not require an LEP individual to provide their own interpreter.

(2) A recipient also shall not rely on an LEP individual's minor child or adult family or friend(s) to interpret or facilitate communication, except:

(i) An LEP individual's minor child or adult family or friend(s) may interpret or facilitate communication in emergency situations while awaiting a qualified interpreter; or

(ii) The accompanying adult (but not minor child) may interpret or facilitate communication when the information conveyed is of minimal importance to the services to be provided or when the LEP individual specifically requests that the accompanying adult provide language assistance, the accompanying adult agrees to provide assistance, and reliance on that adult for such assistance is appropriate under the circumstances. When the recipient permits the accompanying adult to provide such assistance, it must make and retain a record of the LEP individual's decision to use their own interpreter.

(3) Where precise, complete, and accurate interpretations or translation of information and/or testimony are critical for adjudicatory or legal reasons, or where the competency of the interpreter requested by the LEP individual is not established, a recipient may decide to provide its own, independent interpreter, even if an LEP individual wants to use their own interpreter as well.

(g) With regard to vital information:

(1) For languages spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, a recipient must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site. Written training materials offered or used within employment-related training programs as defined under § 38.4(t) are excluded from these translation requirements. However, recipients must take reasonable steps to ensure meaningful access as stated in § 38.9(b).

(2) For languages not spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, a recipient must take reasonable steps to meet the particularized language needs of LEP individuals who seek to learn about, participate in, and/or access the aid, benefit, service, or training that the recipient provides. Vital information may be conveyed orally if not translated.

(3) Recipients must include a ''Babel notice,'' indicating in appropriate languages that language assistance is available, in all communications of vital information, such as hard copy letters or decisions or those communications posted on Web sites.

(h) To the extent otherwise required by this part, once a recipient becomes aware of the non-English preferred language of an LEP beneficiary, participant, or applicant for aid, benefit, service, or training, the recipient must convey vital information in that language.

(i) Recipients are required to take reasonable steps to provide language assistance and should develop a written language access plan to ensure that LEP individuals have meaningful access. The appendix to this section provides guidance to recipients on developing a language access plan.

Appendix to § 38.9—Guidance to Recipients

Recipient Language Assistance Plan (LEP Plan): Promising Practices

The guidelines in this appendix are consistent with and, in large part, derived from existing federal guidance to federal financial assistance recipients to take reasonable steps to ensure meaningful access by limited English proficient (LEP) individuals.

Recipients that develop, implement, and periodically revise a written language assistance plan are more likely to fulfill their obligation of taking reasonable steps to ensure access to programs and activities by LEP individuals. The guidelines set forth below provide a clear framework for developing a written plan that will ensure meaningful access to LEP individuals. Developing and implementing a written plan has many benefits, including providing the recipient with a roadmap for establishing and documenting compliance with nondiscrimination obligations and ensuring that LEP beneficiaries receive the necessary assistance to participate in the recipient's programs and activities.

The elements of a successful LEP plan are not fixed. Written LEP plans must be tailored to the recipient's specific programs and activities. And, over time, plans will need to be revised to reflect new recommendations and government guidance; changes in the recipient's operations, as well as the recipient's experiences and lessons learned; changing demographics; and stakeholder and beneficiary feedback. Nonetheless, a recipient that develops an LEP plan incorporating the elements identified below will benefit greatly in accomplishing its

mission and providing an equal opportunity for LEP individuals to participate in its programs and activities.

A written LEP plan should identify and describe:

1. The process the recipient will use to determine the language needs of individuals who may or may seek to participate in the recipient's program and activities (self- or needs-assessment)
2. The results of the assessment, *e.g.,* identifying the LEP populations to be served by the recipient
3. Timelines for implementing the written LEP plan
4. All language services to be provided to LEP individuals
5. The manner in which LEP individuals will be advised of available services
6. Steps individuals should take to request language assistance
7. The manner in which staff will provide language assistance services
8. What steps must be taken to implement the LEP plan, *e.g.,* creating or modifying policy documents, employee manuals, employee training material, posters, Web sites, outreach material, contracts, and electronic and information technologies, applications, or adaptations
9. The manner in which staff will be trained
10. Steps the recipient will take to ensure quality control, including monitoring implementation, establishing a complaint process, timely addressing complaints, and obtaining feedback from stakeholders and employees
11. The manner in which the recipient will document the provision of language assistance services
12. The schedule for revising the LEP plan
13. The individual(s) assigned to oversee implementation of the plan (*e.g.,* LEP Coordinator or Program Manager)
14. Allocation of resources to implement the plan

Illustrative Applications in Recipient Programs and Activities

Unemployment Insurance Program Example

1. Unemployment insurance programs are recipients covered under this rule, and States must take reasonable steps to provide meaningful access to LEP individuals served or encountered in their unemployment insurance programs and activities. For example, given the nature and importance of unemployment insurance, if an LEP individual who speaks Urdu seeks information about unemployment insurance from a State's telephone call center that assists unemployment insurance enrollees and applicants, the State may consider the proportion of Urdu-speaking LEP individuals served or encountered by the State's unemployment insurance program; the frequency with which Urdu-speaking LEP individuals come in contact with the State's unemployment insurance program; and the resources available to the State and costs in determining how it will provide this LEP individual with language assistance. Urdu is a language that is rarely, if ever, encountered by this State's UI program. Because low-cost commercial language services, such as telephonic oral interpretation services, are widely available, the State should, at a minimum, provide the Urdu-speaking LEP individual telephonic interpretation services to ensure meaningful access to unemployment insurance because, even if Urdu is a non-frequently encountered, non-English language, low-cost commercial language services, such as telephonic oral interpretation services, are widely available.

Population Significance as It Pertains to Vital Information

2. Recipients have some flexibility as to the means to provide language assistance services to LEP individuals, as long as they take reasonable steps to provide meaningful access to their program or activity. For instance, if a recipient provides career services to an LEP individual who speaks Tagalog and the individual requests a translated brochure on an upcoming job fair, the recipient should consider the importance of the information in the brochure, and may consider: The proportion of Tagalog-speaking LEP individuals served or encountered; the frequency with which Tagalog-speaking LEP individuals come in contact with the recipient; and the resources available to the recipient. In this instance, the recipient would be required to provide a written translation of the brochure for the LEP individual if Tagalog were a language spoken by a significant number or proportion of the LEP persons in the eligible service population and a language frequently encountered in the career services program. But if Tagalog is not spoken by a significant number or proportion of the population eligible to be served, and was not frequently encountered by the career services program, it would be reasonable for the recipient to provide an oral summary of the brochure's contents in Tagalog.

Training Provider Example Incorporating English Language Learning

3. Providing English language learning opportunities may be one step that a recipient takes in order to take reasonable steps to provide an LEP individual meaningful access to its programs or activities. For example, John, a Korean-speaking LEP individual, learns through the one-stop center about available welding positions at ABC Welding, Co. He also learns through the one-stop center about upcoming welder training courses offered at XYZ Technical Institute, an eligible training provider. John decides to enroll in one of the XYZ welding courses. XYZ, which conducts its training courses in English, must take reasonable steps to provide John meaningful access to the welder training course.

Recipients may work together to provide meaningful access, but remain independently obligated to take reasonable steps to provide meaningful access to programs and activities. In this regard, XYZ is not required to administer an English language learning class itself. Instead, XYZ may coordinate with the one-stop center to ensure that John receives appropriate English language learning either directly from the one-stop or from another organization that provides such English language training. The English language class would not be offered to John instead of the training program, but John could attend the English language class at the same time as or prior to the training program. Whether John takes the English class before or concurrently with the welding course will depend on many factors including an objective, individualized analysis of John's English proficiency relative to the welding course. Regardless of how the English language learning is delivered, it must be provided at no cost to John.

In evaluating whether reasonable steps include oral interpretation, translation, English language learning, another language service, or some combination of these services, XYZ may work with the one-stop center to provide meaningful access to John.

§ 38.10 Harassment prohibited.

Harassment of an individual based on race, color, religion, sex, national origin, age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, based on citizenship status or participation in any WIOA Title I-financially assisted program or activity, is a violation of the nondiscrimination provisions of WIOA and this part.

(a) Unwelcome sexual advances, requests for sexual favors, or offensive remarks about a person's race, color, religion, sex, national origin, age, disability, political affiliation or belief, or citizenship or participation, and other unwelcome verbal or physical conduct based on one or more of these protected categories constitutes unlawful harassment on that basi(e)s when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of accessing the aid, benefit, service, or training of, or employment in the administration of or in connection with, any WIOA Title I-financially assisted program or activity;

(2) Submission to or rejection of such conduct by an individual is used as the basis for limiting that individual's access to any aid, benefit, service, training, or employment from, or employment in the administration of or in connection with, any WIOA Title I-financially assisted program or activity; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's participation in a WIOA Title I-financially assisted program or activity creating an intimidating, hostile or offensive program environment.

(b) Harassment because of sex includes harassment based on gender identity; harassment based on failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, and related medical conditions; and sex-based harassment that is not sexual in nature but that is

because of sex or where one sex is targeted for the harassment.

§ 38.11 Discrimination prohibited based on citizenship status.

In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, discriminate on the basis of citizenship status. Individuals protected under this section include citizens and nationals of the United States, lawfully admitted permanent resident aliens, refugees, asylees, and parolees, and other immigrants authorized by the Secretary of Homeland Security or the Secretary's designee to work in the United States. Citizenship discrimination occurs when a recipient maintains and enforces policies and procedures that have the purpose or effect of discriminating against individual beneficiaries, applicants, and participants, on the basis of their status as citizens or nationals of the United States, lawfully admitted permanent resident aliens, refugees, asylees, and parolees, or other immigrants authorized by the Secretary of Homeland Security or the Secretary's designee to work in the United States.

§ 38.12 Discrimination prohibited based on disability.

(a) In providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

(1) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, service, or training, including meaningful opportunities to seek employment and work in competitive integrated settings;

(2) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefits, services, or training that is not equal to that afforded others;

(3) Provide a qualified individual with a disability with any aid, benefit, service, or training that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(4) Provide different, segregated, or separate aid, benefit, service, or training to individuals with disabilities, or to any class of individuals with disabilities, unless such action is necessary to provide qualified individuals with disabilities with any aid, benefit, service, or training that is as effective as those provided to others, and consistent with the requirements of the Rehabilitation Act as amended by WIOA, including those provisions that prioritize opportunities in competitive integrated employment;

(5) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or

(6) Otherwise limit a qualified individual with a disability in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service, or training.

(b) A recipient must not, directly or through contractual, licensing, or other arrangements, aid or perpetuate discrimination against qualified individuals with disabilities by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, service, or training to registrants, applicants, or participants.

(c) A recipient must not deny a qualified individual with a disability the opportunity to participate in WIOA Title I-financially assisted programs or activities despite the existence of permissibly separate or different programs or activities.

(d) A recipient must administer WIOA Title I-financially assisted programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e) A recipient must not, directly or through contractual, licensing, or other arrangements, use standards, procedures, criteria, or administrative methods:

(1) That have the purpose or effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(2) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the WIOA Title I-financially assisted program or activity with respect to individuals with disabilities; or

(3) That perpetuate the discrimination of another entity if both entities are subject to common administrative control or are agencies of the same State.

(f) In determining the site or location of facilities, a grant applicant or recipient must not make selections that have any of the following purposes or effects:

(1) On the basis of disability:

(i) Excluding qualified individuals from a WIOA Title I-financially assisted program or activity;

(ii) Denying qualified individuals the benefits of such a program or activity; or

(iii) Subjecting qualified individuals to discrimination; or

(2) Defeating or substantially impairing the accomplishment of the disability-related objectives of either:

(i) The WIOA Title I-financially assisted program or activity; or

(ii) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(g) A recipient, in the selection of contractors, must not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(h) A recipient must not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a recipient establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a recipient are not, themselves, covered by this part.

(i) A recipient must not impose or apply eligibility criteria that screen out or tend to screen out individuals with disabilities or any class of individuals with disabilities from fully and equally enjoying any aid, benefit, service, training, program, or activity, unless such criteria can be shown to be necessary for the provision of any aid, benefit, service, training, program, or activity being offered.

(j) Nothing in this part prohibits a recipient from providing any aid, benefit, service, training, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part.

(k) A recipient must not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by WIOA Title I or this part.

(l) A recipient must not exclude, or otherwise deny equal aid, benefits, services, training, programs, or activities to, an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(m) The exclusion of an individual without a disability from the benefits of

a program limited by federal law to individuals with disabilities, or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive Order to a different class of individuals with disabilities, is not prohibited by this part.

(n) This part does not require a recipient to provide any of the following to individuals with disabilities:

(1) Personal devices, such as wheelchairs;

(2) Individually prescribed devices, such as prescription eyeglasses or hearing aids;

(3) Readers for personal use or study; or

(4) Services of a personal nature, including assistance in eating, toileting, or dressing.

(o)(1) Nothing in this part requires an individual with a disability to accept any accommodation, aid, benefit, service, training, or opportunity provided under WIOA Title I or this part that such individual chooses not to accept.

(2) Nothing in this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(p) *Claims of no disability.* Nothing in this part provides the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted auxiliary aids or services, reasonable modifications, or reasonable accommodations that were denied to an individual without a disability.

§ 38.13 Accessibility requirements.

(a) *Physical accessibility.* No qualified individual with a disability may be excluded from participation in, or be denied the benefits of a recipient's service, program, or activity or be subjected to discrimination by any recipient because a recipient's facilities are inaccessible or unusable by individuals with disabilities. Recipients that are subject to Title II of the ADA must also ensure that new facilities or alterations of facilities that began construction after January 26, 1992, comply with the applicable federal accessible design standards, such as the ADA Standards for Accessible Design (1991 or 2010) or the Uniform Federal Accessibility Standards. In addition, recipients that receive federal financial assistance must meet their accessibility obligations under Section 504 of the Rehabilitation Act and the implementing regulations at 29 CFR part 32. Some recipients may be subject to additional accessibility requirements under other statutory authority, including Title III of the ADA, that is not enforced by CRC. As indicated in § 38.3(d)(10), compliance with this part does not affect a recipient's obligation to comply with the applicable ADA Standards for Accessible Design.

(b) *Programmatic accessibility.* All WIOA Title I-financially assisted programs and activities must be programmatically accessible, which includes providing reasonable accommodations for individuals with disabilities, making reasonable modifications to policies, practices, and procedures, administering programs in the most integrated setting appropriate, communicating with persons with disabilities as effectively as with others, and providing appropriate auxiliary aids or services, including assistive technology devices and services, where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, the program or activity.

§ 38.14 Reasonable accommodations and reasonable modifications for individuals with disabilities.

(a) With regard to any aid, benefit, service, training, and employment, a recipient must provide reasonable accommodations to qualified individuals with disabilities who are applicants, registrants, eligible applicants/registrants, participants, employees, or applicants for employment, unless providing the accommodation would cause undue hardship. See the definitions of ''reasonable accommodation'' and ''undue hardship'' in § 38.4(rrr)(1).

(1) In those circumstances where a recipient believes that the proposed accommodation would cause undue hardship, the recipient has the burden of proving that the accommodation would result in such hardship.

(2) The recipient must make the decision that the accommodation would cause such hardship only after considering all factors listed in the definition of ''undue hardship'' in § 38.4(rrr)(1). The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the accommodation.

(3) If a requested accommodation would result in undue hardship, the recipient must, after consultation with an individual with a disability (or individuals with disabilities), take any other action that would not result in such hardship, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefit, service, training, or employment provided by the recipient.

(b) With regard to any aid, benefit, service, training, and employment, a recipient must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity. See the definition of ''fundamental alteration'' in § 38.4(z).

(1) In those circumstances where a recipient believes that the proposed modification would fundamentally alter the program, activity, or service, the recipient has the burden of proving that the modification would result in such an alteration.

(2) The recipient must make the decision that the modification would result in such an alteration only after considering all factors listed in the definition of ''fundamental alteration'' in § 38.4(z). The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the modification.

(3) If a modification would result in a fundamental alteration, the recipient must take any other action that would not result in such an alteration, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefits, services, training, or employment provided by the recipient.

§ 38.15 Communications with individuals with disabilities.

(a) *General*—(1) *Communications with individuals with disabilities.* (i) A recipient must take appropriate steps to ensure that communications with individuals with disabilities, such as beneficiaries, registrants, applicants, eligible applicants/registrants, participants, applicants for employment, employees, members of the public, and their companions are as effective as communications with others.

(ii) For purposes of this section, ''companion'' means a family member, friend, or associate of an individual seeking access to an aid, benefit, service, training, program, or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

(2) *Auxiliary aids and services.* (i) A recipient must furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including beneficiaries, registrants, applicants, eligible applicants/registrants, participants, members of the public, and companions, an equal opportunity to participate in, and enjoy the benefits of, a WIOA Title I-financially assisted service, program, or activity of a recipient.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a recipient must give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(3) *Interpreters.* (i) A recipient must not require an individual with a disability to bring another individual to interpret for him or her.

(ii) A recipient must not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(A) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(B) Where the individual with a disability specifically requests that an accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(iii) A recipient must not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(4) *Video remote interpreting (VRI) services.* A recipient that chooses to provide qualified interpreters via VRI services must ensure that it provides—

(i) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(ii) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of the individual's body position;

(iii) A clear, audible transmission of voices; and

(iv) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

(5) *Electronic and information technology.* When developing, procuring, maintaining, or using electronic and information technology, a recipient must utilize electronic and information technologies, applications, or adaptations which:

(i) Incorporate accessibility features for individuals with disabilities;

(ii) Are consistent with modern accessibility standards, such as Section 508 Standards (36 CFR part 1194) and W3C's Web Content Accessibility Guidelines (WCAG) 2.0 AA; and

(iii) Provide individuals with disabilities access to, and use of, information, resources, programs, and activities that are fully accessible, or ensure that the opportunities and benefits provided by the electronic and information technologies are provided to individuals with disabilities in an equally effective and equally integrated manner.

(b) *Telecommunications.* (1) Where a recipient communicates by telephone with beneficiaries, registrants, applicants, eligible applicants/registrants, participants, applicants for employment, employees, and/or members of the public, text telephones (TTYs) or equally effective telecommunications systems must be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(2) When a recipient uses an automated-attendant system, including, but not limited to, voicemail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including internet-based relay systems.

(3) A recipient must respond to telephone calls from a telecommunications relay service established under title IV of the Americans with Disabilities Act in the same manner that it responds to other telephone calls.

(c) *Information and signage.* (1) A recipient must ensure that interested individuals, including individuals with visual or hearing impairments, can obtain information as to the existence and location of accessible services, activities, and facilities.

(2)(i) A recipient must provide signage at the public entrances to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The signage provided must meet the Standards for Accessible Design under the Americans with Disabilities Act. Alternative standards for the signage may be adopted when it is clearly evident that such alternative standards provide equivalent or greater access to the information. See 36 CFR part 1191, appendix B, section 103.

(ii) The international symbol for accessibility must be used at each primary entrance of an accessible facility.

(d) *Fundamental alteration.* This section does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a WIOA Title I-financially assisted service, program, or activity.

(1) In those circumstances where a recipient believes that the proposed action would fundamentally alter the WIOA Title I-financially assisted program, activity, or service, the recipient has the burden of proving that compliance with this section would result in such an alteration.

(2) The decision that compliance would result in such an alteration must be made by the recipient after considering all resources available for use in the funding and operation of the WIOA Title I-financially assisted program, activity, or service, and must be accompanied by a written statement of the recipient's reasons for reaching that conclusion.

(3) If an action required to comply with this section would result in the fundamental alteration described in paragraph (d)(1) of this section, the recipient must take any other action that would not result in such an alteration or such burdens, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient.

§ 38.16 Service animals.

(a) *General.* Generally, a recipient shall modify its policies, practices, or procedures to permit the use of a service

animal by an individual with a disability.

(b) *Exceptions.* A recipient may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded.* If a recipient properly excludes a service animal under paragraph (b) of this section, the recipient must give the individual with a disability the opportunity to participate in the WIOA Title I-financially assisted service, program, or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal must be under the control of its handler. A service animal must have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).

(e) *Care or supervision.* A recipient is not responsible for the care or supervision of a service animal.

(f) *Inquiries.* A recipient must not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A recipient may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A recipient must not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a recipient may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of a recipient's facilities.*

(1) *In general.* Individuals with disabilities must be permitted to be accompanied by their service animals in all areas of a recipient's facilities where members of the public, participants in services, programs or activities, beneficiaries, registrants, applicants, eligible applicants/registrants, applicants for employment and employees, or invitees, as relevant, are allowed to go.

(2) *Use of service animals in food preparation areas.* An employee, applicant or beneficiary with a disability who needs to use a service animal in a food preparation area must be allowed to do so unless the employer recipient, after an individualized assessment, can demonstrate, that the presence of the service animal presents a direct threat to health or safety that cannot be eliminated or reduced by a reasonable accommodation to the employee, applicant or beneficiary.

(h) *Surcharges.* A recipient must not ask or require an individual with a disability to pay a surcharge because of the individual's service animal, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by the individual's service animal.

§ 38.17 Mobility aids and devices.

(a) *Use of wheelchairs and manually-powered mobility aids.* A recipient must permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities, in any areas open to pedestrian use.

(b)(1) *Use of other power-driven mobility devices.* A recipient must make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the recipient can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the recipient has adopted.

(2) *Assessment factors.* In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a recipient must consider—

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (*e.g.,* whether its WIOA Title I-financially assisted service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws.

§ 38.18 Employment practices covered.

(a) *Employment practices covered.* It is an unlawful employment practice to discriminate on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin, age, disability, or political affiliation or belief in the administration of, or in connection with:

(1) Any WIOA Title I-financially assisted program or activity; and

(2) Any program or activity that is part of the one-stop delivery system and is operated by a one-stop partner listed in Section 121(b) of WIOA, to the extent that the program or activity is being conducted as part of the one-stop delivery system.

(b) *Employee selection procedures.* In implementing this section, a recipient must comply with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3, where applicable.

(c) *Standards for employment-related investigations and reviews.* In any investigation or compliance review, the Director must consider Equal Employment Opportunity Commission (EEOC) regulations, guidance and appropriate case law in determining whether a recipient has engaged in an unlawful employment practice.

(d) *Section 504 of the Rehabilitation Act.* As provided in § 38.3(b), 29 CFR part 32, subparts B and C and appendix A, which implement the requirements of Section 504 pertaining to employment practices and employment-related training, program accessibility, and reasonable accommodation, have been adopted by this part. Therefore, recipients must comply with the requirements set forth in those regulatory sections as well as the requirements listed in this part.

(e) *Employers, employment agencies, or other entities.* (1) Recipients that are also employers, employment agencies, or other entities subject to or covered by Titles I and II of the ADA should be aware of obligations imposed by those

titles. *See* 29 CFR part 1630 and 28 CFR part 35.

(2) Recipients that are also employers, employment agencies, or other entities subject to or covered by Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793) must meet their obligations imposed by that provision.

(f) *Immigration and Nationality Act.* Similarly, recipients that are also employers covered by the anti-discrimination provision of the Immigration and Nationality Act should be aware of the obligations imposed by that provision. *See* 8 U.S.C. 1324b, as amended.

(g) *State and local requirements.* This section does not preempt consistent State and local requirements.

§ 38.19 Intimidation and retaliation prohibited.

(a) A recipient must not discharge, intimidate, retaliate, threaten, coerce or discriminate against any individual because the individual has:

(1) Filed a complaint alleging a violation of Section 188 of WIOA or this part;

(2) Opposed a practice prohibited by the nondiscrimination and equal opportunity provisions of WIOA or this part;

(3) Furnished information to, or assisted or participated in any manner in, an investigation, review, hearing, or any other activity related to any of the following:

(i) Administration of the nondiscrimination and equal opportunity provisions of WIOA or this part;

(ii) Exercise of authority under those provisions; or

(iii) Exercise of privilege secured by those provisions; or

(4) Otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of WIOA or this part.

(b) The sanctions and penalties contained in Section 188(b) of WIOA or this part may be imposed against any recipient that engages in any such retaliation or intimidation, or fails to take appropriate steps to prevent such activity.

§ 38.20 Administration of this part.

The Civil Rights Center, in the Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor, is responsible for administering and enforcing the nondiscrimination and equal opportunity provisions of WIOA and this part, and for developing and issuing policies, standards, guidance, and procedures for effecting compliance.

§ 38.21 Interpretation of this part.

The Director will make any rulings under, or interpretations of, the nondiscrimination and equal opportunity provisions of WIOA or this part.

§ 38.22 Delegation of administration and interpretation of this part.

(a) The Secretary may from time to time assign to officials of other departments or agencies of the Federal Government (with the consent of such department or agency) responsibilities in connection with the effectuation of the nondiscrimination and equal opportunity provisions of WIOA and this part (other than responsibility for final decisions under § 38.112), including the achievement of effective coordination and maximum uniformity within the Department and within the executive branch of the Government in the application of the nondiscrimination and equal opportunity provisions of WIOA or this part to similar programs and similar situations.

(b) Any action taken, determination made, or requirement imposed by an official of another department or agency acting under an assignment of responsibility under this section has the same effect as if the action had been taken by the Director.

§ 38.23 Coordination with other agencies.

(a) Whenever a compliance review or complaint investigation under this part reveals possible violation of one or more of the laws listed in paragraph (b) of this section, or of any other Federal civil rights law, that is not also a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part, the Director must attempt to notify the appropriate agency and provide it with all relevant documents and information.

(b) This section applies to the following:

(1) Executive Order 11246, as amended;

(2) Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793);

(3) The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212);

(4) The Equal Pay Act of 1963, as amended (29 U.S.C. 206d);

(5) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*);

(6) The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621);

(7) The Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*);

(8) The anti-discrimination provision of the Immigration and Nationality Act, as amended (8 U.S.C. 1324b); and

(9) Any other Federal civil rights law.

§ 38.24 Effect on other laws and policies.

(a) *Effect of State or local law or other requirements.* The obligation to comply with the nondiscrimination and equal opportunity provisions of WIOA or this part are not excused or reduced by any State or local law or other requirement that, on a prohibited basis, prohibits or limits an individual's eligibility to receive any aid, benefit, service, or training; to participate in any WIOA Title I-financially assisted program or activity; to be employed by any recipient; or to practice any occupation or profession.

(b) *Effect of private organization rules.* The obligation to comply with the nondiscrimination and equal opportunity provisions of WIOA Title I-financially assisted program or activity and this part is not excused or reduced by any rule or regulation of any private organization, club, league or association that, on a prohibited basis, prohibits or limits an individual's eligibility to participate in any WIOA financially assisted program or activity to which this part applies.

(c) *Effect of possible future exclusion from employment opportunities.* A recipient must not exclude any individual from, or restrict any individual's participation in, any program or activity based on the recipient's belief or concern that the individual will encounter limited future employment opportunities because of the individual's race, color, religion, sex, national origin, age, disability, political affiliation or belief, citizenship status, or participation in a WIOA Title I-financially assisted program or activity.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

Assurances

§ 38.25 A grant applicant's obligation to provide a written assurance.

(a) *Grant applicant's obligation to provide a written assurance.* (1) Each application for financial assistance, under Title I of WIOA, as defined in § 38.4, must include the following assurance:

(i) As a condition to the award of financial assistance from the Department of Labor under Title I of WIOA, the grant applicant assures that it has the ability to comply with the nondiscrimination and equal opportunity provisions of the following laws and will remain in compliance for

the duration of the award of federal financial assistance:

(A) Section 188 of the Workforce Innovation and Opportunity Act (WIOA), which prohibits discrimination against all individuals in the United States on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, or political affiliation or belief, or against beneficiaries on the basis of either citizenship status or participation in any WIOA Title I-financially assisted program or activity;

(B) Title VI of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the bases of race, color and national origin;

(C) Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against qualified individuals with disabilities;

(D) The Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age; and

(E) Title IX of the Education Amendments of 1972, as amended, which prohibits discrimination on the basis of sex in educational programs.

(ii) The grant applicant also assures that, as a recipient of WIOA Title I financial assistance, it will comply with 29 CFR part 38 and all other regulations implementing the laws listed above. This assurance applies to the grant applicant's operation of the WIOA Title I-financially assisted program or activity, and to all agreements the grant applicant makes to carry out the WIOA Title I-financially assisted program or activity. The grant applicant understands that the United States has the right to seek judicial enforcement of this assurance.

(2) The assurance is considered incorporated by operation of law in the grant, cooperative agreement, contract or other arrangement whereby Federal financial assistance under Title I of WIOA is made available, whether it is explicitly incorporated in such document and whether there is a written agreement between the Department and the recipient, between the Department and the Governor, between the Governor and the recipient, or between recipients. The assurance also may be incorporated in such grants, cooperative agreements, contracts, or other arrangements by reference.

(b) *Continuing State Programs.* Each Strategic Four-Year State Plan submitted by a State to carry out a continuing WIOA financially assisted program or activity must provide the text of the assurance in paragraph (a)(1) of this section, as a condition to the approval of the Four-Year Plan and the extension of any WIOA Title I assistance under the Plan. The State also must certify that it has developed and maintains a Nondiscrimination Plan under § 38.54.

§ 38.26 Duration and scope of the assurance.

(a) Where the WIOA Title I financial assistance is intended to provide, or is in the form of, either personal property, real property, structures on real property, or interest in any such property or structures, the assurance will obligate the recipient, or (in the case of a subsequent transfer) the transferee, for the longer of:

(1) The period during which the property is used either:

(i) For a purpose for which WIOA Title I financial assistance is extended; or

(ii) For another purpose involving the provision of similar services or benefits; or

(2) The period during which either:

(i) The recipient retains ownership or possession of the property; or

(ii) The transferee retains ownership or possession of the property without compensating the Departmental grantmaking agency for the fair market value of that ownership or possession.

(b) In all other cases, the assurance will obligate the recipient for the period during which WIOA Title I financial assistance is extended.

§ 38.27 Covenants.

(a) Where WIOA Title I financial assistance is provided in the form of a transfer of real property, structures, or improvements on real property or structures, or interests in real property or structures, the instrument effecting or recording the transfer must contain a covenant assuring nondiscrimination and equal opportunity for the period described in § 38.25(a)(1).

(b) Where no Federal transfer of real property or interest therein from the Federal Government is involved, but real property or an interest therein is acquired or improved under a program of WIOA Title I financial assistance, the recipient must include the covenant described in paragraph (a) of this section in the instrument effecting or recording any subsequent transfer of such property.

(c) When the property is obtained from the Federal Government, the covenant described in paragraph (a) of this section also may include a condition coupled with a right of reverter to the Department in the event of a breach of the covenant.

Equal Opportunity Officers

§ 38.28 Designation of Equal Opportunity Officers.

(a) *Governors.* Every Governor must designate an individual as a State-level Equal Opportunity Officer (State-level EO Officer), who reports directly to the Governor and is responsible for State Program–wide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA and this part, including but not limited to §§ 38.51, 38.53, 38.54, and 38.55 for State Programs. The State-level EO Officer must have staff and resources sufficient to carry out these requirements.

(b) *All recipients.* Every recipient except small recipients and service providers, as defined in § 38.4(hhh) and (ggg), must designate a recipient-level Equal Opportunity Officer (recipient-level EO Officer), who reports directly to the individual in the highest-level position of authority for the entity that is the recipient, such as the Governor, the Administrator of the State Department of Employment Services, the Chair of the Local Workforce Development Board, the Chief Executive Officer, the Chief Operating Officer, or an equivalent official. The recipient-level EO Officer must have staff and resources sufficient to carry out the requirements of this section and § 38.31. The responsibilities of small recipients and service providers are described in §§ 38.32 and 38.33.

§ 38.29 Recipients' obligations regarding Equal Opportunity Officers.

All recipients have the following obligations related to their EO Officers:

(a) Ensuring that the EO Officer is a senior-level employee reporting directly to the individual in the highest-level position of authority for the entity that is the recipient, such as the Governor, the Administrator of the State Department of Employment Services, the Chair of the Local Workforce Development Board, the Chief Executive Officer, the Chief Operating Officer, or an equivalent official;

(b) Designating an individual who can fulfill the responsibilities of an EO Officer as described in § 38.31;

(c) Making the EO Officer's name, position title, address, and telephone number (voice and TDD/TTY) public;

(d) Ensuring that the EO Officer's identity and contact information appear on all internal and external communications about the recipient's nondiscrimination and equal opportunity programs;

(e) Assigning sufficient authority, staff, and resources to the EO Officer,

and support of top management, to ensure compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part; and

(f) Ensuring that the EO Officer and the EO Officer's staff are afforded the opportunity to receive (at the recipient's expense) the training necessary and appropriate to maintain competency.

§ 38.30 Requisite skill and authority of Equal Opportunity Officer.

The EO Officer must be a senior level employee of the recipient who has the knowledge, skills and abilities necessary to fulfill the responsibilities competently as described in this subpart. Depending upon the size of the recipient, the size of the recipient's WIOA Title I-financially assisted programs or activities, and the number of applicants, registrants, and participants served by the recipient, the EO Officer may, or may not, be assigned other duties. However, the EO Officer must not have other responsibilities or activities that create a conflict or the appearance of a conflict with the responsibilities of an EO Officer.

§ 38.31 Equal Opportunity Officer responsibilities.

An Equal Opportunity Officer is responsible for coordinating a recipient's obligations under this part. Those responsibilities include, but are not limited to:

(a) Serving as a recipient's liaison with CRC;

(b) Monitoring and investigating the recipient's activities, and the activities of the entities that receive WIOA Title I-financial assistance from the recipient, to make sure that the recipient and its subrecipients are not violating their nondiscrimination and equal opportunity obligations under WIOA Title I and this part, which includes monitoring the collection of data required in this part to ensure compliance with the nondiscrimination and equal opportunity requirements of WIOA and this part;

(c) Reviewing the recipient's written policies to make sure that those policies are nondiscriminatory;

(d) Developing and publishing the recipient's procedures for processing discrimination complaints under §§ 38.72 through 38.73, including tracking the discrimination complaints filed against the recipient, developing procedures for investigating and resolving discrimination complaints filed against the recipient, making sure that those procedures are followed, and making available to the public, in appropriate languages and formats, the procedures for filing a complaint;

(e) Conducting outreach and education about equal opportunity and nondiscrimination requirements consistent with § 38.40 and how an individual may file a complaint consistent with § 38.69;

(f) Undergoing training (at the recipient's expense) to maintain competency of the EO Officer and staff, as required by the Director; and

(g) If applicable, overseeing the development and implementation of the recipient's Nondiscrimination Plan under § 38.54.

§ 38.32 Small recipient Equal Opportunity Officer obligations.

Although small recipients, as defined in § 38.4(hhh), do not need to designate EO Officers who have the full range of responsibilities listed in § 38.31, they must designate an individual who will be responsible for adopting and publishing complaint procedures, and processing complaints, as explained in §§ 38.72 through 38.75.

§ 38.33 Service provider Equal Opportunity Officer obligations.

Service providers, as defined in § 38.4(ggg), are not required to designate an EO Officer. The obligation for ensuring service provider compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part rests with the Governor or LWDA grant recipient, as specified in the State's Nondiscrimination Plan.

Notice and Communication

§ 38.34 Recipients' obligations to disseminate equal opportunity notice.

(a) A recipient must provide initial and continuing notice as defined in § 38.36 that it does not discriminate on any prohibited basis. This notice must be provided to:

(1) Registrants, applicants, and eligible applicants/registrants;

(2) Participants;

(3) Applicants for employment and employees;

(4) Unions or professional organizations that hold collective bargaining or professional agreements with the recipient;

(5) Subrecipients that receive WIOA Title I financial assistance from the recipient; and

(6) Members of the public, including those with impaired vision or hearing and those with limited English proficiency.

(b) As provided in § 38.15, the recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others and that this notice is provided in appropriate languages to ensure meaningful access for LEP individuals as described in § 38.9.

§ 38.35 Equal opportunity notice/poster.

The notice must contain the following specific wording:

Equal Opportunity Is the Law

It is against the law for this recipient of Federal financial assistance to discriminate on the following bases: Against any individual in the United States, on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, sex stereotyping, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, or political affiliation or belief, or, against any beneficiary of, applicant to, or participant in programs financially assisted under Title I of the Workforce Innovation and Opportunity Act, on the basis of the individual's citizenship status or participation in any WIOA Title I-financially assisted program or activity.

The recipient must not discriminate in any of the following areas:

Deciding who will be admitted, or have access, to any WIOA Title I-financially assisted program or activity;

providing opportunities in, or treating any person with regard to, such a program or activity; or

making employment decisions in the administration of, or in connection with, such a program or activity.

Recipients of federal financial assistance must take reasonable steps to ensure that communications with individuals with disabilities are as effective as communications with others. This means that, upon request and at no cost to the individual, recipients are required to provide appropriate auxiliary aids and services to qualified individuals with disabilities.

What To Do If You Believe You Have Experienced Discrimination

If you think that you have been subjected to discrimination under a WIOA Title I-financially assisted program or activity, you may file a complaint within 180 days from the date of the alleged violation with either:

The recipient's Equal Opportunity Officer (or the person whom the recipient has designated for this purpose); or

The Director, Civil Rights Center (CRC), U.S. Department of Labor, 200 Constitution Avenue NW., Room N–

4123, Washington, DC 20210 or electronically as directed on the CRC Web site at *www.dol.gov/crc*.

If you file your complaint with the recipient, you must wait either until the recipient issues a written Notice of Final Action, or until 90 days have passed (whichever is sooner), before filing with the Civil Rights Center (see address above).

If the recipient does not give you a written Notice of Final Action within 90 days of the day on which you filed your complaint, you may file a complaint with CRC before receiving that Notice. However, you must file your CRC complaint within 30 days of the 90-day deadline (in other words, within 120 days after the day on which you filed your complaint with the recipient).

If the recipient does give you a written Notice of Final Action on your complaint, but you are dissatisfied with the decision or resolution, you may file a complaint with CRC. You must file your CRC complaint within 30 days of the date on which you received the Notice of Final Action.

§ 38.36 Recipients' obligations to publish equal opportunity notice.

(a) At a minimum, the Equal Opportunity Notice required by §§ 38.34 and 38.35 must be:

(1) Posted prominently, in reasonable numbers and places, in available and conspicuous physical locations and on the recipient's Web site pages;

(2) Disseminated in internal memoranda and other written or electronic communications with staff;

(3) Included in employee and participant handbooks or manuals regardless of form, including electronic and paper form if both are available; and

(4) Provided to each participant and employee; the notice must be made part of each employee's and participant's file. It must be a part of both paper and electronic files, if both are maintained.

(b) The notice must be provided in appropriate formats to registrants, applicants, eligible applicants/registrants, applicants for employment and employees and participants with visual impairments. Where notice has been given in an alternate format to registrants, applicants, eligible applicants/registrants, participants, applicants for employment and employees with a visual impairment, a record that such notice has been given must be made a part of the employee's or participant's file.

(c) The notice must be provided to participants in appropriate languages other than English as required in § 38.9.

(d) The notice required by §§ 38.34 and 38.35 must be initially published and provided within 90 days of January 3, 2017, or of the date this part first applies to the recipient, whichever comes later.

§ 38.37 Notice requirement for service providers.

The Governor or the LWDA grant recipient, as determined by the Governor and as provided in that State's Nondiscrimination Plan, will be responsible for meeting the notice requirement provided in §§ 38.34 and 38.35 with respect to a State's service providers.

§ 38.38 Publications, broadcasts, and other communications.

(a) Recipients must indicate that the WIOA Title I-financially assisted program or activity in question is an ''equal opportunity employer/program,'' and that ''auxiliary aids and services are available upon request to individuals with disabilities,'' in recruitment brochures and other materials that are ordinarily distributed or communicated in written and/or oral form, electronically and/or on paper, to staff, clients, or the public at large, to describe programs financially assisted under Title I of WIOA or the requirements for participation by recipients and participants. Where such materials indicate that the recipient may be reached by voice telephone, the materials must also prominently provide the telephone number of the text telephone (TTY) or equally effective telecommunications system, such as a relay service, videophone, or captioned telephone used by the recipient, as required by § 38.15(b).

(b) Recipients that publish or broadcast program information in the news media must ensure that such publications and broadcasts state that the WIOA Title I-financially assisted program or activity in question is an equal opportunity employer/program (or otherwise indicate that discrimination in the WIOA Title I-financially assisted program or activity is prohibited by Federal law), and indicate that auxiliary aids and services are available upon request to individuals with disabilities.

(c) A recipient must not communicate any information that suggests, by text or illustration, that the recipient treats beneficiaries, registrants, applicants, participants, employees or applicants for employment differently on any prohibited basis specified in § 38.5, except as such treatment is otherwise permitted under Federal law or this part.

§ 38.39 Communication of notice in orientations.

During each presentation to orient new participants, new employees, and/or the general public to its WIOA Title I-financially assisted program or activity, in person or over the internet or using other technology, a recipient must include a discussion of rights and responsibilities under the nondiscrimination and equal opportunity provisions of WIOA and this part, including the right to file a complaint of discrimination with the recipient or the Director. This information must be communicated in appropriate languages as required in § 38.9 and in formats accessible for individuals with disabilities as required in this part and specified in § 38.15.

§ 38.40 Affirmative outreach.

Recipients must take appropriate steps to ensure that they are providing equal access to their WIOA Title I-financially assisted programs and activities. These steps should involve reasonable efforts to include members of the various groups protected by these regulations including but not limited to persons of different sexes, various racial and ethnic/national origin groups, various religions, individuals with limited English proficiency, individuals with disabilities, and individuals in different age groups. Such efforts may include, but are not limited to:

(a) Advertising the recipient's programs and/or activities in media, such as newspapers or radio programs, that specifically target various populations;

(b) Sending notices about openings in the recipient's programs and/or activities to schools or community service groups that serve various populations; and

(c) Consulting with appropriate community service groups about ways in which the recipient may improve its outreach and service to various populations.

Data and Information Collection Maintenance

§ 38.41 Collection and maintenance of equal opportunity data and other information.

(a) The Director will not require submission of data that can be obtained from existing reporting requirements or sources, including those of other agencies, if the source is known and available to the Director.

(b)(1) Each recipient must collect such data and maintain such records, in accordance with procedures prescribed by the Director, as the Director finds necessary to determine whether the

recipient has complied or is complying with the nondiscrimination and equal opportunity provisions of WIOA or this part. The system and format in which the records and data are kept must be designed to allow the Governor and CRC to conduct statistical or other quantifiable data analyses to verify the recipient's compliance with section 188 of WIOA and this part.

(2) Such records must include, but are not limited to, records on applicants, registrants, eligible applicants/registrants, participants, terminees, employees, and applicants for employment. Each recipient must record the race/ethnicity, sex, age, and where known, disability status, of every applicant, registrant, participant, terminee, applicant for employment, and employee. Beginning on January 3, 2019, each recipient must also record the limited English proficiency and preferred language of each applicant, registrant, participant, and terminee. Such information must be stored in a manner that ensures confidentiality, and must be used only for the purposes of recordkeeping and reporting; determining eligibility, where appropriate, for WIOA Title I-financially assisted programs or activities; determining the extent to which the recipient is operating its WIOA Title I-financially assisted program or activity in a nondiscriminatory manner; or other use authorized by law.

(3) Any medical or disability-related information obtained about a particular individual, including information that could lead to the disclosure of a disability, must be collected on separate forms. All such information, whether in hard copy, electronic, or both, must be maintained in one or more separate files, apart from any other information about the individual, and treated as confidential. Whether these files are electronic or hard copy, they must be locked or otherwise secured (for example, through password protection).

(i) *Knowledge of disability status or medical condition and access to information in related files.* Persons in the following categories may be informed about an individual's disability or medical condition and have access to the information in related files under the following listed circumstances:

(A) Program staff who are responsible for documenting eligibility, where disability is an eligibility criterion for a program or activity.

(B) First aid and safety personnel who need access to underlying documentation related to a participant's medical condition in an emergency.

(C) Government officials engaged in enforcing this part, any other laws administered by the Department, or any other Federal laws. *See also* § 38.44.

(ii) *Knowledge of disability status or medical condition only.* Supervisors, managers, and other necessary personnel may be informed regarding restrictions on the activities of individuals with disabilities and regarding reasonable accommodations for such individuals.

(c) Each recipient must maintain, and submit to CRC upon request, a log of complaints filed with the recipient that allege discrimination on the basis(es) of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin, age, disability, political affiliation or belief, citizenship, and/or participation in a WIOA Title I-financially assisted program or activity. The log must include: The name and address of the complainant; the basis of the complaint; a description of the complaint; the date the complaint was filed; the disposition and date of disposition of the complaint; and other pertinent information. Information that could lead to identification of a particular individual as having filed a complaint must be kept confidential.

(d) Where designation of individuals by race or ethnicity is required, the guidelines of the Office of Management and Budget must be used.

(e) A service provider's responsibility for collecting and maintaining the information required under this section may be assumed by the Governor or LWDA grant recipient, as provided in the State's Nondiscrimination Plan.

§ 38.42 Information to be provided to the Civil Rights Center (CRC) by grant applicants and recipients.

In addition to the information which must be collected, maintained, and, upon request, submitted to CRC under § 38.41:

(a) Each grant applicant and recipient must promptly notify the Director when any administrative enforcement actions or lawsuits are filed against it alleging discrimination on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only, on the basis of citizenship or participation in a WIOA Title I-financially assisted program or activity. This notification must include:

(1) The names of the parties to the action or lawsuit;

(2) The forum in which each case was filed; and

(3) The relevant case numbers.

(b) Each recipient (as part of a compliance review conducted under § 38.63, or monitoring activity carried out under § 38.65) must provide the following information:

(1) The name of any other Federal agency that conducted a civil rights compliance review or complaint investigation, and that found the grant applicant or recipient to be in noncompliance, during the two years before the grant application was filed or CRC began its examination; and

(2) Information about any administrative enforcement actions or lawsuits that alleged discrimination on any protected basis, and that were filed against the grant applicant or recipient during the two years before the application or renewal application, compliance review, or monitoring activity. This information must include:

(i) The names of the parties;

(ii) The forum in which each case was filed; and

(iii) The relevant case numbers.

(c) At the discretion of the Director, grant applicants and recipients may be required to provide, in a timely manner, any information and data that the Director considers necessary to investigate complaints and conduct compliance reviews on bases prohibited under the nondiscrimination and equal opportunity provisions of WIOA and this part.

(d) At the discretion of the Director, recipients may be required to provide, in a timely manner, the particularized information and/or to submit the periodic reports that the Director considers necessary to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(e) At the discretion of the Director, grant applicants may be required to submit, in a timely manner, the particularized information that the Director considers necessary to determine whether or not the grant applicant, if financially assisted, would be able to comply with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(f) Where designation of individuals by race or ethnicity is required, the guidelines of the Office of Management and Budget must be used.

§ 38.43 Required maintenance of records by recipients.

(a) Each recipient must maintain the following records, whether they exist in

electronic form (including email) or hard copy, for a period of not less than three years from the close of the applicable program year:

(1) The records of applicants, registrants, eligible applicants/registrants, participants, terminees, employees, and applicants for employment; and

(2) Such other records as are required under this part or by the Director.

(b) Where a discrimination complaint has been filed or compliance review initiated, every recipient that possesses or maintains any type of hard-copy or electronic record related to the complaint (including records that have any relevance to the underlying allegations in the complaint, as well as records regarding actions taken on the complaint) or to the subject of the compliance review must preserve all records, regardless whether hard-copy or electronic, that may be relevant to a complaint investigation or compliance review, and maintain those records for a period of not less than three years from the date of final action related to resolution of the complaint or compliance review.

§ 38.44 CRC access to information and information sources.

(a) Each grant applicant and recipient must permit access by the Director or the Director's designee during its hours of operation to its premises and to its employees and participants, to the extent that such individuals are on the premises during the course of the investigation, for the purpose of conducting complaint investigations, compliance reviews, or monitoring activities associated with a State's development and implementation of a Nondiscrimination Plan, and for inspecting and copying such books, records, accounts and other materials as may be pertinent to ascertain compliance with and ensure enforcement of the nondiscrimination and equal opportunity provisions of WIOA or this part.

(b) Asserted considerations of privacy or confidentiality are not a basis for withholding information from CRC and will not bar CRC from evaluating or seeking to enforce compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(c) Whenever any information that the Director asks a grant applicant or recipient to provide is in the exclusive possession of another agency, institution, or person, and that agency, institution, or person fails or refuses to furnish the information upon request, the grant applicant or recipient must certify to CRC that it has made efforts to obtain the information and that the agency, institution, or person has failed or refused to provide it. This certification must list the name and address of the agency, institution, or person that has possession of the information and the specific efforts the grant applicant or recipient made to obtain it.

§ 38.45 Confidentiality responsibilities of grant applicants, recipients, and the Department.

Grant applicants, recipients and the Department must keep confidential to the extent possible, consistent with a fair determination of the issues, the identity of any individual who furnishes information relating to, or assists in, an investigation or a compliance review, including the identity of any individual who files a complaint. An individual whose identity is disclosed must be protected from retaliation (*See* § 38.19).

Subpart C—Governor's Responsibilities to Implement the Nondiscrimination and Equal Opportunity Requirements of the Workforce Innovation and Opportunity Act (WIOA)

§ 38.50 Subpart application to State Programs.

This subpart applies to State Programs as defined in § 38.4. However, the provisions of § 38.52(b) do not apply to State Workforce Agencies (SWA), because the Governor's liability for any noncompliance on the part of a SWA cannot be waived.

§ 38.51 Governor's oversight and monitoring responsibilities for State Programs.

The Governor is responsible for oversight and monitoring of all WIOA Title I-financially assisted State Programs. This responsibility includes:

(a) Ensuring compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part, and negotiating, where appropriate, with a recipient to secure voluntary compliance when noncompliance is found under § 38.91(b).

(b) Annually monitoring the compliance of recipients with WIOA section 188 and this part, including a determination as to whether each recipient is conducting its WIOA Title I-financially assisted program or activity in a nondiscriminatory way. At a minimum, each annual monitoring review required by this paragraph must include:

(1) A statistical or other quantifiable analysis of records and data kept by the recipient under § 38.41, including analyses by race/ethnicity, sex, limited English proficiency, preferred language, age, and disability status;

(2) An investigation of any significant differences identified in paragraph (b)(1) of this section in participation in the programs, activities, or employment provided by the recipient, to determine whether these differences appear to be caused by discrimination. This investigation must be conducted through review of the recipient's records and any other appropriate means; and

(3) An assessment to determine whether the recipient has fulfilled its administrative obligations under Section 188 of WIOA or this part (for example, recordkeeping, notice and communication) and any duties assigned to it under the Nondiscrimination Plan.

§ 38.52 Governor's liability for actions of recipients the Governor has financially assisted under Title I of WIOA.

(a) The Governor and the recipient are jointly and severally liable for all violations of the nondiscrimination and equal opportunity provisions of WIOA and this part by the recipient, unless the Governor has:

(1) Established and implemented a Nondiscrimination Plan, under § 38.54, designed to give a reasonable guarantee of the recipient's compliance with such provisions;

(2) Entered into a written contract with the recipient that clearly establishes the recipient's obligations regarding nondiscrimination and equal opportunity;

(3) Acted with due diligence to monitor the recipient's compliance with these provisions; and

(4) Taken prompt and appropriate corrective action to effect compliance.

(b) If the Director determines that the Governor has demonstrated substantial compliance with the requirements of paragraph (a) of this section, the Director may recommend to the Secretary that the imposition of sanctions against the Governor be waived and that sanctions be imposed only against the noncomplying recipient.

§ 38.53 Governor's oversight responsibilities regarding recipients' recordkeeping.

The Governor must ensure that recipients collect and maintain records in a manner consistent with the provisions of § 38.41 and any procedures prescribed by the Director under § 38.41(a). The Governor must further ensure that recipients are able to provide data and reports in the manner prescribed by the Director.

§ 38.54 Governor's obligations to develop and implement a Nondiscrimination Plan.

(a)(1) Each Governor must establish and implement a Nondiscrimination Plan for State Programs as defined in § 38.4(kkk). In those States in which one agency contains both SWA or unemployment insurance and WIOA Title I-financially assisted programs, the Governor must develop a combined Nondiscrimination Plan.

(2) Each Nondiscrimination Plan must be designed to give a reasonable guarantee that all recipients will comply, and are complying, with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(b) The Nondiscrimination Plan must be:

(1) In writing, addressing each requirement of paragraph (c) of this section with narrative and documentation;

(2) Reviewed and updated as required in § 38.55; and

(3) Signed by the Governor.

(c) At a minimum, each Nondiscrimination Plan must:

(1) Describe how the State Programs and recipients have satisfied the requirements of the following regulations:

(i) Sections 38.25 through 38.27 (Assurances);

(ii) Sections 38.28 through 38.33 (Equal Opportunity Officers);

(iii) Sections 38.34 through 38.39 (Notice and Communication);

(iv) Sections 38.41 through 38.45 (Data and Information Collection and Maintenance);

(v) Section 38.40 (Affirmative Outreach);

(vi) Section 38.53 (Governor's Oversight Responsibility Regarding Recipients' Recordkeeping);

(vii) Sections 38.72 and 38.73 (Complaint Processing Procedures); and

(viii) Sections 38.51 and 38.53 (Governor's Oversight and Monitoring Responsibilities for State Programs).

(2) Include the following additional elements:

(i) A system for determining whether a grant applicant, if financially assisted, and/or a training provider, if selected as eligible under Section 122 of WIOA, is likely to conduct its WIOA Title I-financially assisted programs or activities in a nondiscriminatory way, and to comply with the regulations in this part;

(ii) A review of recipient policy issuances to ensure they are nondiscriminatory;

(iii) A system for reviewing recipients' job training plans, contracts, assurances, and other similar agreements to ensure that they are both nondiscriminatory and contain the required language regarding nondiscrimination and equal opportunity;

(iv) Procedures for ensuring that recipients comply with the nondiscrimination and equal opportunity requirements of § 38.5 regarding race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, political affiliation or belief, citizenship, or participation in any WIOA Title I-financially assisted program or activity;

(v) Procedures for ensuring that recipients comply with the requirements of applicable Federal disability nondiscrimination law, including Section 504; Title II of the Americans with Disabilities Act of 1990, as amended, if applicable; WIOA Section 188, and this part with regard to individuals with disabilities;

(vi) A system of policy communication and training to ensure that EO Officers and members of the recipients' staffs who have been assigned responsibilities under the nondiscrimination and equal opportunity provisions of WIOA or this part are aware of and can effectively carry out these responsibilities;

(vii) Procedures for obtaining prompt corrective action or, as necessary, applying sanctions when noncompliance is found; and

(viii) Supporting documentation to show that the commitments made in the Nondiscrimination Plan have been and/or are being carried out. This supporting documentation includes, but is not limited to:

(A) Policy and procedural issuances concerning required elements of the Nondiscrimination Plan;

(B) Copies of monitoring instruments and instructions;

(C) Evidence of the extent to which nondiscrimination and equal opportunity policies have been developed and communicated as required by this part;

(D) Information reflecting the extent to which equal opportunity training, including training called for by §§ 38.29(f) and 38.31(f), is planned and/or has been carried out;

(E) Reports of monitoring reviews and reports of follow-up actions taken under those reviews where violations have been found, including, where appropriate, sanctions; and

(F) Copies of any notices made under §§ 38.34 through 38.40.

§ 38.55 Schedule of the Governor's obligations regarding the Nondiscrimination Plan.

(a) Within 180 days of either January 3, 2017, or the date on which the Governor is required to review and update their Methods of Administration as determined by the schedule in § 37.55, whichever is later, a Governor must:

(1) Develop and implement a Nondiscrimination Plan consistent with the requirements of this part; and

(2) Submit a copy of the Nondiscrimination Plan to the Director.

(b) The Governor must promptly update the Nondiscrimination Plan whenever necessary, and submit the changes made to the Director in writing at the time that any such updates are made.

(c) Every two years from the date on which the initial Nondiscrimination Plan is submitted to the Director under paragraph (a)(2) of this section, the Governor must review the Nondiscrimination Plan and the manner in which it has been implemented, and determine whether any changes are necessary in order for the State to comply fully and effectively with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(1) If any such changes are necessary, the Governor must make the appropriate changes and submit them, in writing, to the Director.

(2) If the Governor determines that no such changes are necessary, the Governor must certify, in writing, to the Director that the Nondiscrimination Plan previously submitted continues in effect.

(3) Submit a copy of all reports of any monitoring reviews conducted by the Governor pursuant to § 38.51(b) since the last Nondiscrimination Plan update.

Subpart D—Compliance Procedures

§ 38.60 Evaluation of compliance.

From time to time, the Director may conduct pre-approval compliance reviews of grant applicants for WIOA Title I-financial assistance to determine the ability to comply with the nondiscrimination and equal opportunity provisions of WIOA and this part and may conduct post-approval compliance reviews of recipients to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part. Reviews may focus on one or more specific programs or activities, or one or more issues within a program or activity. The Director may also investigate and resolve complaints

alleging violations of the nondiscrimination and equal opportunity provisions of WIOA and this part.

§ 38.61 Authority to issue subpoenas.

Section 183(c) of WIOA authorizes the issuance of subpoenas. The subpoena may require the appearance of witnesses, and the production of documents, from any place in the United States, at any designated time and place. A subpoena may direct the individual named on the subpoena to take the following actions:

(a) To appear:

(1) Before a designated CRC representative;

(2) At a designated time and place;

(b) To give testimony; and/or

(c) To produce documentary evidence.

Compliance Reviews

§ 38.62 Authority and procedures for pre-approval compliance reviews.

(a) As appropriate and necessary to ensure compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part, the Director may review any application, or class of applications, for Federal financial assistance under Title I of WIOA, before and as a condition of their approval. The basis for such review may be the assurance specified in § 38.25, information and reports submitted by the grant applicant under this part or guidance published by the Director, and any relevant records on file with the Department.

(b) When awarding financial assistance under Title I of WIOA, departmental grantmaking agencies must consult with the Director to review whether the CRC has issued a Notice to Show Cause under § 38.66(b) or a Final Determination against an applicant that has been identified as a probable awardee.

(c) The grantmaking agency will consider, in consultation with the Director, the information referenced in paragraph (b) of this section, along with any other information provided by the Director in determining whether to award a grant or grants. Departmental grantmaking agencies must consider refraining from awarding new grants to applicants or must consider including special terms in the grant agreement for entities named by the Director as described in paragraph (b) of this section. Special terms will not be lifted until a compliance review has been conducted by the Director, and the Director has approved a determination that the applicant is likely to comply with the nondiscrimination and equal opportunity requirements of WIOA and this part.

(d) Where the Director determines that the grant applicant for Federal financial assistance under Title I of WIOA, if financially assisted, is not likely to comply with the nondiscrimination and equal opportunity requirements of WIOA or this part, the Director must:

(1) Notify, in a timely manner, the Departmental grantmaking agency and the Assistant Attorney General of the findings of the pre-approval compliance review; and

(2) Issue a Letter of Findings. The Letter of Findings must advise the grant applicant, in writing, of:

(i) The preliminary findings of the review;

(ii) The proposed remedial or corrective action under § 38.90 and the time within which the remedial or corrective action should be completed;

(iii) Whether it will be necessary for the grant applicant to enter into a written Conciliation Agreement as described in §§ 38.91 and 38.93; and

(iv) The opportunity to engage in voluntary compliance negotiations.

(e) If a grant applicant has agreed to certain remedial or corrective actions in order to receive WIOA Title I financial assistance, the Department must ensure that the remedial or corrective actions have been taken, or that a Conciliation Agreement has been entered into, before approving the award of further assistance under WIOA Title I. If a grant applicant refuses or fails to take remedial or corrective actions or to enter into a Conciliation Agreement, as applicable, the Director must follow the procedures outlined in §§ 38.95 through 38.97.

§ 38.63 Authority and procedures for conducting post-approval compliance reviews.

(a) The Director may initiate a post-approval compliance review of any recipient to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part. The initiation of a post-approval review may be based on, but need not be limited to, the results of routine program monitoring by other Departmental or Federal agencies, or the nature or frequency of complaints.

(b) A post-approval review must be initiated by a Notification Letter, advising the recipient of:

(1) The practices to be reviewed;

(2) The programs to be reviewed;

(3) The information, records, and/or data to be submitted by the recipient within 30 days of the receipt of the Notification Letter, unless this time frame is modified by the Director; and

(4) The opportunity, at any time before receipt of the Final Determination described in §§ 38.95 and 38.96, to make a documentary or other written submission that explains, validates or otherwise addresses the practices under review.

(c) The Director may conduct post-approval reviews using such techniques as desk audits and on-site reviews.

§ 38.64 Procedures for concluding post-approval compliance reviews.

(a) Where, as the result of a post-approval review, the Director has made a finding of noncompliance, the Director must issue a Letter of Findings. This Letter must advise the recipient, in writing, of:

(1) The preliminary findings of the review;

(2) Where appropriate, the proposed remedial or corrective action to be taken, and the time by which such action should be completed, as provided in § 38.90;

(3) Whether it will be necessary for the recipient to enter into a written assurance or Conciliation Agreement, as provided in §§ 38.92 and 38.93; and

(4) The opportunity to engage in voluntary compliance negotiations.

(b) Where no violation is found, the recipient must be so informed in writing.

§ 38.65 Authority to monitor the activities of a Governor.

(a) The Director may periodically review the adequacy of the Nondiscrimination Plan established by a Governor, as well as the adequacy of the Governor's performance under the Nondiscrimination Plan, to determine compliance with the requirements of §§ 38.50 through 38.55. The Director may review the Nondiscrimination Plan during a compliance review under §§ 38.62 and 38.63, or at another time.

(b) Nothing in this subpart limits or precludes the Director from monitoring directly any recipient or from investigating any matter necessary to determine a recipient's compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(c) Where the Director determines that the Governor has not complied with the oversight and monitoring responsibilities set forth in the nondiscrimination and equal opportunity requirements of WIOA or this part, the Director may:

(1) Issue a Letter of Findings. The Letter of Findings must advise the Governor, in writing, of:

(i) The preliminary findings of the review;

(ii) The proposed remedial or corrective action under § 38. 90 and the time within which the remedial or corrective action should be completed;

(iii) Whether it will be necessary for the Governor to enter into a conciliation agreement as described in §§ 38.91 and 38.93; and

(iv) The opportunity to engage in voluntary compliance negotiations.

(2) If a Governor refuses or fails to take remedial or corrective actions or to enter into a conciliation agreement, the Director may follow the procedures outlined in §§ 38.89, 38.90, and 38.91.

§ 38.66 Notice to Show Cause issued to a recipient.

(a) The Director may issue a Notice to Show Cause to a recipient failing to comply with the requirements of this part, where such failure results in the inability of the Director to make a finding. Such a failure includes, but is not limited to, the recipient's failure or refusal to:

(1) Submit requested information, records, and/or data within the timeframe specified in a Notification Letter issued pursuant to § 38.63;

(2) Submit, in a timely manner, information, records, and/or data requested during a compliance review, complaint investigation, or other action to determine a recipient's compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part; or

(3) Provide CRC access in a timely manner to a recipient's premises, records, or employees during a compliance review or complaint investigation, as required in § 38.42(c).

(b) The Director may issue a Notice to Show Cause to a recipient after a Letter of Findings and/or an Initial Determination has been issued, and after a reasonable period of time has passed within which the recipient refuses to negotiate a conciliation agreement with the Director regarding the violation(s).

(c) A Notice to Show Cause must contain:

(1) A description of the violation and a citation to the pertinent nondiscrimination or equal opportunity provision(s) of WIOA and this part;

(2) The corrective action necessary to achieve compliance or, as may be appropriate, the concepts and principles of acceptable corrective or remedial action and the results anticipated; and

(3) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence.

(d) A Notice to Show Cause must give the recipient 30 days from receipt of the Notice to show cause why enforcement proceedings under the nondiscrimination and equal opportunity provisions of WIOA or this part should not be instituted.

§ 38.67 Methods by which a recipient may show cause why enforcement proceedings should not be instituted.

A recipient may show cause why enforcement proceedings should not be instituted by, among other means:

(a) Correcting the violation(s) that brought about the Notice to Show Cause and entering into a Conciliation Agreement, under §§ 38.91 and 38.93;

(b) Demonstrating that CRC does not have jurisdiction; or

(c) Demonstrating that the violation alleged by CRC did not occur.

§ 38.68 Failing to show cause.

If the recipient fails to show cause why enforcement proceedings should not be initiated, the Director may follow the enforcement procedures outlined in § 38.95.

Complaint Processing Procedures

§ 38.69 Complaint filing.

(a) Any person or the person's representative who believes that any of the following circumstances exist may file a written complaint:

(1) A person, or any specific class of individuals, has been or is being discriminated against on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, political affiliation or belief, citizenship status, or participation in any WIOA Title I-financially assisted program or activity as prohibited by WIOA or this part.

(2) Either the person, or any specific class of individuals, has been or is being retaliated against as described in § 38.19.

(b) A person or the person's representative may file a complaint with either the recipient's EO Officer (or the person the recipient has designated for this purpose) or the Director. Complaints filed with the Director should be sent to the address listed in the notice or filed electronically as described in the notice in § 38.35.

(c) Generally, a complaint must be filed within 180 days of the alleged discrimination or retaliation. However, for good cause shown, the Director may extend the filing time. The time period for filing is for the administrative convenience of CRC, and does not create a defense for the respondent.

§ 38.70 Required contents of complaint.

Each complaint must be filed in writing, either electronically or in hard copy, and must contain the following information:

(a) The complainant's name, mailing address, and, if available, email address (or another means of contacting the complainant).

(b) The identity of the respondent (the individual or entity that the complainant alleges is responsible for the discrimination).

(c) A description of the complainant's allegations. This description must include enough detail to allow the Director or the recipient, as applicable, to decide whether:

(1) CRC or the recipient, as applicable, has jurisdiction over the complaint;

(2) The complaint was filed in time; and

(3) The complaint has apparent merit; in other words, whether the complainant's allegations, if true, would indicate noncompliance with any of the nondiscrimination and equal opportunity provisions of WIOA or this part.

(d) The written or electronic signature of the complainant or the written or electronic signature of the complainant's representative.

(e) A complainant may file a complaint by completing and submitting CRC's Complaint Information and Privacy Act Consent Forms, which may be obtained either from the recipient's EO Officer or from CRC. The forms are available electronically on CRC's Web site, and in hard copy via postal mail upon request. The latter requests may be sent to CRC at the address listed in the notice contained in § 38.35.

§ 38.71 Right to representation.

Both the complainant and the respondent have the right to be represented by an attorney or other individual of their choice.

§ 38.72 Required elements of a recipient's complaint processing procedures.

(a) The procedures that a recipient adopts and publishes for processing complaints permitted under this part and WIOA Section 188 must state that the recipient will issue a written Notice of Final Action on complaints within 90 days of the date on which the complaint is filed.

(b) At a minimum, the procedures must include the following elements:

(1) Initial, written notice to the complainant that contains the following information:

(i) An acknowledgment that the recipient has received the complaint; and

(ii) Notice that the complainant has the right to be represented in the complaint process;

(iii) Notice of rights contained in § 38.35; and

(iv) Notice that the complainant has the right to request and receive, at no cost, auxiliary aids and services, language assistance services, and that this notice will be translated into the non-English languages as required in §§ 38.4(h) and (i), 38.34, and 38.36.

(2) A written statement of the issue(s), provided to the complainant, that includes the following information:

(i) A list of the issues raised in the complaint; and

(ii) For each such issue, a statement whether the recipient will accept the issue for investigation or reject the issue, and the reasons for each rejection.

(3) A period for fact-finding or investigation of the circumstances underlying the complaint.

(4) A period during which the recipient attempts to resolve the complaint. The methods available to resolve the complaint must include alternative dispute resolution (ADR), as described in paragraph (c) of this section.

(5) A written Notice of Final Action, provided to the complainant within 90 days of the date on which the complaint was filed, that contains the following information:

(i) For each issue raised in the complaint, a statement of either:

(A) The recipient's decision on the issue and an explanation of the reasons underlying the decision; or

(B) A description of the way the parties resolved the issue; and

(ii) Notice that the complainant has a right to file a complaint with CRC within 30 days of the date on which the Notice of Final Action is received if the complainant is dissatisfied with the recipient's final action on the complaint.

(c) The procedures the recipient adopts must provide for alternative dispute resolution (ADR). The recipient's ADR procedures must provide that:

(1) The complainant may attempt ADR at any time after the complainant has filed a written complaint with the recipient, but before a Notice of Final Action has been issued.

(2) The choice whether to use ADR or the customary process rests with the complainant.

(3) A party to any agreement reached under ADR may notify the Director in the event the agreement is breached. In such circumstances, the following rules will apply:

(i) The non-breaching party may notify with the Director within 30 days of the date on which the non-breaching party learns of the alleged breach; and

(ii) The Director must evaluate the circumstances to determine whether the agreement has been breached. If the Director determines that the agreement has been breached, the complaint will be reinstated and processed in accordance with the recipient's procedures.

(4) If the parties do not reach an agreement under ADR, the complainant may file a complaint with the Director as described in §§ 38.69 through 38.71.

§ 38.73 Responsibility for developing and publishing complaint processing procedures for service providers.

The Governor or the LWDA grant recipient, as provided in the State's Nondiscrimination Plan, must develop and publish, on behalf of its service providers, the complaint processing procedures required in § 38.72. The service providers must then follow those procedures.

§ 38.74 Recipient's obligations when it determines that it has no jurisdiction over a complaint.

If a recipient determines that it does not have jurisdiction over a complaint, it must notify the complainant, in writing within five business days of making such determination. This Notice of Lack of Jurisdiction must include:

(a) A statement of the reasons for that determination; and

(b) Notice that the complainant has a right to file a complaint with CRC within 30 days of the date on which the complainant receives the Notice.

§ 38.75 If the complainant is dissatisfied after receiving a Notice of Final Action.

If the recipient issues its Notice of Final Action before the 90-day period ends, but the complainant is dissatisfied with the recipient's decision on the complaint, the complainant or the complainant's representative may file a complaint with the Director within 30 days after the date on which the complainant receives the Notice.

§ 38.76 If a recipient fails to issue a Notice of Final Action within 90 days after the complaint was filed.

If, by the end of 90 days from the date on which the complainant filed the complaint, the recipient has failed to issue a Notice of Final Action, the complainant or the complainant's representative may file a complaint with the Director within 30 days of the expiration of the 90-day period. In other words, the complaint must be filed with the Director within 120 days of the date on which the complaint was filed with the recipient.

§ 38.77 Extension of deadline to file complaint.

(a) The Director may extend the 30-day time limit for filing a complaint:

(1) If a recipient does not include in its Notice of Final Action the required notice about the complainant's right to file with the Director, as described in § 38.72(b)(5); or

(2) For other good cause shown.

(b) The complainant has the burden of proving to the Director that the time limit should be extended.

§ 38.78 Determinations regarding acceptance of complaints.

The Director must decide whether CRC will accept a particular complaint for resolution. For example, a complaint need not be accepted if:

(a) It has not been timely filed;

(b) CRC has no jurisdiction over the complaint; or

(c) CRC has previously decided the matter.

§ 38.79 When a complaint contains insufficient information.

(a) If a complaint does not contain enough information to identify the respondent or the basis of the alleged discrimination, the timeliness of the complaint, or the apparent merit of the complaint, the Director must try to get the needed information from the complainant.

(b) The Director may close the complainant's file, without prejudice, if:

(1) The Director makes reasonable efforts to try to find the complainant, but is unable to reach him or her; or

(2) The complainant does not provide the needed information to CRC within the time specified in the request for more information.

(c) If the Director closes the complainant's file, the Director must send written notice to the complainant's last known address, email address (or another known method of contacting the complainant in writing).

§ 38.80 Lack of jurisdiction.

If CRC does not have jurisdiction over a complaint, the Director must:

(a) Notify the complainant in writing and explain why the complaint falls outside the coverage of the nondiscrimination and equal opportunity provisions of WIOA or this part; and

(b) Where possible, transfer the complaint to an appropriate Federal, State or local authority.

§ 38.81 Complaint referral.

The Director refers complaints to other agencies in the following circumstances:

(a) Where the complaint alleges discrimination based on age, and the

complaint falls within the jurisdiction of the Age Discrimination Act of 1975, as amended, then the Director must refer the complaint, in accordance with the provisions of 45 CFR 90.43(c)(3).

(b) Where the only allegation in the complaint is a charge of individual employment discrimination that is covered both by WIOA or this part and by one or more of the laws listed in paragraphs (b)(1) through (4) of this section, then the complaint is a ''joint complaint,'' and the Director may refer it to the EEOC for investigation and conciliation under the procedures described in 29 CFR part 1640 or 1691, as appropriate. The relevant laws are:

(1) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e to 2000e–17);

(2) The Equal Pay Act of 1963, as amended (29 U.S.C. 206(d));

(3) The Age Discrimination in Employment Act of 1976, as amended (29 U.S.C. 621, *et seq.*); and

(4) Title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*).

(c) Where the complaint alleges discrimination by an entity that operates a program or activity financially assisted by a Federal grantmaking agency other than the Department, but that participates as a partner in a one-stop delivery system, the following procedures apply:

(1) Where the complaint alleges discrimination on a basis that is prohibited both by Section 188 of WIOA and by a civil rights law enforced by the Federal grantmaking agency, then CRC and the grantmaking agency have dual jurisdiction over the complaint, and the Director will refer the complaint to the grantmaking agency for processing. In such circumstances, the grantmaking agency's regulations will govern the processing of the complaint.

(2) Where the complaint alleges discrimination on a basis that is prohibited by Section 188 of WIOA, but not by any civil rights laws enforced by the Federal grantmaking agency, then CRC has sole jurisdiction over the complaint, and will retain the complaint and process it pursuant to this part. Such bases generally include religion, political affiliation or belief, citizenship, and/or participation in a WIOA Title I-financially assisted program or activity.

(d) Where the Director makes a referral under this section, the Director must notify the complainant and the respondent about the referral.

§ 38.82 Notice that complaint will not be accepted.

If a complaint will not be accepted, the Director must notify the complainant, in writing, about that fact, and provide the complainant the Director's reasons for making that determination.

§ 38.83 Notice of complaint acceptance.

If the Director accepts the complaint for resolution, the Director must notify in writing the complainant, the respondent, and the grantmaking agency. The notice must:

(a) State that the complaint will be accepted;

(b) Identify the issues over which CRC has accepted jurisdiction; and

(c) Explain the reasons why any issues were rejected.

§ 38.84 Contacting CRC about a complaint.

Both the complainant and the respondent, or their representative, may contact CRC for information about the complaint. The Director will determine what information, if any, about the complaint will be released.

§ 38.85 Alternative dispute resolution.

The Director may offer the option of alternative dispute resolution (ADR) of the complaint filed with CRC. In such circumstances, the following rules apply:

(a) ADR is voluntary; consent must be given by the complainant and respondent before the ADR process will proceed.

(b) The ADR will be conducted under the guidance of the Director.

(c) ADR may take place at any time after a complaint has been filed under § 38.69, as deemed appropriate by the Director.

(d) CRC will not suspend its investigation and complaint processes during ADR.

Complaint Determinations

§ 38.86 Notice at conclusion of complaint investigation.

At the conclusion of the investigation of the complaint, the Director must take the following actions:

(a) Determine whether there is reasonable cause to believe that the respondent has violated the nondiscrimination and equal opportunity provisions of WIOA or this part; and

(b) Notify the complainant, the respondent, and the grantmaking agency, in writing, of that determination as provided in §§ 38.87 and 38.88.

§ 38.87 Director's Initial Determination that reasonable cause exists to believe that a violation has taken place.

If the Director finds reasonable cause to believe that the respondent has violated the nondiscrimination and equal opportunity provisions of WIOA or this part the Director must issue an Initial Determination. The Initial Determination must include:

(a) The specific findings of the investigation;

(b) The corrective or remedial action that the Department proposes to the respondent, under § 38.90;

(c) The time by which the respondent must complete the corrective or remedial action;

(d) Whether it will be necessary for the respondent to enter into a written agreement under §§ 38.91 through 38.93; and

(e) The opportunity to engage in voluntary compliance negotiations.

§ 38.88 Director's Final Determination that no reasonable cause exists to believe that a violation has taken place.

If the Director determines that there is no reasonable cause to believe that a violation has taken place, the Director must issue a Final Determination under § 38.96. The Final Determination represents the Department's final agency action on the complaint.

§ 38.89 When the recipient fails or refuses to take the corrective action listed in the Initial Determination.

Under such circumstances, following a complaint investigation or compliance review, the Department may take the actions described in § 38.95.

§ 38.90 Corrective or remedial action that may be imposed when the Director finds a violation.

(a) A Letter of Findings, Notice to Show Cause, or Initial Determination, issued under § 38.62 or § 38.64, §§ 38.66 and 38.67, or § 38.87, respectively, must include the specific steps the grant applicant or recipient, as applicable, must take within a stated period of time in order to achieve voluntary compliance.

(b) Such steps may include:

(1) Actions to end and/or redress the violation of the nondiscrimination and equal opportunity provisions of WIOA or this part;

(2) Make-whole relief where discrimination has been identified, including, as appropriate, back pay (which must not accrue from a date more than 2 years before the filing of the complaint or the initiation of a compliance review), or other monetary relief; hire or reinstatement; retroactive seniority; promotion; benefits or other services discriminatorily denied; and

(3) Such other remedial or affirmative relief as the Director deems necessary, including but not limited to outreach, recruitment and training designed to ensure equal opportunity.

(c) Monetary relief may not be paid from Federal funds.

§ 38.91 Post-violation procedures.

(a) *Violations at the State level.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred at the State level, the Director must notify the Governor of that State through the issuance of a Letter of Findings, Notice to Show Cause, or Initial Determination, as appropriate, under § 38.62 or § 38.64, §§ 38.66 and 38.67, or § 38.87, respectively. The Director may secure compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part through, among other means, the execution of a written assurance or Conciliation Agreement.

(b) *Violations below State level.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred below the State level, the Director must so notify the Governor and the violating recipient(s) through the issuance of a Letter of Findings, Notice to Show Cause or Initial Determination, as appropriate, under § 38.62 or § 38.64, §§ 38.66 and 38.67, or § 38.87, respectively.

(1) Such issuance may:

(i) Direct the Governor to initiate negotiations immediately with the violating recipient(s) to secure compliance by voluntary means.

(ii) Direct the Governor to complete such negotiations within 30 days of the Governor's receipt of the Notice to Show Cause or within 45 days of the Governor's receipt of the Letter of Findings or Initial Determination, as applicable. The Director reserves the right to enter into negotiations with the recipient at any time during the period. For good cause shown, the Director may approve an extension of time to secure voluntary compliance. The total time allotted to secure voluntary compliance must not exceed 60 days.

(iii) Include a determination as to whether compliance must be achieved by:

(A) Immediate correction of the violation(s) and written assurance that such violations have been corrected, under § 38.92; or

(B) Entering into a written Conciliation Agreement under § 38.93.

(2) If the Governor determines, at any time during the period described in paragraph (b)(1)(ii) of this section, that a recipient's compliance cannot be achieved by voluntary means, the Governor must so notify the Director.

(3) If the Governor is able to secure voluntary compliance under paragraph (b)(1) of this section, the Governor must submit to the Director for approval, as applicable:

(i) Written assurance that the required action has been taken, as described in § 38.92; or

(ii) A copy of the Conciliation Agreement, as described in § 38.93.

(4) The Director may disapprove any written assurance or Conciliation Agreement submitted for approval under paragraph (b)(3) of this section that fails to satisfy each of the applicable requirements provided in §§ 38.92 and 38.93.

(c) *Violations in National Programs.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred in a National Program, the Director must notify the Federal grantmaking agency and the recipient by issuing a Letter of Findings, Notice to Show Cause, or Initial Determination, as appropriate, under § 38.62 or § 38.63, §§ 38.66 and 38.67, or § 38.87, respectively. The Director may secure compliance with the nondiscrimination and equal opportunities provisions of WIOA through, among other means, the execution of a written assurance or conciliation agreement under § 38.92 or § 38.93.

§ 38.92 Written assurance.

A written assurance is the resolution document that may be used when the Director determines that a recipient has, within fifteen business days after receipt of the Letter of Findings or Initial Determination identifying the violations, taken all corrective actions to remedy the violations specified in those documents.

§ 38.93 Required elements of a conciliation agreement.

A conciliation agreement must:

(a) Be in writing;

(b) Address the legal and contractual obligations of the recipient;

(c) Address each cited violation;

(d) Specify the corrective or remedial action to be taken within a stated period of time to come into compliance;

(e) Provide for periodic reporting on the status of the corrective and remedial action;

(f) State that the violation(s) will not recur;

(g) State that nothing in the agreement will prohibit CRC from sending the agreement to the complainant, making it available to the public, or posting it on the CRC or recipient's Web site;

(h) State that, in any proceeding involving an alleged violation of the conciliation agreement, CRC may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement; and

(i) Provide for enforcement for a breach of the agreement.

§ 38.94 When voluntary compliance cannot be secured.

The Director will conclude that compliance cannot be secured by voluntary means under the following circumstances:

(a) The Governor, grant applicant or recipient fails to or refuses to correct the violation(s) within the time period established by the Letter of Findings, Notice to Show Cause or Initial Determination; or

(b) The Director has not approved an extension of time for agreement on voluntary compliance under § 38.91(b)(1)(ii) and the Director either:

(1) Has not been notified under § 38.91(b)(3) that the Governor, grant applicant, or recipient has agreed to voluntary compliance;

(2) Has disapproved a written assurance or Conciliation Agreement, under § 38.91(b)(4); or

(3) Has received notice from the Governor, under § 38.91(b)(2), that the grant applicant or recipient will not comply voluntarily.

§ 38.95 Enforcement when voluntary compliance cannot be secured.

If the Director concludes that compliance cannot be secured by voluntary means, the Director must either:

(a) Issue a Final Determination;

(b) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or

(c) Take such other action as may be provided by law.

§ 38.96 Contents of a Final Determination of a violation.

A Final Determination must contain the following information:

(a) A statement of the efforts made to achieve voluntary compliance, and a statement that those efforts have been unsuccessful;

(b) A statement of those matters upon which the grant applicant or recipient and CRC continue to disagree;

(c) A list of any modifications to the findings of fact or conclusions that were set forth in the Initial Determination, Notice to Show Cause or Letter of Findings;

(d) A statement of the grant applicant's or recipient's liability, and, if appropriate, the extent of that liability;

(e) A description of the corrective or remedial actions that the grant applicant

or recipient must take to come into compliance;

(f) A notice that if the grant applicant or recipient fails to come into compliance within 10 days of the date on which it receives the Final Determination, one or more of the following consequences may result:

(1) After the grant applicant or recipient is given the opportunity for a hearing, its WIOA Title I financial assistance may be terminated, discontinued, or withheld in whole or in part, or its application for such financial assistance may be denied, as appropriate;

(2) The Secretary of Labor may refer the case to the Department of Justice with a request to file suit against the grant applicant or recipient; or

(3) The Secretary may take any other action against the grant applicant or recipient that is provided by law;

(g) A notice of the grant applicant's or recipient's right to request a hearing under the procedures described in §§ 38.112 through 37.115; and

(h) A determination of the Governor's liability, if any, under § 38.52.

§ 38.97 Notification of finding of noncompliance.

Where a compliance review or complaint investigation results in a finding of noncompliance, the Director must notify:

(a) The grant applicant or recipient;

(b) The grantmaking agency; and

(c) The Assistant Attorney General.

Breaches of Conciliation Agreements

§ 38.98 Notification of Breach of Conciliation Agreement.

(a) When it becomes known to the Director that a Conciliation Agreement has been breached, the Director may issue a Notification of Breach of Conciliation Agreement.

(b) The Director must send a Notification of Breach of Conciliation Agreement to the Governor, the grantmaking agency, and/or other party(ies) to the Conciliation Agreement, as applicable.

§ 38.99 Contents of Notification of Breach of Conciliation Agreement.

A Notification of Breach of Conciliation Agreement must:

(a) Specify any efforts made to achieve voluntary compliance, and indicate that those efforts have been unsuccessful;

(b) Identify the specific provisions of the Conciliation Agreement violated;

(c) Determine liability for the violation and the extent of the liability;

(d) Indicate that failure of the violating party to come into compliance within 10 days of the receipt of the Notification of Breach of Conciliation Agreement may result, after opportunity for a hearing, in the termination or denial of the grant, or discontinuation of assistance, as appropriate, or in referral to the Department of Justice with a request from the Department to file suit;

(e) Advise the violating party of the right to request a hearing, and reference the applicable procedures in § 38.111; and

(f) Include a determination as to the Governor's liability, if any, in accordance with the provisions of § 38.52.

§ 38.100 Notification of an enforcement action based on breach of conciliation agreement.

In such circumstances, the Director must notify:

(a) The grantmaking agency; and

(b) The Governor, recipient or grant applicant, as applicable.

Subpart E—Federal Procedures for Effecting Compliance

§ 38.110 Enforcement procedures.

(a) *Sanctions; judicial enforcement.* If compliance has not been achieved after issuance of a Final Determination under §§ 38.95 and 38.96, or a Notification of Breach of Conciliation Agreement under §§ 38.98 through 38.100, the Secretary may:

(1) After opportunity for a hearing, suspend, terminate, deny or discontinue the WIOA Title I financial assistance, in whole or in part;

(2) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or

(3) Take such action as may be provided by law, which may include seeking injunctive relief.

(b) *Deferral of new grants.* When proceedings under § 38.111 have been initiated against a particular recipient, the Department may defer action on that recipient's applications for new WIOA Title I financial assistance until a Final Decision under § 38.112 has been rendered. Deferral is not appropriate when WIOA Title I financial assistance is due and payable under a previously approved application.

(1) New WIOA Title I financial assistance includes all assistance for which an application or approval, including renewal or continuation of existing activities, or authorization of new activities, is required during the deferral period.

(2) New WIOA Title I financial assistance does not include assistance approved before the beginning of proceedings under § 38.111, or increases in funding as a result of changed computations of formula awards.

§ 38.111 Hearing procedures.

(a) *Notice of opportunity for hearing.* As part of a Final Determination, or a Notification of Breach of a Conciliation Agreement, the Director must include, and serve on the grant applicant or recipient (by certified mail, return receipt requested), a notice of opportunity for hearing.

(b) *Complaint; request for hearing; answer.* (1) In the case of noncompliance that cannot be voluntarily resolved, the Final Determination or Notification of Breach of Conciliation Agreement is considered the Department's formal complaint.

(2) To request a hearing, the grant applicant or recipient must file a written answer to the Final Determination or Notification of Breach of Conciliation Agreement, and a copy of the Final Determination or Notification of Breach of Conciliation Agreement, with the Office of the Administrative Law Judges, 800 K Street NW., Suite 400, Washington, DC 20001.

(i) The answer must be filed within 30 days of the date of receipt of the Final Determination or Notification of Breach of Conciliation Agreement.

(ii) A request for hearing must be set forth in a separate paragraph of the answer.

(iii) The answer must specifically admit or deny each finding of fact in the Final Determination or Notification of Breach of Conciliation Agreement. Where the grant applicant or recipient does not have knowledge or information sufficient to form a belief, the answer may so state and the statement will have the effect of a denial. Findings of fact not denied are considered admitted. The answer must separately state and identify matters alleged as affirmative defenses, and must also set forth the matters of fact and law relied on by the grant applicant or recipient.

(3) The grant applicant or recipient must simultaneously serve a copy of its filing on the Office of the Solicitor, Civil Rights and Labor-Management Division, Room N–2474, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

(4)(i) The failure of a grant applicant or recipient to request a hearing under this paragraph (b), or to appear at a hearing for which a date has been set, waives the right to a hearing; and

(ii) Whenever a hearing is waived, all allegations of fact contained in the Final Determination or Notification of Breach of Conciliation Agreement are considered admitted, and the Final Determination or Notification of Breach

of Conciliation Agreement becomes the Final Decision of the Secretary as of the day following the last date by which the grant applicant or recipient was required to request a hearing or was to appear at a hearing.

(c) *Time and place of hearing.* Hearings will be held at a time and place ordered by the Administrative Law Judge upon reasonable notice to all parties and, as appropriate, the complainant. In selecting a place for the hearing, due regard must be given to the convenience of the parties, their counsel, and witnesses, if any.

(d) *Judicial process; evidence*—(1) *Judicial process.* The Administrative Law Judge may use judicial process to secure the attendance of witnesses and the production of documents authorized by Section 9 of the Federal Trade Commission Act (15 U.S.C. 49).

(2) *Evidence.* In any hearing or administrative review conducted under this part, evidentiary matters will be governed by the standards and principles set forth in the Rules of Evidence issued by the Department of Labor's Office of Administrative Law Judges, 29 CFR part 18.

§ 38.112 Initial and final decision procedures.

(a) *Initial decision.* After the hearing, the Administrative Law Judge must issue an initial decision and order, containing findings of fact and conclusions of law. The initial decision and order must be served on all parties by certified mail, return receipt requested.

(b) *Exceptions; Final Decision*—(1) *Final Decision after a hearing.* The initial decision and order becomes the Final Decision and Order of the Department unless exceptions are filed by a party or, in the absence of exceptions, the Administrative Review Board serves notice that it will review the decision.

(i) *Exceptions.* A party dissatisfied with the initial decision and order may, within 45 days of receipt, file with the Administrative Review Board and serve on the other parties to the proceedings and on the Administrative Law Judge, exceptions to the initial decision and order or any part thereof.

(ii) *Transmittal of record and initial decision by Administrative Law Judge.* Upon receipt of exceptions, the Administrative Law Judge must index and forward the record and the initial decision and order to the Administrative Review Board within three days of such receipt.

(iii) Specificity required when filing exceptions. A party filing exceptions must specifically identify the finding or conclusion to which exception is taken.

(iv) *Reply.* Within 45 days of the date of filing such exceptions, a reply, which must be limited to the scope of the exceptions, may be filed and served by any other party to the proceeding.

(v) *Requests for extensions.* Requests for extensions for the filing of exceptions or replies must be received by the Administrative Review Board no later than 3 days before the exceptions or replies are due.

(vi) Review by *Administrative Review Board on its own motion.* If no exceptions are filed, the Administrative Review Board may, within 30 days of the expiration of the time for filing exceptions, on its own motion serve notice on the parties that it will review the decision.

(vii) *Final Decision and Order without review by Administrative Review Board.* (A) Where exceptions have been filed, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order unless the Administrative Review Board, within 30 days of the expiration of the time for filing exceptions and replies, has notified the parties that the case is accepted for review.

(B) Where exceptions have not been filed, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order unless the Administrative Review Board has served notice on the parties that it will review the decision, as provided in paragraph (b)(1)(vi) of this section.

(viii) *Final Decision and Order after review by Administrative Review Board.* Any case reviewed by the Administrative Review Board under this paragraph must be decided within 180 days of the notification of such review. If the Administrative Review Board fails to issue a Final Decision and Order within the 180-day period, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order.

(2) *Final Decision where a hearing is waived.* (i) If, after issuance of a Final Determination under § 38.95 or Notification of Breach of Conciliation Agreement under § 38.98, voluntary compliance has not been achieved within the time set by this part and the opportunity for a hearing has been waived as provided for in § 38.111(b)(4), the Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision.

(ii) When a Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision, the Administrative Review Board may, within 45 days, issue an order terminating or denying the grant or continuation of assistance; or imposing other appropriate sanctions for the grant applicant's, Governor's, or recipient's failure to comply with the required corrective and/or remedial actions, or the Secretary may refer the matter to the Attorney General for further enforcement action.

(3) *Final agency action.* A Final Decision and Order issued under paragraph (b) of this section constitutes final agency action.

§ 38.113 Suspension, termination, withholding, denial, or discontinuation of financial assistance.

Any action to suspend, terminate, deny or discontinue WIOA Title I financial assistance must be limited to the particular political entity, or part thereof, or other recipient (or grant applicant) as to which the finding has been made, and must be limited in its effect to the particular program, or part thereof, in which the noncompliance has been found. No order suspending, terminating, denying or discontinuing WIOA Title I financial assistance will become effective until:

(a) The Director has issued a Final Determination under § 38.95 or Notification of Breach of Conciliation Agreement under § 38.98;

(b) There has been an express finding on the record, after opportunity for a hearing, of failure by the grant applicant or recipient to comply with a requirement imposed by or under the nondiscrimination and equal opportunity provisions of WIOA or this part;

(c) A Final Decision has been issued by the Administrative Review Board, the Administrative Law Judge's decision and order has become the Final Agency Decision, or the Final Determination or Notification of Conciliation Agreement has been deemed the Final Agency Decision, under § 38.112(b); and

(d) The expiration of 30 days after the Secretary has filed, with the committees of Congress having legislative jurisdiction over the program involved, a full written report of the circumstances and grounds for such action.

§ 38.114 Distribution of WIOA Title I financial assistance to an alternate recipient.

When the Department withholds funds from a recipient or grant applicant under these regulations, the Secretary may disburse the withheld funds directly to an alternate recipient. In such case, the Secretary will require any alternate recipient to demonstrate:

(a) The ability to comply with these regulations; and

(b) The ability to achieve the goals of the nondiscrimination and equal opportunity provisions of WIOA.

§ 38.115 Post-termination proceedings.

(a) A grant applicant or recipient adversely affected by a Final Decision and Order issued under § 38.112(b) will be restored, where appropriate, to full eligibility to receive WIOA Title I financial assistance if the grant applicant or recipient satisfies the terms and conditions of the Final Decision and Order and brings itself into compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(b) A grant applicant or recipient adversely affected by a Final Decision and Order issued under § 38.112(b) may at any time petition the Director to restore its eligibility to receive WIOA Title I financial assistance. A copy of the petition must be served on the parties to the original proceeding that led to the Final Decision and Order. The petition must be supported by information showing the actions taken by the grant applicant or recipient to bring itself into compliance. The grant applicant or recipient has the burden of demonstrating that it has satisfied the requirements of paragraph (a) of this section. While proceedings under this section are pending, sanctions imposed by the Final Decision and Order under § 38.112(b)(1) and (2) must remain in effect.

(c) The Director must issue a written decision on the petition for restoration.

(1) If the Director determines that the grant applicant or recipient has not brought itself into compliance, the Director must issue a decision denying the petition.

(2) Within 30 days of its receipt of the Director's decision, the recipient or grant applicant may file a petition for review of the decision by the Administrative Review Board, setting forth the grounds for its objection to the Director's decision.

(3) The petition must be served on the Director and on the Office of the Solicitor, Civil Rights and Labor-Management Division.

(4) The Director may file a response to the petition within 14 days.

(5) The Administrative Review Board must issue the final agency decision denying or granting the recipient's or grant applicant's request for restoration to eligibility.

[FR Doc. 2016–27737 Filed 12–1–16; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 81 Friday,

No. 232 December 2, 2016

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2016–0095; FF09E21000 FXES11190900000 167]

Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notification of review.

SUMMARY: In this Candidate Notice of Review (CNOR), we, the U.S. Fish and Wildlife Service (Service), present an updated list of plant and animal species native to the United States that we regard as candidates for or, have proposed for addition to the Lists of Endangered and Threatened Wildlife and Plants under the Endangered Species Act of 1973, as amended. Identification of candidate species can assist environmental planning efforts by providing advance notice of potential listings, and by allowing landowners and resource managers to alleviate threats and thereby possibly remove the need to list species as endangered or threatened. Even if we subsequently list a candidate species, the early notice provided here could result in more options for species management and recovery by prompting earlier candidate conservation measures to alleviate threats to the species.

This CNOR summarizes the status and threats that we evaluated in order to determine whether species qualify as candidates, to assign a listing priority number (LPN) to each candidate species, and to determine whether a species should be removed from candidate status. Additional material that we relied on is available in the Species Assessment and Listing Priority Assignment Forms (species assessment forms) for each candidate species.

This CNOR changes the LPN for one candidate. Combined with other decisions for individual species that were published separately from this CNOR in the past year, the current number of species that are candidates for listing is 30.

This document also includes our findings on resubmitted petitions and describes our progress in revising the Lists of Endangered and Threatened Wildlife and Plants (Lists) during the period October 1, 2015, through September 30, 2016.

Moreover, we request any additional status information that may be available for the candidate species identified in this CNOR.

DATES: We will accept information on any of the species in this Candidate Notice of Review at any time.

ADDRESSES: This notification is available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/endangered/what-we-do/cnor.html.* Species assessment forms with information and references on a particular candidate species' range, status, habitat needs, and listing priority assignment are available for review at the appropriate Regional Office listed below in **SUPPLEMENTARY INFORMATION** or at the Branch of Conservation and Communications, Falls Church, VA (see address under **FOR FURTHER INFORMATION CONTACT**), or on our Web site (*http://ecos.fws.gov/tess_public/reports/candidate-species-report*). Please submit any new information, materials, comments, or questions of a general nature on this notice to the Falls Church, VA, address listed under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions pertaining to a particular species to the address of the Endangered Species Coordinator in the appropriate Regional Office listed in **SUPPLEMENTARY INFORMATION**. Species-specific information and materials we receive will be available for public inspection by appointment, during normal business hours, at the appropriate Regional Office listed below under Request for Information in **SUPPLEMENTARY INFORMATION**. General information we receive will be available at the Branch of Conservation and Communications, Falls Church, VA (see address under **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Chief, Branch of Conservation and Communications, U.S. Fish and Wildlife Service Headquarters, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803 (telephone 703–358–2171). Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: We request additional status information that may be available for any of the candidate species identified in this CNOR. We will consider this information to monitor changes in the status or LPN of candidate species and to manage candidates as we prepare listing documents and future revisions to the notice of review. We also request information on additional species to consider including as candidates as we prepare future updates of this notice.

Candidate Notice of Review

Background

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.;* ESA), requires that we identify species of wildlife and plants that are endangered or threatened based solely on the best scientific and commercial data available. As defined in section 3 of the ESA, an endangered species is any species that is in danger of extinction throughout all or a significant portion of its range, and a threatened species is any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Through the Federal rulemaking process, we add species that meet these definitions to the List of Endangered and Threatened Wildlife at 50 CFR 17.11 or the List of Endangered and Threatened Plants at 50 CFR 17.12. As part of this program, we maintain a list of species that we regard as candidates for listing. A candidate species is one for which we have on file sufficient information on biological vulnerability and threats to support a proposal for listing as endangered or threatened, but for which preparation and publication of a proposal is precluded by higher-priority listing actions. We may identify a species as a candidate for listing after we have conducted an evaluation of its status—either on our own initiative, or in response to a petition we have received. If we have made a finding on a petition to list a species, and have found that listing is warranted but precluded by other higher priority listing actions, we will add the species to our list of candidates.

We maintain this list of candidates for a variety of reasons: (1) To notify the public that these species are facing threats to their survival; (2) to provide advance knowledge of potential listings that could affect decisions of environmental planners and developers; (3) to provide information that may stimulate and guide conservation efforts that will remove or reduce threats to these species and possibly make listing unnecessary; (4) to request input from interested parties to help us identify those candidate species that may not require protection under the ESA, as well as additional species that may require the ESA's protections; and (5) to request necessary information for setting priorities for preparing listing proposals. We encourage collaborative

conservation efforts for candidate species, and offer technical and financial assistance to facilitate such efforts. For additional information regarding such assistance, please contact the appropriate Regional Office listed under Request for Information or visit our Web site, *http://www.fws.gov/endangered/what-we-do/cca.html.*

Previous Notices of Review

We have been publishing CNORs since 1975. The most recent was published on December 24, 2015 (80 FR 80584). CNORs published since 1994 are available on our Web site, *http://www.fws.gov/endangered/what-we-do/cnor.html.* For copies of CNORs published prior to 1994, please contact the Branch of Conservation and Communications (see **FOR FURTHER INFORMATION CONTACT**, above).

On September 21, 1983, we published guidance for assigning an LPN for each candidate species (48 FR 43098). Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats, immediacy of threats, and taxonomic status; the lower the LPN, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). Section 4(h)(3) of the ESA (16 U.S.C. 1533(h)(3)) requires the Secretary to establish guidelines for such a priority-ranking system. As explained below, in using this system, we first categorize based on the magnitude of the threat(s), then by the immediacy of the threat(s), and finally by taxonomic status.

Under this priority-ranking system, magnitude of threat can be either ''high'' or ''moderate to low.'' This criterion helps ensure that the species facing the greatest threats to their continued existence receive the highest listing priority. It is important to recognize that all candidate species face threats to their continued existence, so the magnitude of threats is in relative terms. For all candidate species, the threats are of sufficiently high magnitude to put them in danger of extinction, or make them likely to become in danger of extinction in the foreseeable future. But for species with higher-magnitude threats, the threats have a greater likelihood of bringing about extinction or are expected to bring about extinction on a shorter timescale (once the threats are imminent) than for species with lower-magnitude threats. Because we do not routinely quantify how likely or how soon extinction would be expected to occur absent listing, we must evaluate factors that contribute to the likelihood and time scale for extinction. We therefore consider information such as: (1) The number of populations or extent of range of the species affected by the threat(s), or both; (2) the biological significance of the affected population(s), taking into consideration the life-history characteristics of the species and its current abundance and distribution; (3) whether the threats affect the species in only a portion of its range, and, if so, the likelihood of persistence of the species in the unaffected portions; (4) the severity of the effects and the rapidity with which they have caused or are likely to cause mortality to individuals and accompanying declines in population levels; (5) whether the effects are likely to be permanent; and (6) the extent to which any ongoing conservation efforts reduce the severity of the threat(s).

As used in our priority-ranking system, immediacy of threat is categorized as either ''imminent'' or ''nonimminent,'' and is based on when the threats will begin. If a threat is currently occurring or likely to occur in the very near future, we classify the threat as imminent. Determining the immediacy of threats helps ensure that species facing actual, identifiable threats are given priority for listing proposals over species for which threats are only potential or species that are intrinsically vulnerable to certain types of threats but are not known to be presently facing such threats.

Our priority-ranking system has three categories for taxonomic status: Species that are the sole members of a genus; full species (in genera that have more than one species); and subspecies and distinct population segments of vertebrate species (DPS).

The result of the ranking system is that we assign each candidate a listing priority number of 1 to 12. For example, if the threats are of high magnitude, with immediacy classified as imminent, the listable entity is assigned an LPN of 1, 2, or 3 based on its taxonomic status (*i.e.,* a species that is the only member of its genus would be assigned to the LPN 1 category, a full species to LPN 2, and a subspecies or DPS would be assigned to LPN 3). In summary, the LPN ranking system provides a basis for making decisions about the relative priority for preparing a proposed rule to list a given species. No matter which LPN we assign to a species, each species included in this notice as a candidate is one for which we have concluded that we have sufficient information to prepare a proposed rule for listing because it is in danger of extinction or likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

For more information on the process and standards used in assigning LPNs, a copy of the 1983 guidance is available on our Web site at: *http://www.fws.gov/endangered/esa-library/pdf/1983_LPN_Policy_FR_pub.pdf.* Information on the LPN assigned to a particular species is summarized in this CNOR, and the species assessment for each candidate contains the LPN chart and a more-detailed explanation for our determination of the magnitude and immediacy of threat(s) and assignment of the LPN.

To the extent this revised notice differs from any previous animal, plant, and combined candidate notices of review for native species or previous 12-month warranted-but-precluded petition findings for those candidate species that were petitioned for listing, this notice supercedes them.

Summary of This CNOR

Since publication of the previous CNOR on December 24, 2015 (80 FR 80584), we reviewed the available information on candidate species to ensure that a proposed listing is justified for each species, and reevaluated the relative LPN assigned to each species. We also evaluated the need to emergency list any of these species, particularly species with higher priorities (*i.e.,* species with LPNs of 1, 2, or 3). This review and reevaluation ensures that we focus conservation efforts on those species at greatest risk.

In addition to reviewing candidate species since publication of the last CNOR, we have worked on findings in response to petitions to list species, and on proposed rules to list species under the ESA and on final listing determinations. Some of these findings and determinations have been completed and published in the **Federal Register**, while work on others is still under way (see *Preclusion and Expeditious Progress,* below, for details).

Based on our review of the best available scientific and commercial information, with this CNOR, we change the LPN for one candidate. Combined with other findings and determinations published separately from this CNOR, a total of 30 species (10 plant and 20 animal species) are now candidates awaiting preparation of rules proposing their listing. Table 1 identifies these 30 species, along with the 20 species currently proposed for listing (including 1 species proposed for listing due to similarity in appearance).

Table 2 lists the changes for species identified in the previous CNOR, and includes 97 species identified in the previous CNOR as either proposed for listing or classified as candidates that are no longer in those categories. This includes 78 species for which we

published a final listing rule (includes 11 DPSs of green sea turtle), 18 candidate species for which we published separate not-warranted findings and removed them from candidate status, and 1 species for which we published a withdrawal of a proposed rule.

New Candidates

We have not identified any new candidate species through this notice but identified one species—island marble butterfly—as a candidate on April 5, 2016, as a result of a separate petition finding published in the **Federal Register** (81 FR 19527).

Listing Priority Changes in Candidates

We reviewed the LPNs for all candidate species and are changing the number for the following species discussed below.

Flowering plants

Boechera pusilla (Fremont County rockcress)—The following summary is based on information in our files and in the petition received on July 24, 2007. Fremont County rockcress is a perennial herb consisting of a single population made of eight subpopulations found on sparsely vegetated granite-pegmatite outcrops at an elevation between 2,438 and 2,469 meters (m) (8,000 and 8,100 feet (ft)) in Fremont County, Wyoming. The entire species' range is located on lands managed by the Bureau of Land Management (BLM), and is protected by their regulatory mechanisms as well as by a 1998 Secretarial Order that withdraws the species' habitat from mineral development for 50 years. The species' range is likely limited by the presence of granite-pegmatite outcrops; however, the species has likely persisted without competition from other herbaceous plant or sagebrush-grassland species present in the surrounding landscape due to this dependence on a very specific, yet limited, substrate.

Overutilization and predation are not threats to the species, and regulatory mechanisms have removed threats associated with habitat loss and fragmentation. We previously determined that threats to the Fremont County rockcress were moderate in magnitude and imminent, due largely to uncertainty regarding a small and declining population size attributed to an unknown threat. Although the population likely declined in the past, new information since our last review has helped clarify that the population likely fluctuates around a stable, average size in response to precipitation, with the population increasing during wet years and declining during dry years, but within a normal range of variation that may not be a threat to the species. Therefore, drought is likely the previously unidentified threat, which reduces the size of the population. Although the effects of climate change may result in drier summers, the Fremont County rockcress may benefit from longer growing seasons and more precipitation at the start of the growing season. Further, asexual reproduction helps reduce risks associated with a small population size. However, stochastic events could negatively affect the population, so drought and small population size are threats to the species. Although the population has declined in the past and could fluctuate in the future due to precipitation, the entire species' habitat is protected by the BLM's fully implemented and effective regulatory mechanisms, and no other impacts rise to the level of a threat. With drought implicated as the previously unidentified threat and an improved understanding of population fluctuations, we now determine that the magnitude of the threat to the species from drought is low. This is because the species may be adapted to drought and stochastic events. No other threat is ongoing, so we determine that the threats are now nonimminent. Additional surveys in 2016 will help clarify population trends, fluctuations, and the effects of drought and small population size on the species. Because the threats are low in magnitude and are nonimminent, we are changing the LPN from an 8 to an 11.

Petition Findings

The ESA provides two mechanisms for considering species for listing. One method allows the Secretary, on the Secretary's own initiative, to identify species for listing under the standards of section 4(a)(1). We implement this authority through the candidate program, discussed above. The second method for listing a species provides a mechanism for the public to petition us to add a species to the Lists. As described further in the paragraphs that follow, the CNOR serves several purposes as part of the petition process: (1) In some instances (in particular, for petitions to list species that the Service has already identified as candidates on its own initiative), it serves as the initial petition finding; (2) for candidate species for which the Service has made a warranted-but-precluded petition finding, it serves as a ''resubmitted'' petition finding that the ESA requires the Service to make each year; and (3) it documents the Service's compliance with the statutory requirement to monitor the status of species for which listing is warranted but precluded, and to ascertain if they need emergency listing.

First, the CNOR serves as an initial petition finding in some instances. Under section 4(b)(3)(A) of the ESA, when we receive a petition to list a species, we must determine within 90 days, to the maximum extent practicable, whether the petition presents substantial information indicating that listing may be warranted (a ''90-day finding''). If we make a positive 90-day finding, we must promptly commence a status review of the species under section 4(b)(3)(A); we must then make, within 12 months of the receipt of the petition, one of the following three possible findings (a ''12-month finding''):

(1) The petitioned action is not warranted, and promptly publish the finding in the **Federal Register**;

(2) The petitioned action is warranted (in which case we are required to promptly publish a proposed regulation to implement the petitioned action; once we publish a proposed rule for a species, sections 4(b)(5) and 4(b)(6) of the ESA govern further procedures, regardless of whether or not we issued the proposal in response to a petition); or

(3) The petitioned action is warranted, but (a) the immediate proposal of a regulation and final promulgation of a regulation implementing the petitioned action is precluded by pending proposals to determine whether any species is endangered or threatened, and (b) expeditious progress is being made to add qualified species to the Lists. We refer to this third option as a ''warranted-but-precluded finding,'' and after making such a finding, we must promptly publish it in the **Federal Register**.

We define ''candidate species'' to mean those species for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but for which issuance of the proposed rule is precluded (61 FR 64481; December 5, 1996). The standard for making a species a candidate through our own initiative is identical to the standard for making a warranted-but-precluded 12-month petition finding on a petition to list, and we add all petitioned species for which we have made a warranted-but-precluded 12-month finding to the candidate list.

Therefore, all candidate species identified through our own initiative already have received the equivalent of substantial 90-day and warranted-but-

precluded 12-month findings. Nevertheless, if we receive a petition to list a species that we have already identified as a candidate, we review the status of the newly petitioned candidate species and through this CNOR publish specific section 4(b)(3) findings (*i.e.,* substantial 90-day and warranted-but-precluded 12-month findings) in response to the petitions to list these candidate species. We publish these findings as part of the first CNOR following receipt of the petition. We have identified the candidate species for which we received petitions and made a continued warranted-but-precluded finding on a resubmitted petition by the code ''C*'' in the category column on the left side of Table 1, below.

Second, the CNOR serves as a ''resubmitted'' petition finding. Section 4(b)(3)(C)(i) of the ESA requires that when we make a warranted-but-precluded finding on a petition, we treat the petition as one that is resubmitted on the date of the finding. Thus, we must make a 12-month petition finding for each such species at least once a year in compliance with section 4(b)(3)(B) of the ESA, until we publish a proposal to list the species or make a final not-warranted finding. We make these annual resubmitted petition findings through the CNOR. To the extent these annual findings differ from the initial 12-month warranted-but-precluded finding or any of the resubmitted petition findings in previous CNORs, they supercede the earlier findings, although all previous findings are part of the administrative record for the new finding, and we may rely upon them or incorporate them by reference in the new finding as appropriate.

Third, through undertaking the analysis required to complete the CNOR, the Service determines if any candidate species needs emergency listing. Section 4(b)(3)(C)(iii) of the ESA requires us to ''implement a system to monitor effectively the status of all species'' for which we have made a warranted-but-precluded 12-month finding, and to ''make prompt use of the [emergency listing] authority [under section 4(b)(7)] to prevent a significant risk to the well being of any such species.'' The CNOR plays a crucial role in the monitoring system that we have implemented for all candidate species by providing notice that we are actively seeking information regarding the status of those species. We review all new information on candidate species as it becomes available, prepare an annual species assessment form that reflects monitoring results and other new information, and identify any species for which emergency listing may be appropriate. If we determine that emergency listing is appropriate for any candidate, we will make prompt use of the emergency listing authority under section 4(b)(7) of the ESA. For example, on August 10, 2011, we emergency listed the Miami blue butterfly (76 FR 49542). We have been reviewing and will continue to review, at least annually, the status of every candidate, whether or not we have received a petition to list it. Thus, the CNOR and accompanying species assessment forms constitute the Service's system for monitoring and making annual findings on the status of petitioned species under sections 4(b)(3)(C)(i) and 4(b)(3)(C)(iii) of the ESA.

A number of court decisions have elaborated on the nature and specificity of information that we must consider in making and describing the petition findings in the CNOR. The CNOR that published on November 9, 2009 (74 FR 57804), describes these court decisions in further detail. As with previous CNORs, we continue to incorporate information of the nature and specificity required by the courts. For example, we include a description of the reasons why the listing of every petitioned candidate species is both warranted and precluded at this time. We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis (see below). Regional priorities can also be discerned from Table 1, below, which includes the lead region and the LPN for each species. Our preclusion determinations are further based upon our budget for listing activities for unlisted species only, and we explain the priority system and why the work we have accomplished has precluded action on listing candidate species.

In preparing this CNOR, we reviewed the current status of, and threats to, the 29 candidates for which we have received a petition to list and the 3 listed species for which we have received a petition to reclassify from threatened to endangered, where we found the petitioned action to be warranted but precluded. We find that the immediate issuance of a proposed rule and timely promulgation of a final rule for each of these species, has been, for the preceding months, and continues to be, precluded by higher-priority listing actions. Additional information that is the basis for this finding is found in the species assessments and our administrative record for each species.

Our review included updating the status of, and threats to, petitioned candidate or listed species for which we published findings, under section 4(b)(3)(B) of the ESA, in the previous CNOR. We have incorporated new information we gathered since the prior finding and, as a result of this review, we are making continued warranted-but-precluded 12-month findings on the petitions for these species. However, for some of these species, we are currently engaged in a thorough review of all available data to determine whether to proceed with a proposed listing rule; as a result of this review we may conclude that listing is no longer warranted.

The immediate publication of proposed rules to list these species was precluded by our work on higher-priority listing actions, listed below, during the period from October 1, 2015, through September 30, 2016. Below we describe the actions that continue to preclude the immediate proposal and final promulgation of a regulation implementing each of the petitioned actions for which we have made a warranted-but-precluded finding, and we describe the expeditious progress we are making to add qualified species to, and remove species from, the Lists. We will continue to monitor the status of all candidate species, including petitioned species, as new information becomes available to determine if a change in status is warranted, including the need to emergency list a species under section 4(b)(7) of the ESA.

In addition to identifying petitioned candidate species in Table 1 below, we also present brief summaries of why each of these candidates warrants listing. More complete information, including references, is found in the species assessment forms. You may obtain a copy of these forms from the Regional Office having the lead for the species, or from the Fish and Wildlife Service's Internet Web site: *http://ecos.fws.gov/tess_public/reports/candidate-species-report.* As described above, under section 4 of the ESA, we identify and propose species for listing based on the factors identified in section 4(a)(1)—either on our own initiative or through the mechanism that section 4 provides for the public to petition us to add species to the Lists of Endangered or Threatened Wildlife and Plants.

Preclusion and Expeditious Progress

To make a finding that a particular action is warranted but precluded, the Service must make two determinations: (1) That the immediate proposal and timely promulgation of a final regulation is precluded by pending proposals to determine whether any species is threatened or endangered; and (2) that expeditious progress is being

made to add qualified species to either of the lists and to remove species from the lists (16 U.S.C. 1533(b)(3)(B)(iii)).

Preclusion

A listing proposal is precluded if the Service does not have sufficient resources available to complete the proposal, because there are competing demands for those resources, and the relative priority of those competing demands is higher. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a proposed listing regulation or whether promulgation of such a proposal is precluded by higher-priority listing actions—(1) The amount of resources available for completing the listing function, (2) the estimated cost of completing the proposed listing regulation, and (3) the Service's workload, along with the Service's prioritization of the proposed listing regulation in relation to other actions in its workload.

Available Resources

The resources available for listing actions are determined through the annual Congressional appropriations process. In FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds that may be expended for the Listing Program. This spending cap was designed to prevent the listing function from depleting funds needed for other functions under the ESA (for example, recovery functions, such as removing species from the Lists), or for other Service programs (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997). The funds within the spending cap are available to support work involving the following listing actions: Proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists or to change the status of a species from threatened to endangered; annual ''resubmitted'' petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the ESA; critical habitat petition findings; proposed rules designating critical habitat or final critical habitat determinations; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat).

We cannot spend more for the Listing Program than the amount of funds within the spending cap without violating the Anti-Deficiency Act (31 U.S.C. 1341(a)(1)(A)). In addition, since FY 2002, the Service's listing budget has included a subcap for critical habitat designations for already-listed species to ensure that some funds within the listing cap are available for completing Listing Program actions other than critical habitat designations for already-listed species. (''The critical habitat designation subcap will ensure that some funding is available to address other listing activities.'' House Report No. 107–103, 107th Congress, 1st Session (June 19, 2001)). In FY 2002 and each year until FY 2006, the Service had to use virtually all of the funds within the critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the funds within the critical habitat subcap were available for other listing activities. In some FYs since 2006, we have not needed to use all of the funds within the critical habitat to comply with court orders, and we therefore could use the remaining funds within the subcap towards additional proposed listing determinations for high-priority candidate species. In other FYs, while we did not need to use all of the funds within the critical habitat subcap to comply with court orders requiring critical habitat actions, we did not apply any of the remaining funds towards additional proposed listing determinations, and instead applied the remaining funds towards completing critical habitat determinations concurrently with proposed listing determinations. This allowed us to combine the proposed listing determination and proposed critical habitat designation into one rule, thereby being more efficient in our work. In FY 2016, based on the Service's workload, we were able to use some of the funds within the critical habitat subcap to fund proposed listing determinations.

Since FY 2012, Congress has also put in place two additional subcaps within the listing cap: One for listing actions for foreign species and one for petition findings. As with the critical habitat subcap, if the Service does not need to use all of the funds within either subcap, we are able to use the remaining funds for completing proposed or final listing determinations. In FY 2016, based on the Service's workload, we were able to use some of the funds within the petitions subcap to fund proposed listing determinations.

We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first, and because we allocate our listing budget on a nationwide basis. Through the listing cap, the three subcaps, and the amount of funds needed to complete court-mandated actions within the cap and subcaps, Congress and the courts have in effect determined the amount of money available for listing activities nationwide. Therefore, the funds that remain within the listing cap—after paying for work within the subcaps needed to comply with court orders or court-approved settlement agreements requiring critical habitat actions for already-listed species, listing actions for foreign species, and petition findings, respectively—set the framework within which we make our determinations of preclusion and expeditious progress.

For FY 2016, on December 18, 2015, Congress passed a Consolidated Appropriations Act (Pub. L. 114–113), which provided funding through September 30, 2016. That Appropriations Act included an overall spending cap of $20,515,000 for the listing program. Of that, no more than $4,605,000 could be used for critical habitat determinations; no more than $1,504,000 could be used for listing actions for foreign species; and no more than $1,501,000 could be used to make 90-day or 12-month findings on petitions. The Service thus had $12,905,000 available to work on proposed and final listing determinations for domestic species. In addition, if the Service had funding available within the critical habitat, foreign species, or petition subcaps after those workloads had been completed, it could use those funds to work on listing actions other than critical habitat designations or foreign species.

Costs of Listing Actions. The work involved in preparing various listing documents can be extensive, and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer-review comments on proposed rules and incorporating relevant information from those comments into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. In the past, we estimated that the median cost for preparing and publishing a 90-day finding was $4,500 and for a 12-month finding, $68,875. We have streamlined our processes for making 12-month petition findings to be as efficient as possible to reduce these costs and we estimate that we have cut this cost in half. We estimate that the

median costs for preparing and publishing a proposed listing rule with proposed critical habitat is $240,000; and for a final listing determination with a final critical habitat determination, $205,000.

Prioritizing Listing Actions. The Service's Listing Program workload is broadly composed of four types of actions, which the Service prioritizes as follows: (1) Compliance with court orders and court-approved settlement agreements requiring that petition findings or listing or critical habitat determinations be completed by a specific date; (2) essential litigation-related, administrative, and listing program-management functions; (3) section 4 (of the ESA) listing and critical habitat actions with absolute statutory deadlines; and (4) section 4 listing actions that do not have absolute statutory deadlines.

In previous years, the Service received many new petitions and a single petition to list 404 species, significantly increasing the number of actions within the third category of our workload—actions that have absolute statutory deadlines. As a result of the outstanding petitions to list hundreds of species, and our successful efforts to continue making initial petition findings within 90 days of receiving the petition to the maximum extent practicable, we currently have over 550 12-month petition findings yet to be initiated and completed. Because we are not able to work on all of these at once, we recently finalized a new methodology for prioritizing status reviews and accompanying 12-month findings (81 FR 49248; July 27, 2016). Moving forward, we are applying this methodology to 12-month findings to prioritize the outstanding petition findings and develop a multi-year workplan for completing them.

An additional way in which we prioritize work in the section 4 program is application of the listing priority guidelines (48 FR 43098; September 21, 1983). Under those guidelines, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: Monotypic genus (a species that is the sole member of a genus), a species, or a part of a species (subspecies or distinct population segment)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). A species with a higher LPN would generally be precluded from listing by species with lower LPNs, unless work on a proposed rule for the species with the higher LPN can be combined with work on a proposed rule for other high-priority species.

Finally, proposed rules for reclassification of threatened species to endangered species are generally lower in priority, because as listed species, they are already afforded the protections of the ESA and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to reclassify a species to endangered if we can combine this with work that is subject to a court order or court-approved deadline.

Since before Congress first established the spending cap for the Listing Program in 1998, the Listing Program workload has required considerably more resources than the amount of funds Congress has allowed for the Listing Program. It is therefore important that we be as efficient as possible in our listing process.

On September 1, 2016, the Service released its National Listing Workplan for addressing ESA listing and critical habitat decisions over the next seven years. The workplan identifies the Service's schedule for addressing all 30 species currently on the candidate list and conducting 320 status reviews (also referred to as 12-month findings) for species that have been petitioned for federal protections under the ESA. The petitioned species are prioritized using our final prioritization methodology. As we implement our listing work plan and work on proposed rules for the highest-priority species, we prepare multi-species proposals when appropriate, and these include species with lower priority if they overlap geographically or have the same threats as one of the highest-priority species.

Listing Program Workload. From 2011–2016, we proposed and finalized listing determinations in accordance with a workplan we had developed for our listing work for that time period; we have subsequently developed a National Listing Workplan to cover the future period from 2017 to 2023. Each FY we determine, based on the amount of funding Congress has made available within the Listing Program spending cap, if we can accomplish the work that we have planned to do. Up until 2012, we prepared Allocation Tables that identified the actions that we funded for that FY, and how much we estimated it would cost to complete each action; these Allocation Tables are part of our record for the listing program. Our Allocation Table for FY 2012, which incorporated the Service's approach to prioritizing its workload, was adopted as part of a settlement agreement in a case before the U.S. District Court for the District of Columbia (Endangered Species Act Section 4 Deadline Litigation, No. 10–377 (EGS), MDL Docket No. 2165 (''MDL Litigation''), Document 31–1 (D.D.C. May 10, 2011) (''MDL Settlement Agreement'')). The requirements of paragraphs 1 through 7 of that settlement agreement, combined with the work plan attached to the agreement as Exhibit B, reflected the Service's Allocation Tables for FY 2011 and FY 2012. In addition, paragraphs 2 through 7 of the agreement require the Service to take numerous other actions through FY 2017—in particular, complete either a proposed listing rule or a not-warranted finding for all 251 species designated as ''candidates'' in the 2010 candidate notice of review (''CNOR'') before the end of FY 2016, and complete final listing determinations for those species proposed for listing within the statutory deadline (usually one year from the proposal). Paragraph 10 of that settlement agreement sets forth the Service's conclusion that ''fulfilling the commitments set forth in this Agreement, along with other commitments required by court orders or court-approved settlement agreements already in existence at the signing of this Settlement Agreement (listed in Exhibit A), will require substantially all of the resources in the Listing Program.'' As part of the same lawsuit, the court also approved a separate settlement agreement with the other plaintiff in the case; that settlement agreement requires the Service to complete additional actions in specific fiscal years—including 12-month petition findings for 11 species, 90-day petition findings for 478 species, and proposed listing rules or not-warranted findings for 40 species.

These settlement agreements have led to a number of results that affect our preclusion analysis. First, the Service has been limited in the extent to which it can undertake additional actions within the Listing Program through FY 2017, beyond what is required by the MDL Settlement Agreements. Second, because the settlement is court-approved, completion, before the end of FY 2016, of proposed listings or not-warranted findings for the remaining candidate species that were included in the 2010 CNOR was the Service's highest priority (compliance with a court order) for FY 2016. Therefore, one of the Service's highest priorities is to make steady progress towards completing by the end of 2017 the remaining final listing determinations for the 2010 candidate species taking

into consideration the availability of staff resources.

Based on these prioritization factors, we continue to find that proposals to list the petitioned candidate species included in Table 1 are all precluded by higher-priority listing actions, including listing actions with deadlines required by court orders and court-approved settlement agreements and listing actions with absolute statutory deadlines. We provide tables in the *Expeditious Progress* section, below, identifying the listing actions that we completed in FY 2016, as well as those we worked on but did not complete in FY 2016.

Expeditious Progress

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists. As with our ''precluded'' finding, the evaluation of whether progress in adding qualified species to the Lists has been expeditious is a function of the resources available for listing and the competing demands for those funds. (Although we do not discuss it in detail here, we are also making expeditious progress in removing species from the list under the Recovery program in light of the resources available for delisting, which is funded by a separate line item in the budget of the Endangered Species Program. During FY 2016, we completed delisting rules for seven species.) As discussed below, given the limited resources available for listing, we find that we are making expeditious progress in adding qualified species to the Lists.

We provide below tables cataloguing the work of the Service's Listing Program in FY 2016. This work includes all three of the steps necessary for adding species to the Lists: (1) Identifying species that may warrant listing; (2) undertaking the evaluation of the best available scientific data about those species and the threats they face in preparation for a proposed or final determination; and (3) adding species to the Lists by publishing proposed and final listing rules that include a summary of the data on which the rule is based and show the relationship of that data to the rule. After taking into consideration the limited resources available for listing, the competing demands for those funds, and the completed work catalogued in the tables below, we find that we are making expeditious progress to add qualified species to the Lists.

First, we are making expeditious progress in listing qualified species. In FY 2016, we resolved the status of 97 species that we determined, or had previously determined, qualified for listing. Moreover, for 78 of those species, the resolution was to add them to the Lists, some with concurrent designations of critical habitat, and for 1 species we published a withdrawal of the proposed rule. We also proposed to list an additional 18 qualified species.

Second, we are making expeditious progress in working towards adding qualified species to the Lists. In FY 2016, we worked on developing proposed listing rules or not-warranted 12-month petition findings for 3 species (most of them with concurrent critical habitat proposals). Although we have not yet completed those actions, we are making expeditious progress towards doing so.

Third, we are making expeditious progress in identifying additional species that may qualify for listing. In FY 2016, we completed 90-day petition findings for 57 species and 12-month petition findings for 30 species.

Our accomplishments this year should also be considered in the broader context of our commitment to reduce the number of candidate species for which we have not made final determinations whether to list. On May 10, 2011, the Service filed in the MDL Litigation a settlement agreement that put in place an ambitious schedule for completing proposed and final listing determinations at least through FY 2016; the court approved that settlement agreement on September 9, 2011. That agreement required, among other things, that for all 251 species that were included as candidates in the 2010 CNOR, the Service submit to the **Federal Register** proposed listing rules or not-warranted findings by the end of FY 2016, and for any proposed listing rules, the Service complete final listing determinations within the statutory time frame. The Service has completed proposed listing rules or not-warranted findings for all 251 of the 2010 candidate species, as well as final listing rules for 140 of those proposed rules, and is therefore making adequate progress towards meeting all of the requirements of the MDL Settlement Agreement. Both by entering into the settlement agreement and by making progress towards final listing determinations for those species proposed for listing (of the 251 species on the 2010 candidate list), the Service is making expeditious progress to add qualified species to the lists.

The Service's progress in FY 2016 included completing and publishing the following determinations:

FY 2016 COMPLETED LISTING ACTIONS

Publication date	Title	Actions	FR pages
12/22/2015	90-Day and 12-month Findings on a Petition to List the Miami Tiger Beetle as an Endangered or Threatened Species; Proposed Endangered Species Status for the Miami Tiger Beetle.	90-Day and 12-month petition findings—Substantial and warranted; Proposed listing; Endangered.	80 FR 79533–79554.
1/6/2016	12-Month Finding on a Petition to List the Alexander Archipelago Wolf as an Endangered or Threatened Species.	12-Month petition finding; Not warranted	81 FR 435–458.
1/12/2016	90-Day Findings on 17 Petitions	90-Day petition findings; Substantial and not substantial.	81 FR 1368–1375.
3/16/2016	90-Day Findings on 29 Petitions	90-Day petition findings; Substantial and not substantial.	81 FR 14058–14072.
4/5/2016	12-Month Findings on Petitions To List Island Marble Butterfly, San Bernardino Flying Squirrel, Spotless Crake, and Sprague's Pipit as Endangered or Threatened Species.	12-Month petition finding; Warranted but precluded and; Not warranted; Candidate removal.	81 FR 19527–19542.

FY 2016 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR pages
4/6/2016	Final Rule to List Eleven Distinct Population Segments of the Green Sea Turtle (*Chelonia mydas*) as Endangered or Threatened and Revision of Current Listings Under the Endangered Species Act.	Final Listing; Endangered and Threatened	81 FR 20057–20090.
4/7/2016	Final Listing Determination for the Big Sandy Crayfish and the Guyandotte River Crayfish.	Final Listing; Endangered and Threatened	81 FR 20449–20481.
4/18/2016	Withdrawal of the Proposed Rule To List the West Coast Distinct Population Segment of Fisher.	Proposed Listing; Withdrawal	81 FR 22709–22808.
6/22/2016	Threatened Species Status for the Elfin-Woods Warbler With 4(d) Rule.	Final Listing; Threatened	81 FR 40534–40547.
7/6/2016	12-Month Findings on Petitions To List the Eagle Lake Rainbow Trout and the Ichetucknee Siltsnail as Endangered or Threatened Species.	12-Month petition finding; Not warranted	81 FR 43972–43979.
8/10/2016	Endangered Species Status for Texas Hornshell.	Proposed Listing; Endangered	81 FR 52796–52809.
8/17/2016	Threatened Status for *Lepidium papilliferum* (Slickspot Peppergrass) Throughout Its Range.	Final Listing; Threatened	81 FR 55057–55084.
9/9/2016	Endangered Species Status for Guadalupe Fescue.	Proposed Listing; Endangered	81 FR 62450–62455.
9/13/2016	Threatened Species Status for Platanthera integrilabia (White Fringeless Orchid).	Proposed Listing; Threatened	81 FR 62826–62833.
9/14/2016	90-Day Findings on 10 Petitions	90-Day petition findings; Substantial and not substantial.	81 FR 63160–63165.
9/15/2016	Threatened Species Status for *Chorizanthe parryi* var. *fernandina* (San Fernando Valley Spineflower).	Proposed Listing; Threatened	81 FR 63454–63466.
9/20/2016	Threatened Species Status for the Iiwi (*Drepanis coccinea*).	12-Month petition finding; Warranted; Proposed Listing; Threatened.	81 FR 64414–64426.
9/21/2016	Endangered Species Status for Sonoyta Mud Turtle.	Proposed Listing; Endangered	81 FR 64829–64843.
9/21/2016	12-Month Findings on Petitions To List Nine Species as Endangered or Threatened Species.	12-Month petition findings; Not warranted; Candidate removals.	81 FR 64843–64857.
9/21/2016	Threatened Species Status for Pearl Darter	Proposed Listing; Threatened	81 FR 64857–64868.
9/22/2016	Endangered Species Status for Rusty Patched Bumble Bee.	12-Month petition finding; Warranted; Proposed Listing; Endangered.	81 FR 65324–65334.
9/22/2016	Endangered Status for Five Species from American Samoa.	Final Listing; Threatened	81 FR 65465–65508.
9/29/2016	Endangered Species Status for *Chamaecrista lineata* var. *keyensis* (Big Pine Partridge Pea), *Chamaesyce deltoidea* ssp. *serpyllum* (Wedge Spurge), and *Linum arenicola* (Sand Flax), and Threatened Species Status for *Argythamnia blodgettii* (Blodgett's Silverbush).	Final Listing; Threatened and Endangered	81 FR 66842–66865.
9/30/2016	Threatened Species Status for the Eastern Massasauga Rattlesnake.	Final Listing; Threatened	81 FR 67193–67214.
9/30/2016	Endangered Species Status for the Kenk's Amphipod.	Proposed Listing; Endangered	81 FR 67270–67287.
9/30/2016	Endangered Status for 49 Species From the Hawaiian Islands.	Final Listing; Endangered	81 FR 67786–67860.
10/4/2016	12-Month Finding on a Petition to List the Western Glacier Stonefly as an Endangered or Threatened Species; Proposed Threatened Species Status for Meltwater Lednian Stonefly and Western Glacier Stonefly.	12-Month petition finding; Warranted; Proposed Listing; Threatened.	81 FR 68379–68397.
10/5/2016	Threatened Species Status for Kentucky Arrow Darter with 4(d) Rule.	Final Listing; Threatened	81 FR 68963–68985.
10/5/2016	Endangered Species Status for the Miami Tiger Beetle (*Cicindelidia floridana*).	Final Listing; Endangered	81 FR 68985–69007.
10/6/2016	Threatened Species Status for Suwannee Moccasinshell.	Final Listing; Threatened	81 FR 69417–69425.
10/6/2016	12-Month Findings on Petitions To List 10 Species as Endangered or Threatened Species.	12-Month petition finding; Not warranted; Candidate removal.	81 FR 69425–69442.
10/6/2016	Proposed Threatened Species Status for Louisiana pinesnake.	Proposed Listing; Threatened	81 FR 69454–69475.
10/6/2016	Endangered Species Status for Black Warrior Waterdog.	Proposed Listing; Endangered	81 FR 69500–69508.

FY 2016 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR pages
10/11/2016	Proposed Threatened Species Status for *Sideroxylon reclinatum* ssp. *austrofloridense* (Everglades Bully), *Digitaria pauciflora* (Florida Pineland Crabgrass), and *Chamaesyce deltoidea* ssp. *pinetorum* (Pineland Sandmat) and Endangered Species Status for *Dalea carthagenensis* var. *floridana* (Florida Prairie-Clover).	Proposed Listing; Threatened; Endangered	81 FR 70282–70308.

Our expeditious progress also included work on listing actions that we funded in previous fiscal years and in FY 2016, but did not complete in FY 2016. For these species, we have completed the first step, and have been working on the second step, necessary for adding species to the Lists. These actions are listed below. The Pacific walrus proposed listing determination in the top portion of the table is being conducted under a deadline set by a court through a court-approved settlement agreement.

ACTIONS FUNDED IN PREVIOUS FYS AND FY 2016 BUT NOT YET COMPLETED

Species	Action
Actions Subject to Court Order/Settlement Agreement	
Pacific walrus	Proposed listing determination.
Other Actions	
Hermes copper butterfly	Proposed listing determination.
Cirsium wrightii (Wright's marsh thistle)	Proposed listing determination.

We also funded work on resubmitted petition findings for 29 candidate species (species petitioned prior to the last CNOR). We did not include an updated assessment form as part of our resubmitted petition findings for the three candidate species for which we are preparing either proposed listing determinations or not-warranted 12-month findings. However, in the course of preparing the proposed listing determinations or 12-month not-warranted findings for those species, we have continued to monitor new information about their status so that we can make prompt use of our authority under section 4(b)(7) of the ESA in the case of an emergency posing a significant risk to the well-being of any of these candidate species; see summaries below regarding publication of these determinations (these species will remain on the candidate list until a proposed listing rule is published). Because the majority of these petitioned species were already candidate species prior to our receipt of a petition to list them, we had already assessed their status using funds from our Candidate Conservation Program, so we continue to monitor the status of these species through our Candidate Conservation Program. The cost of updating the species assessment forms and publishing the joint publication of the CNOR and resubmitted petition findings is shared between the Listing Program and the Candidate Conservation Program.

During FY 2016, we also funded work on resubmitted petition findings for petitions to uplist three listed species (one grizzly bear population, Delta smelt, and *Sclerocactus brevispinus* (Pariette cactus)), for which we had previously received a petition and made a warranted-but-precluded finding.

Another way that we have been expeditious in making progress to add qualified species to the Lists is that we have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, and have been batching related actions together. Given our limited budget for implementing section 4 of the ESA, these efforts also contribute towards finding that we are making expeditious progress to add qualified species to the Lists.

Although we have not resolved the listing status of all of the species we identified as candidates after 2010, we continue to contribute to the conservation of these species through several programs in the Service. In particular, the Candidate Conservation Program, which is separately budgeted, focuses on providing technical expertise for developing conservation strategies and agreements to guide voluntary on-the-ground conservation work for candidate and other at-risk species. The main goal of this program is to address the threats facing candidate species. Through this program, we work with our partners (other Federal agencies, State agencies, Tribes, local governments, private landowners, and private conservation organizations) to address the threats to candidate species and other species at risk. We are currently working with our partners to implement voluntary conservation agreements for more than 110 species covering 6.1 million acres of habitat. In some instances, the sustained implementation of strategically designed conservation efforts has culminated in making listing unnecessary for species that are candidates for listing or for which listing has been proposed (see *http://ecos.fws.gov/tess_public/reports/non-listed-species-precluded-from-listing-due-to-conservation-report*).

Findings for Petitioned Candidate Species

Below are updated summaries for petitioned candidates for which we published findings under section 4(b)(3)(B) of the ESA. In accordance

with section 4(b)(3)(C)(i), we treat any petitions for which we made warranted-but-precluded 12-month findings within the past year as having been resubmitted on the date of the warranted-but-precluded finding. We are making continued warranted-but-precluded 12-month findings on the petitions for these species.

Mammals

Peñasco least chipmunk (*Tamias minimus atristria*)—The following summary is based on information contained in our files. Peñasco least chipmunk is endemic to the White Mountains, Otero and Lincoln Counties, and the Sacramento Mountains, Otero County, New Mexico. The Peñasco least chipmunk historically had a broad distribution throughout the Sacramento Mountains within ponderosa pine forests. The last verification of persistence of the Sacramento Mountains population of Peñasco least chipmunk was in 1966, and the subspecies appears to be extirpated from the Sacramento Mountains. The only remaining known distribution of the Peñasco least chipmunk is restricted to open, high-elevation talus slopes within a subalpine grassland, located in the Sierra Blanca area of the White Mountains in Lincoln and Otero Counties, New Mexico.

The Peñasco least chipmunk faces threats from present or threatened destruction, modification, and curtailment of its habitat from the alteration or loss of mature ponderosa pine forests in one of the two historically occupied areas. The documented decline in occupied localities, in conjunction with the small numbers of individuals captured, is linked to widespread habitat alteration. Moreover, the highly fragmented nature of its distribution is a significant contributor to the vulnerability of this subspecies and increases the likelihood of very small, isolated populations being extirpated. As a result of this fragmentation, even if suitable habitat exists (or is restored) in the Sacramento Mountains, the likelihood of natural recolonization of historical habitat or population expansion from the White Mountains is extremely remote. Considering the high magnitude and immediacy of these threats to the subspecies and its habitat, and the vulnerability of the White Mountains population, we conclude that the Peñasco least chipmunk is in danger of extinction throughout all of its known range now or in the foreseeable future.

Because the one known remaining extant population of Peñasco least chipmunk in the White Mountains is particularly susceptible to extinction as a result of small, reduced population sizes, and its isolation due to the lack of contiguous habitat, even a small impact on the White Mountains could have a very large impact on the status of the subspecies as a whole. The combination of its restricted range, apparent small population size, and fragmented historical habitat make the White Mountains population inherently vulnerable to extinction due to effects of small population sizes (*e.g.,* loss of genetic diversity). These impacts are likely to be seen in the population at some point in the foreseeable future, but do not appear to be affecting this population currently as it appears to be stable at this time. Therefore, we conclude that the threats to this population are of high magnitude, but not imminent, and we assign an LPN of 6 to the subspecies.

Sierra Nevada red fox, Sierra Nevada DPS (*Vulpes vulpes necator*)—The following summary is based on information contained in our files and in our warranted-but-precluded finding, published in the **Federal Register** on October 8, 2015 (80 FR 60990). The Sierra Nevada red fox is a subspecies of red fox found at high elevations (above 4,000 ft) in the Cascade and Sierra Nevada mountains of Oregon and California. It is somewhat smaller than lowland-dwelling red foxes, with a thicker coat and furry pads on its feet during winter months to facilitate travel over snow. The subspecies consists of two distinct population segments (DPSs), one in the Sierra Nevada Mountains and the other in the Cascades. The only known remnant of the Sierra Nevada DPS is a population in the Sonora Pass area estimated to contain approximately 29 adults, including an estimated 14 breeding individuals.

The Sierra Nevada DPS originally extended along the Sierra Nevada Mountains above about 1,200 m (3,937 ft), from Sierra County south into Inyo and Tulare Counties. Recent sightings have been limited to the general area around Sonora Pass, and to the northern portion of Yosemite National Park. Those areas are connected by high-quality habitat, facilitating potential travel between them. The Yosemite sightings were collected by remote camera on 3 days in the winter of 2014–2015, and indicate one to three individuals. The sightings around Sonora Pass primarily consist of photographs and genetically-tested hair or scat samples collected from 2011 to 2014 as part of a study of red foxes in the area. The study covered approximately 50 square miles (130 square kilometers), which was estimated to constitute 20 to 50 percent of the contiguous high-quality habitat in the general area. Sierra Nevada red fox numbers in the study area dropped from six in 2011 to two in 2014. During the same time period, the study also documented an increase in nonnative red foxes from zero to two (possibly three), and an increase in the number of hybrids from zero to eight. Scientists identified an additional three hybrids in 2013, but they were no longer in the area in 2014. There is no evidence of hybrids in the study area since 2014.

The Sierra Nevada DPS of the Sierra Nevada red fox may be vulnerable to extinction from genetic swamping (gradual loss of the identifying characteristics of a population due to extensive hybridization). The DPS may also be vulnerable to outbreeding depression (lowered survival or reproductive fitness in hybrids). Because the DPS consists of few individuals, any portions of the population not undergoing hybridization may be subject to inbreeding depression (congenital defects due to breeding among close relatives). If additional interbreeding with nonnative foxes is curtailed, then inbreeding depression may also be a future concern for those portions of the population that have undergone hybridization, because hybridization can introduce new deleterious alleles into the population. Small populations may also suffer proportionately greater impacts from deleterious chance events such as storms or local disease outbreaks. Finally, the DPS may be made more susceptible to extinction because of competition with coyotes. Coyotes are known to chase and kill red foxes, thereby excluding them from necessary habitat. Normally they are kept out of high-elevation areas during winter, and during the red-fox pupping season in early spring, by high snow banks, but coyotes have recently been found living year-round in areas around Sonora Pass occupied by Sierra Nevada red foxes. Global climate change may facilitate encroachment of coyotes into the area by limiting deposition and longevity of high-elevation snowpacks in the Sierra Nevada Mountains. The threats to this red fox population are ongoing and, therefore, imminent. The threats are high in magnitude because the population is so small (fewer than 50 adults), and it could be extirpated by any of the population-level threats discussed above. Therefore, we assigned the Sierra Nevada DPS of the Sierra Nevada red fox a LPN of 3.

Red tree vole, north Oregon coast DPS (*Arborimus longicaudus*)—The

following summary is based on information contained in our files and in our initial warranted-but-precluded finding, published in the **Federal Register** on October 13, 2011 (76 FR 63720). Red tree voles are small, mouse-sized rodents that live in conifer forests and spend almost all of their time in the tree canopy. They are one of the few animals that can persist on a diet of conifer needles, which is their principal food. Red tree voles are endemic to the humid, coniferous forests of western Oregon (generally west of the crest of the Cascade Range) and northwestern California (north of the Klamath River). The north Oregon coast DPS of the red tree vole comprises that portion of the Oregon Coast Range from the Columbia River south to the Siuslaw River. Red tree voles demonstrate strong selection for nesting in older conifer forests, which are now relatively rare across the DPS. Red tree voles generally avoid younger forests, and while their nests are found in younger forests, these forests are unlikely to provide long-term persistence of red tree vole populations.

Although data are not available to rigorously assess population trends, information from retrospective surveys indicates population numbers of red tree voles have declined in the DPS and are largely absent in areas where they were once relatively abundant. Older forests that provide habitat for red tree voles are limited and highly fragmented, while ongoing forest practices in much of the DPS maintain the remnant patches of older forest in a highly fragmented and isolated condition. Modeling indicates that 11 percent of the DPS currently contains tree vole habitat, largely restricted to the 22 percent of the DPS that is under Federal ownership.

Existing regulatory mechanisms on State and private lands are not preventing continued harvest of forest stands at a scale and extent that would be meaningful for conserving red tree voles. Biological characteristics of red tree voles, such as small home ranges, limited dispersal distances, and low reproductive potential, limit their ability to persist in areas of extensive habitat loss and alteration. These biological characteristics also make it difficult for the tree voles to recolonize isolated habitat patches. Due to the species' reduced distribution, the red tree vole is vulnerable to random environmental disturbances that may remove or further isolate large blocks of already limited habitat, and to extirpation within the DPS from such factors as lack of genetic variability, inbreeding depression, and demographic stochasticity. Although the entire population is experiencing threats, the impact is less pronounced on Federal lands, where much of the red tree vole habitat remains. Hence, the magnitude of these threats is moderate to low. The threats are imminent because habitat loss and reduced distribution are currently occurring within the DPS. Therefore, we have retained an LPN of 9 for this DPS.

Pacific walrus (*Odobenus rosmarus divergens*)—We continue to find that listing this subspecies is warranted but precluded as of the date of publication of this notice. However, we are working on a thorough review of all available data and expect to publish either a proposed listing rule or a 12-month not-warranted finding prior to making the next annual resubmitted petition 12-month finding. In the course of preparing a proposed listing rule or not-warranted petition finding, we are continuing to monitor new information about this subspecies' status so that we can make prompt use of our authority under section 4(b)(7) of the ESA in the case of an emergency posing a significant risk to the subspecies.

Birds

Red-crowned parrot (*Amazona viridigenalis*)—The following summary is based on information contained in the notice of 12-month finding (76 FR 62016; October 6, 2011), scientific reports, journal articles, and newspaper and magazine articles, and on communications with internal and external partners. Currently, there are no changes to the range or distribution of the red-crowned parrot. The red-crowned parrot is non-migratory, and occurs in fragmented areas of isolated habitat in the Mexican states of Veracruz, San Luis Potosi, Nuevo Leon, Tamaulipas, and northeast Queretaro, with the majority of its remaining range in Tamaulipas. In Texas, red-crowned parrots occur in the cities of Mission, McAllen, Pharr, and Edinburg (Hidalgo County) and in Brownsville, Los Fresnos, San Benito, and Harlingen (Cameron County). Feral populations also exist in southern California, Puerto Rico, Hawaii, and Florida, and escaped birds have been reported in central Texas. As of 2004, half of the wild population is believed to be found in the United States.

The species is nomadic during the winter (non-breeding) season when large flocks range widely to forage, moving tens of kilometers during a single flight in Mexico. The species within Texas is thought to move between urban areas in search for food and other available resources. Parrots were found to occur exclusively in urban habitats in the Texas Lower Rio Grande Valley during the breeding season. Loss of nesting habitat is a concern for the species in southern Texas. Nest boxes were provided in 2011, in areas where the red-crowned parrots had actively traveled during the prior spring, summer, and fall months; however, as of March 2013, these nest sites had not been used. Recent monitoring efforts for red-crowned parrots in Mexico have been done on a relatively localized level, taking place on pastureland in southeastern Tamaulipas and in forested areas of the Tamaulipan Sierras nearby to Ciudad Victoria. In southern Texas, red-crowned parrots have been included in Christmas Bird Counts, and special monitoring efforts have included an online iNaturalist project developed in 2015, and an intensive, one-night roost survey in January 2016.

The primary threats within Mexico and Texas remain habitat destruction and modification from logging, deforestation, conversion of suitable habitat, and urbanization; trapping; and illegal trade. Recent reassessment of a site in southeastern Tamaulipas, first studied in the 1990s, showed red-crowned parrots to be persisting in pastureland with remaining large trees, providing some hope that this species can coexist with ranching, provided that large trees are left standing and there is a high level of watchfulness to prevent poaching. Multiple laws and regulations have been passed to control illegal trade, but they are not adequately enforced; poaching of nests has been documented as recently as 2015. In addition, existing regulations do not address the habitat threats to the species. In South Texas, at least four city ordinances have been put in place that prohibit malicious acts (injury, mortality) to birds and their habitat. Texas Parks and Wildlife Department now considers the species to be indigenous in Texas, a classification that affords State protection for the individual parrots. Conservation efforts include monitoring and habitat-use research, as well as education and outreach in Mexico and Texas. Conservation also includes revegetation efforts, as well as conservation of existing native tracts of land, to provide habitat in the future once trees have matured. Threats to the species are extensive and are imminent, and, therefore, we have determined that an LPN of 2 remains appropriate for the species.

Reptiles

Gopher tortoise, eastern population (*Gopherus polyphemus*) — The

following summary is based on information in our files. The gopher tortoise is a large, terrestrial, herbivorous turtle that reaches a total length up to 15 inches (in) (38 centimeters (cm)) and typically inhabits the sandhills, pine/scrub oak uplands, and pine flatwoods associated with the longleaf pine (*Pinus palustris*) ecosystem. A fossorial animal, the gopher tortoise is usually found in areas with well-drained, deep, sandy soils; an open tree canopy; and a diverse, abundant, herbaceous groundcover.

The gopher tortoise ranges from extreme southern South Carolina south through peninsular Florida, and west through southern Georgia, Florida, southern Alabama, and Mississippi, into extreme southeastern Louisiana. In the eastern portion of the gopher tortoise's range in South Carolina, Florida, Georgia, and Alabama (east of the Mobile and Tombigbee Rivers) it is a candidate species; the gopher tortoise is federally listed as threatened in the western portion of its range, which includes Alabama (west of the Mobile and Tombigbee Rivers), Mississippi, and Louisiana.

The primary threat to the gopher tortoise is habitat fragmentation, destruction, and modification (either deliberately or from inattention), including conversion of longleaf pine forests to incompatible silvicultural or agricultural habitats, urbanization, shrub/hardwood encroachment (mainly from fire exclusion or insufficient fire management), and establishment and spread of invasive species. Other threats include disease and predation (mainly on nests and young tortoises), and existing regulatory mechanisms do not address habitat enhancement or protection in perpetuity for relocated tortoise populations. The magnitude of threats to the gopher tortoise in the eastern part of its range is moderate to low, as populations extend over a broad geographic area and conservation measures are in place in some areas. However, because the species is currently being affected by a number of threats including destruction and modification of its habitat, disease, predation, and exotics, the threat is imminent. Thus, we have assigned an LPN of 8 for this species.

Amphibians

Striped newt (*Notophthalmus perstriatus*)—The following summary is based on information contained in our files. The striped newt is a small salamander that inhabits ephemeral ponds surrounded by upland habitats of high pine, scrubby flatwoods, and scrub. Longleaf pine–turkey oak stands with intact ground cover containing wiregrass are the preferred upland habitat for striped newts, followed by scrub, then flatwoods. Life-history stages of the striped newt are complex, and include the use of both aquatic and terrestrial habitats throughout their life cycle. Striped newts are opportunistic feeders that prey on a variety of items such as frog eggs, worms, snails, fairy shrimp, spiders, and insects (adult and larvae) that are of appropriate size. They occur in appropriate habitats from the Atlantic Coastal Plain of southeastern Georgia to the north-central peninsula of Florida and through the Florida panhandle into portions of southwest Georgia, upward to Taylor County in western Georgia.

Prior to 2014, scientists thought there was a 125-km (78-mi) separation between the western and eastern portions of the striped newt's range. However, in 2014, the discovery of five adult striped newts in Taylor County, Florida, represents a significant reduction in the gap between these areas. In addition to the newts discovered in Taylor County, Florida, researchers also discovered 15 striped newts (14 paedomorphs and 1 non-gilled adult) in a pond in Osceola County, Florida, in 2014, which represents a significant range expansion to the south. The historical range of the striped newt was likely similar to the current range. However, loss of native longleaf habitat, fire suppression, and the natural patchy distribution of upland habitats used by striped newts have resulted in fragmentation of existing populations. Other threats to the species include disease and drought, and existing regulatory mechanisms have not addressed the threats. Overall, the magnitude of the threats is moderate, and the threats are ongoing and, therefore, imminent. Therefore, we assigned an LPN of 8 to the striped newt.

Berry Cave salamander (*Gyrinophilus gulolineatus*)—The following summary is based on information in our files. The Berry Cave salamander is recorded from Berry Cave in Roane County; from Mud Flats, Aycock Spring, Christian, Meades Quarry, Meades River, Fifth, and The Lost Puddle caves in Knox County; from Blythe Ferry Cave in Meigs County; from Small Cave in McMinn County; and from an unknown cave in Athens, McMinn County, Tennessee. These cave systems are all located within the Upper Tennessee River and Clinch River drainages. A total of 113 caves in Middle and East Tennessee were surveyed from the time period of April 2004 through June 2007, resulting in observations of 63 Berry Cave salamanders. These surveys documented two new populations of Berry Cave salamanders at Aycock Spring and Christian caves and led species experts to conclude that Berry Cave salamander populations are robust at Berry and Mudflats caves, where population declines had been previously reported. Further survey efforts in Berry Cave and Mudflats Cave in 2014 and early 2015 confirmed that viable populations of Berry Cave salamanders persist in these caves. One juvenile Berry Cave salamander was spotted during a May 10, 2014, survey in Small Cave, McMinn County. Significant sediment deposition was observed in the sinkhole entrance to the cave, likely due to nearby agricultural and pastureland use.

Ongoing threats to this species include lye leaching in the Meades Quarry Cave as a result of past quarrying activities, the possible development of a roadway with potential to affect the recharge area for the Meades Quarry Cave system, urban development in Knox County, water-quality impacts despite existing State and Federal laws, and hybridization between spring salamanders and Berry Cave salamanders in Meades Quarry Cave. These threats, coupled with confined distribution of the species and apparent low population densities, are all factors that leave the Berry Cave salamander vulnerable to extirpation. We have determined that the Berry Cave salamander faces ongoing and therefore imminent threats. The threats to the salamander are moderate in magnitude because, although some of the threats to the species are widespread, the salamander still occurs in several different cave systems, and existing populations appear stable. We continue to assign this species an LPN of 8.

Fishes

Longfin smelt (*Spirinchus thaleichthys*), Bay-Delta DPS—The following summary is based on information contained in our files and the petition we received on August 8, 2007. On April 2, 2012 (77 FR 19756), we determined that the longfin smelt San Francisco Bay-Delta distinct population segment (Bay-Delta DPS) warranted listing as an endangered or threatened species under the ESA, but that listing was precluded by higher-priority listing actions. Longfin smelt measure 9–11 cm (3.5–4.3 in) standard length. Longfin smelt are considered pelagic and anadromous, although anadromy in longfin smelt is poorly understood, and certain populations in other parts of the species' range are not anadromous and complete their entire

life cycle in freshwater lakes and streams. Longfin smelt usually live for 2 years, spawn, and then die, although some individuals may spawn as 1- or 3-year-old fish before dying. In the Bay-Delta, longfin smelt are believed to spawn primarily in freshwater in the lower reaches of the Sacramento River and San Joaquin River.

Longfin smelt numbers in the Bay-Delta have declined significantly since the 1980s. Abundance indices derived from the Fall Midwater Trawl (FMWT), Bay Study Midwater Trawl (BSMT), and Bay Study Otter Trawl (BSOT) all show marked declines in Bay-Delta longfin smelt populations from 2002 to 2016. Longfin smelt abundance over the last decade is the lowest recorded in the 40-year history of the FMWT monitoring surveys of the California Department of Fish and Wildlife (formerly the California Department of Fish and Game). The 2015 longfin smelt abundance index numbers for the FMWT are the lowest ever recorded.

The primary threat to the DPS is from reduced freshwater flows. Freshwater flows, especially winter-spring flows, are significantly correlated with longfin smelt abundance (*i.e.,* longfin smelt abundance is lower when winter-spring flows are lower). The long-term decline in abundance of longfin smelt in the Bay-Delta has been partially attributed to reductions in food availability and disruptions of the Bay-Delta food web caused by establishment of the nonnative overbite clam (*Corbula amurensis*) and likely by increasing ammonium concentrations. The threats remain high in magnitude, as they pose a significant risk to the DPS throughout its range. The threats are ongoing, and thus are imminent. Thus, we are maintaining an LPN of 3 for this population.

Clams

Texas fatmucket (*Lampsilis bracteata*)—The following summary is based on information contained in our files. The Texas fatmucket is a large, elongated freshwater mussel that is endemic to central Texas. Its shell can be moderately thick, smooth, and rhomboidal to oval in shape. Its external coloration varies from tan to brown with continuous dark brown, green-brown, or black rays, and internally it is pearly white, with some having a light salmon tint. This species historically occurred throughout the Colorado and Guadalupe–San Antonio River basins but is now known to occur only in nine streams within these basins in very limited numbers. All existing populations are represented by only one or two individuals and are not likely to be stable or recruiting.

The Texas fatmucket is primarily threatened by habitat destruction and modification from impoundments, which scour river beds, thereby removing mussel habitat; decrease water quality; modify stream flows; and prevent host fish migration and distribution of freshwater mussels. This species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. These threats may be exacerbated by the current and projected effects of climate change, population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the Texas fatmucket and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats are likely to result in the extinction of the Texas fatmucket in the foreseeable future.

The threats to the Texas fatmucket are high in magnitude, because habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the Texas fatmucket and profoundly affect its survival and recruitment. These threats are exacerbated by climate change, which will increase the frequency and magnitude of droughts. Remaining populations are small, isolated, and highly vulnerable to stochastic events, which could lead to extirpation or extinction. These threats are imminent, because they are ongoing and will continue in the foreseeable future. Habitat loss and degradation have already occurred and will continue as the human population continues to grow in central Texas. Texas fatmucket populations may already be below the minimum viable population requirement, which causes a reduction in the resliency of a population and an increase in the species' vulnerability to extinction. Based on imminent, high-magnitude threats, we maintained an LPN of 2 for the Texas fatmucket.

Texas fawnsfoot (*Truncilla macrodon*)—The following summary is based on information contained in our files. The Texas fawnsfoot is a small, relatively thin-shelled freshwater mussel that is endemic to central Texas. Its shell is long and oval, generally free of external sculpturing, with external coloration that varies from yellowish- or orangish-tan, brown, reddish-brown, to smoky-green with a pattern of broken rays or irregular blotches. The internal color is bluish-white or white and iridescent posteriorly. This species historically occurred throughout the Colorado and Brazos River basins and is now known from only five locations. The Texas fawnsfoot has been extirpated from nearly all of the Colorado River basin and from much of the Brazos River basin. Of the populations that remain, only three are likely to be stable and recruiting; the remaining populations are disjunct and restricted to short stream reaches.

The Texas fawnsfoot is primarily threatened by habitat destruction and modification from impoundments, which scour river beds, thereby removing mussel habitat; decrease water quality; modify stream flows; and prevent host fish migration and distribution of freshwater mussels. The species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. These threats may be exacerbated by the current and projected effects of climate change, population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the Texas fawnsfoot and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats are likely to result in the extinction of the Texas fawnsfoot in the foreseeable future.

The threats to the Texas fawnsfoot are high in magnitude. Habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the Texas fawnsfoot and profoundly affect its habitat. These threats are exacerbated by climate change, which will increase the frequency and magnitude of droughts. Remaining populations are small, isolated, and highly vulnerable to stochastic events. These threats are imminent, because they are ongoing and will continue in the foreseeable future. Habitat loss and degradation has already occurred and will continue as the human population continues to grow in central Texas. The Texas fawnsfoot populations may already be below the minimum viable population requirement, which causes a reduction in the resiliency of a population and an increase in the species' vulnerability to extinction. Based on imminent, high-magnitude threats, we assigned the Texas fawnsfoot an LPN of 2.

Golden orb (*Quadrula aurea*)—The following summary is based on information contained in our files. The golden orb is a small, round-shaped freshwater mussel that is endemic to

central Texas. This species historically occurred throughout the Nueces-Frio and Guadalupe–San Antonio River basins and is now known from only nine locations in four rivers. The golden orb has been eliminated from nearly the entire Nueces-Frio River basin. Four of these populations appear to be stable and reproducing, and the remaining five populations are small and isolated and show no evidence of recruitment. It appears that the populations in the middle Guadalupe and lower San Marcos Rivers are likely connected. The remaining extant populations are highly fragmented and restricted to short reaches.

The golden orb is primarily threatened by habitat destruction and modification from impoundments, which scour river beds (thereby removing mussel habitat), decrease water quality, modify stream flows, and prevent host fish migration and distribution of freshwater mussels. The species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. These threats may be exacerbated by the current and projected effects of climate change, population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the golden orb and its habitat are not being addressed by existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats may be likely to result in the golden orb becoming in danger of extinction in the foreseeable future.

The threats to the golden orb are moderate in magnitude. Although habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the golden orb and are likely to be exacerbated by climate change, which will increase the frequency and magnitude of droughts, four large populations remain, including one that was recently discovered, suggesting that the threats are not high in magnitude. The threats from habitat loss and degradation are imminent, because habitat loss and degradation have already occurred and will likely continue as the human population continues to grow in central Texas. Several golden orb populations may already be below the minimum viable population requirement, which causes a reduction in the resliency of a population and an increase in the species' vulnerability to extinction. Based on imminent, moderate threats, we maintain an LPN of 8 for the golden orb.

Smooth pimpleback (*Quadrula houstonensis*)—The following summary is based on information contained in our files. The smooth pimpleback is a small, round-shaped freshwater mussel that is endemic to central Texas. This species historically occurred throughout the Colorado and Brazos River basins and is now known from only nine locations. The smooth pimpleback has been eliminated from nearly the entire Colorado River and all but one of its tributaries, and has been limited to the central and lower Brazos River drainage. Five of the populations are represented by no more than a few individuals and are small and isolated. Six of the existing populations appear to be relatively stable and recruiting.

The smooth pimpleback is primarily threatened by habitat destruction and modification from impoundments, which scour river beds (thereby removing mussel habitat), decrease water quality, modify stream flows, and prevent host fish migration and distribution of freshwater mussels. The species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. These threats may be exacerbated by the current and projected effects of climate change, population fragmentation, and isolation, and the anticipated threat of nonnative species. Threats to the smooth pimpleback and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats may be likely to result in the smooth pimpleback becoming in danger of extinction in the foreseeable future.

The threats to the smooth pimpleback are moderate in magnitude. Although habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the smooth pimpleback and may be exacerbated by climate change, which will increase the frequency and magnitude of droughts, several large populations remain, including one that was recently discovered, suggesting that the threats are not high in magnitude. The threats from habitat loss and degradation are imminent, because they have already occurred and will continue as the human population continues to grow in central Texas. Several smooth pimpleback populations may already be below the minimum viable population requirement, which causes a reduction in the resliency of a population and an increase in the species' vulnerability to extinction. Based on imminent, moderate threats, we maintain an LPN of 8 for the smooth pimpleback.

Texas pimpleback (*Quadrula petrina*)—The following summary is based on information contained in our files. The Texas pimpleback is a large freshwater mussel that is endemic to central Texas. This species historically occurred throughout the Colorado and Guadalupe–San Antonio River basins, but it is now known to occur only in four streams within these basins. Only two populations appear large enough to be stable, but evidence of recruitment is limited in one of them (the Concho River population) so the San Saba River population may be the only remaining recruiting populations of Texas pimpleback. The remaining two populations are represented by one or two individuals and are highly disjunct.

The Texas pimpleback is primarily threatened by habitat destruction and modification from impoundments, which scour river beds (thereby removing mussel habitat), decrease water quality, modify stream flows, and prevent host fish migration and distribution of freshwater mussels. This species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. These threats may be exacerbated by the current and projected effects of climate change (which will increase the frequency and magnitude of droughts), population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the Texas pimpleback and its habitat are not being addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats may be likely to result in the Texas pimpleback becoming in danger of extinction in the foreseeable future.

The threats to the Texas pimpleback are high in magnitude, because habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the entire range of the Texas pimpleback and profoundly affect its survival and recruitment. The only remaining populations are small, isolated, and highly vulnerable to stochastic events, which could lead to extirpation or extinction. The threats are imminent, because habitat loss and degradation have already occurred and will continue as the human population continues to grow in central Texas. All Texas pimpleback populations may already be below the minimum viable

population requirement, which causes a reduction in the resiliency of a population and an increase in the species' vulnerability to extinction. Based on imminent, high-magnitude threats, we assigned the Texas pimpleback an LPN of 2.

Snails

Magnificent ramshorn (*Planorbella magnifica*)—Magnificent ramshorn is the largest North American air-breathing freshwater snail in the family Planorbidae. It has a discoidal (*i.e.,* coiling in one plane), relatively thin shell that reaches a diameter commonly exceeding 35 millimeters (mm) and heights exceeding 20 mm. The great width of its shell, in relation to the diameter, makes it easily identifiable at all ages. The shell is brown colored (often with leopard like spots) and fragile, thus indicating it is adapted to still or slow-flowing aquatic habitats. The magnificent ramshorn is believed to be a southeastern North Carolina endemic. The species was historically known from only four sites in the lower Cape Fear River Basin in North Carolina—all four sites appear to be extirpated. Although the complete historical range of the species is unknown, the size of the species and the fact that it was not reported until 1903 suggest that the species may have always been rare and localized.

Salinity and pH appear to have been major factors limiting the distribution of the magnificent ramshorn, as the snail prefers freshwater bodies with circumneutral pH (*i.e.,* pH within the range of 6.8–7.5). While members of the family Planorbidae are hermaphroditic, it is currently unknown whether magnificent ramshorns self-fertilize their eggs, mate with other individuals of the species, or both. Like other members of the Planorbidae family, the magnificent ramshorn is believed to be primarily a vegetarian, feeding on submerged aquatic plants, algae, and detritus. While several factors have likely contributed to the possible extirpation of the magnificent ramshorn in the wild, the primary factors include loss of habitat associated with the extirpation of beavers (and their impoundments) in the early 20th century, increased salinity and alteration of flow patterns, as well as increased input of nutrients and other pollutants. The magnificent ramshorn appears to be extirpated from the wild due to habitat loss and degradation resulting from a variety of human-induced and natural factors. The only known surviving individuals of the species are presently being held and propagated at a private residence, a lab at North Carolina State University's Veterinary School, and the North Carolina Wildlife Resources Commission's Watha State Fish Hatchery.

While efforts have been made to restore habitat for the magnificent ramshorn at one of the sites known to have previously supported the species, all of the sites continue to be affected or threatened by the same factors (*i.e.,* salt-water intrusion and other water-quality degradation, nuisance-aquatic-plant control, storms, sea-level rise, etc.) believed to have resulted in extirpation of the species from the wild. Currently, only three captive populations exist: A population of the species comprised of approximately 300+ adults, a population with approximately 200+ adults, and a population of 50+ small individuals. Although captive populations of the species have been maintained since 1993, a single catastrophic event, such as a severe storm, disease, or predator infestation, affecting a captive population could result in the near extinction of the species. The threats are high in magnitude and ongoing—therefore, we assigned this species an LPN of 2.

Insects

Hermes copper butterfly (*Lycaena hermes*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a thorough review of all available data and expect to publish either a proposed listing rule or a 12-month not-warranted finding prior to making the next annual resubmitted petition 12-month finding. In the course of preparing a proposed listing rule or not-warranted petition finding, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) of the ESA in the case of an emergency posing a significant risk to the species.

Puerto Rican harlequin butterfly (*Atlantea tulita*)—The following summary is based on information in our files and in the petition we received on February 29, 2009. The Puerto Rican harlequin butterfly is endemic to Puerto Rico, and one of the four species endemic to the Greater Antilles within the genus *Atlantea*. This species occurs within the subtropical-moist-forest life zone in the northern karst region (*i.e.,* municipality of Quebradillas) of Puerto Rico, and in the subtropical-wet-forest life zone (*i.e.,* Maricao Commonwealth Forest, municipality of Maricao). The Puerto Rican harlequin butterfly population has been estimated at around 50 adults in the northern karst region and fewer than 20 adults in the volcanic serpentine central mountains of the island. The Puerto Rican harlequin butterfly has only been found utilizing *Oplonia spinosa* (prickly bush) as its host plant (*i.e.,* plant used for laying the eggs, which also serves as a food source for development of the larvae).

The primary threats to the Puerto Rican harlequin butterfly are development, habitat fragmentation, and other natural or manmade factors such as human-induced fires, use of herbicides and pesticides, vegetation management, and climate change. These factors, if they occurred in habitat occupied by the species, would substantially affect the distribution and abundance of the species, as well as its habitat. In addition, due to the lack of effective enforcement of existing policies and regulations, the threats to the species' habitat are not being reduced. These threats are of a high magnitue and are imminent because the occurrence of known populations in areas that are subject to development, increased traffic, increased road maintenance and construction, and other threats directly affects the species during all life stages and is likely to result in population decreases. These threats are expected to continue and potentially increase in the foreseeable future. Therefore, we assign an LPN of 2 to the Puerto Rican harlequin butterfly. In 2015, the Service, through the Partners for Fish and Wildlife Program, signed a cooperative agreement with a local nongovernmental organization, Iniciativa Herpetológica, to promote the enhancement and conservation of suitable habitat for the Puerto Rican harlequin butterfly on private lands located within its range on the northern karst region of the island.

Rattlesnake-master borer moth (*Papaipema eryngii*)—Rattlesnake-master borer moths are obligate residents of undisturbed prairie remnants, savanna, and pine barrens that contain their only food plant, rattlesnake master (*Eryngium yuccifolium*). The rattlesnake-master borer moth is known from 31 sites in 7 States: Illinois, Arkansas, Kentucky, Oklahoma, North Carolina, Kansas, and Missouri. Currently 27 of the sites contain extant populations, 3 contain populations with unknown status, and 1 contains a population that is considered extirpated. The 14 Missouri populations and 1 Kansas population were identified in 2015 and are considered extant; however, there are no trend data for these sites.

Although the rattlesnake master plant is widely distributed across 26 States and is a common plant in remnant prairies, it is a conservative species, meaning it is not found in disturbed areas, with relative frequencies of less than 1 percent. The habitat range for the rattlesnake-master borer moth is very narrow and appears to be limiting for the species. The ongoing effects of habitat loss, fragmentation, degradation, and modification from agriculture, development, flooding, invasive species, and secondary succession have resulted in fragmented populations and population declines. Rattlesnake-master borer moths are affected by habitat fragmentation and population isolation. Almost all of the sites with extant populations of the rattlesnake-master borer moth are isolated from one another, with the populations in Kentucky, North Carolina, and Oklahoma occurring within a single site for each State, thus precluding recolonization from other populations. These small, isolated populations are likely to become unviable over time due to: Lower genetic diversity, reducing their ability to adapt to environmental change; the effects of stochastic events; and their inability to recolonize areas where they are extirpated.

Rattlesnake-master borer moths have life-history traits that make them more susceptible to outside stressors. They are univoltine (having a single flight per year), do not disperse widely, and are monophagous (have only one food source). The life history of the species makes it particularly sensitive to fire, which is the primary practice used in prairie management. The species is only safe from fire once it bores into the root of the host plant, which makes adult, egg, and first larval stages subject to mortality during prescribed burns and wildfires. Fire and grazing cause direct mortality to the moth and destroy food plants if the intensity, extent, or timing is not conducive to the species' biology. Although fire management is a threat to the species, lack of management is also a threat, and at least one site has become extirpated likely because of the succession to woody habitat. The species is sought after by collectors and the host plant is very easy to identify, making the moth susceptible to collection, and thus many sites are kept undisclosed to the public.

Existing regulatory mechanisms provide protection for 12 of the 16 sites containing rattlesnake-master borer moth populations recorded before 2015. The 15 populations identified in 2015 are under a range of protection and management levels. Illinois' endangered species statute provides regulatory mechanisms to protect the species from potential impacts from actions such as development and collecting on the 10 Illinois sites; however, illegal collections of the species have occurred at two sites. A permit is required for collection by site managers within the sites in North Carolina and Oklahoma. The rattlesnake-master borer moth is also listed as endangered in Kentucky by the State's Nature Preserves Commission, although this status currently provides no statutory protection. There are no statutory mechanisms in place to protect the populations in North Carolina, Arkansas, or Oklahoma.

Some threats that the rattlesnake-master moth faces are high in magnitude, such as habitat conversion and fragmentation, and population isolation. These threats with the highest magnitude occur in many of the populations throughout the species' range, but although they are likely to affect each population at some time, they are not likely to affect all of the populations at any one time. Other threats, such as agricultural and nonagricultural development, mortality from implementation of some prairie management tools (such as fire), flooding, succession, and climate change, are of moderate to low magnitude. For example, the life history of rattlesnake-master borer moths makes them highly sensitive to fire, which can cause mortality of individuals through most of the year and can affect entire populations. Conversely, complete fire suppression can also be a threat to rattlesnake-master borer moths as prairie habitat declines and woody or invasive species become established such that the species' only food plant is not found in disturbed prairies. Although these threats can cause direct and indirect mortality of the species, they are of moderate or low magnitude because they affect only some populations throughout the range and to varying degrees. Overall, the threats are moderate. The threats are imminent, because they are ongoing; every known population of rattlesnake-master borer moth has at least one ongoing threat, and some have several working in tandem. Thus, we assigned an LPN of 8 to this species.

Arapahoe snowfly (*Arsapnia arapahoe*)—The following summary is based on information contained in our files. This insect is a winter stonefly associated with clean, cool, running waters. Adult snowflies emerge in late winter from the space underneath stream ice. Until 2013, the Arapahoe snowfly had been confirmed in only two streams (Elkhorn Creek and Young Gulch), both of which are small tributaries of the Cache la Poudre River in the Roosevelt National Forest, Larimer County, Colorado. However, the species has not been identified in Young Gulch since 1986; it is likely that either the habitat became unsuitable or other unknown causes extirpated the species. Habitats at Young Gulch were further degraded by the High Park Fire in 2012, and potentially by a flash flood in September 2013. New surveys completed in 2013 and 2014 identified the Arapahoe snowfly in seven new localities, including Elkhorn Creek, Sheep Creek (a tributary of the Big Thompson River), Central Gulch (a tributary of Saint Vrain Creek), and Bummer's Gulch, Martin Gulch, and Bear Canyon Creek (tributaries of Boulder Creek in Boulder County). However, the numbers of specimens collected at each location were extremely low. These new locations occur on U.S. Forest Service land, Boulder County Open Space, and private land.

Climate change is a threat to the Arapahoe snowfly and modifies its habitats by reducing snowpacks, altering streamflows, increasing water temperatures, fostering mountain pine beetle outbreaks, and increasing the frequency of destructive wildfires. Limited dispersal capabilities, a restricted range, dependence on pristine habitats, and a small population size make the Arapahoe snowfly vulnerable to demographic stochasticity, environmental stochasticity, and random catastrophes. Furthermore, regulatory mechanisms are not addressing these threats, which may act cumulatively to affect the species. The threats to the Arapahoe snowfly are high in magnitude because they occur throughout the species' limited range. However, the threats are nonimminent. While limited dispersal capabilities, restricted range, dependence on pristine habitats, and small population size are characteristics that make this species vulnerable to stochastic events and catastrophic events (and potential impacts from climate change), there are no stochastic or catastrophic events that are currently occurring, and although temperatures are increasing, the increasing temperatures are not yet having adverse effects on the species. Therefore, we have assigned the Arapahoe snowfly an LPN of 5.

Flowering Plants

Astragalus microcymbus (Skiff milkvetch)—The following summary is based on information contained in our files and in the petition we received on July 30, 2007. Skiff milkvetch is a

perennial forb that dies back to the ground every year. It has a very limited range and a spotty distribution within Gunnison and Saguache Counties in Colorado, where it is found in open, park-like landscapes in the sagebrush-steppe ecosystem on rocky or cobbly, moderate-to-steep slopes of hills and draws.

The most significant threats to skiff milkvetch are recreation, roads, trails, and habitat fragmentation and degradation. Existing regulatory mechanisms are not addressing these threats to the species. Recreational impacts are likely to increase, given the close proximity of skiff milkvetch to the town of Gunnison and the increasing popularity of mountain biking, motorcycling, and all-terrain vehicles. Furthermore, the Hartman Rocks Recreation Area draws users, and contains over 40 percent of the skiff milkvetch units. Other threats to the species include residential and urban development; livestock, deer, and elk use; climate change; increasing periodic drought; nonnative, invasive cheatgrass; and wildfire. The threats to skiff milkvetch are moderate in magnitude, because, while serious and occurring rangewide, they do not collectively result in population declines on a short time scale. The threats are imminent, because the species is currently facing them in many portions of its range. Therefore, we have assigned skiff milkvetch an LPN of 8.

Astragalus schmolliae (Chapin Mesa milkvetch)—The following summary is based on information provided by Mesa Verde National Park and Colorado Natural Heritage Program, contained in our files, and in the petition we received on July 30, 2007. Chapin Mesa milkvetch is a narrow endemic perennial plant that grows in the mature pinyon–juniper woodland of mesa tops on Chapin Mesa in the Mesa Verde National Park and in the adjoining Ute Mountain Ute Tribal Park in southern Colorado.

The most significant threats to the species are degradation of habitat by fire, followed by invasion by nonnative cheatgrass and subsequent increase in fire frequency. These threats currently affect about 40 percent of the species' entire known range. Cheatgrass is likely to increase given its rapid spread and persistence in habitat disturbed by wildfires, fire and fuels management, and development of infrastructure, and given the inability of land managers to control it on a landscape scale. Other threats to Chapin Mesa milkvetch include fires, fire-break clearings, and drought. Existing regulatory mechanisms are not addressing the threats. The threats to the species overall are imminent and moderate in magnitude, because the species is currently facing them in many portions of its range, but the threats do not collectively result in population declines on a short time scale. Therefore, we have assigned Chapin Mesa milkvetch an LPN of 8.

Boechera pusilla (Fremont County rockcress)—See above summary under Listing Priority Changes in Candidates.

Cirsium wrightii (Wright's marsh thistle)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a thorough review of all available data and expect to publish either a proposed listing rule or a 12-month not-warranted finding prior to making the next annual resubmitted petition 12-month finding. In the course of preparing a proposed listing rule or not-warranted petition finding, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) of the ESA in the case of an emergency posing a significant risk to the species.

Eriogonum soredium (Frisco buckwheat)—The following summary is based on information in our files and the petition we received on July 30, 2007. Frisco buckwheat is a narrow-endemic perennial plant restricted to soils derived from Ordovician limestone outcrops. The range of the species is less than 5 square miles (13 square kilometers), with four known populations. All four populations occur exclusively on private lands in Beaver County, Utah, and each population occupies a very small area with high densities of plants. Available population estimates are highly variable and inaccurate due to the limited access for surveys associated with private lands.

The primary threat to Frisco buckwheat is habitat destruction from precious-metal and gravel mining. Mining for precious metals historically occurred within the vicinity of all four populations. Three of the populations are currently in the immediate vicinity of active limestone quarries. Ongoing mining in the species' habitat has the potential to extirpate one population in the near future and extirpate all populations in the foreseeable future. Ongoing exploration for precious metals and gravel indicate that mining will continue, but it will take time for the mining operations to be put into place and to affect the species. This will result in the loss and fragmentation of Frisco buckwheat populations over a longer time scale. Other threats to the species include nonnative species in conjunction with surface disturbance from mining activities. Existing regulatory mechanisms are not addressing the threats to the species. Vulnerabilities of the species include small population size and climate change. The threats that Frisco buckwheat faces are moderate in magnitude, because while serious and occurring rangewide, the threats do not significantly reduce populations on a short time scale. The threats are imminent, because three of the populations are currently in the immediate vicinity of active limestone quarries. Therefore, we have assigned Frisco buckwheat an LPN of 8.

Lepidium ostleri (Ostler's peppergrass)—The following summary is based on information in our files and the petition we received on July 30, 2007. Ostler's peppergrass is a long-lived perennial herb in the mustard family that grows in dense, cushion-like tufts. Ostler's peppergrass is a narrow endemic restricted to soils derived from Ordovician limestone outcrops. The range of the species is less than 5 square miles (13 square kilometers), with only four known populations. All four populations occur exclusively on private lands in the southern San Francisco Mountains of Beaver County, Utah. Available population estimates are highly variable and inaccurate due largely to the limited access for surveys associated with private lands.

The primary threat to Ostler's peppergrass is habitat destruction from precious-metal and gravel mining. Mining for precious metals historically occurred within the vicinity of all four populations. Three of the populations are currently in the immediate vicinity of active limestone quarries, but mining is only currently occurring in the area of one population. Ongoing mining in the species' habitat has the potential to extirpate one population in the future. Ongoing exploration for precious metals and gravel indicate that mining will continue, but will take time for the mining operations to be put into place. This will result in the loss and fragmentation of Ostler's peppergrass populations over a longer time scale. Other threats to the species include nonnative species, vulnerability associated with small population size, and climate change. Existing regulatory mechanisms are not addressing the threats to the species. The threats that Ostler's peppergrass faces are moderate in magnitude, because, while serious and occurring rangewide, the threats do not collectively result in significant population declines on a short time scale. The threats are imminent, because the species is currently facing them

across its entire range. Therefore, we have assigned Ostler's peppergrass an LPN of 8.

Pinus albicaulis (whitebark pine)—The following summary is based on information in our files and in the petition received on December 9, 2008. Whitebark pine is a hardy conifer found at alpine-tree-line and subalpine elevations in Washington, Oregon, Nevada, California, Idaho, Montana, and Wyoming, and in British Columbia and Alberta, Canada. In the United States, approximately 96 percent of land where the species occurs is federally owned or managed, primarily by the U.S. Forest Service. Whitebark pine is a slow-growing, long-lived tree that often lives for 500 and sometimes more than 1,000 years. It is considered a keystone, or foundation, species in western North America, where it increases biodiversity and contributes to critical ecosystem functions.

The primary threat to the species is from disease in the form of the nonnative white pine blister rust and its interaction with other threats. Although whitebark pine is still also experiencing some mortality from predation by the native mountain pine beetle (*Dendroctonus ponderosae*), the current epidemic is subsiding. We also anticipate that continuing environmental effects resulting from climate change will result in direct habitat loss for whitebark pine. Models predict that suitable habitat for whitebark pine will decline precipitously within the next 100 years. Past and ongoing fire suppression is also negatively affecting populations of whitebark pine through direct habitat loss. Additionally, environmental changes resulting from changing climatic conditions are acting alone and in combination with the effects of fire suppression to increase the frequency and severity of wildfires. Lastly, the existing regulatory mechanisms are not addressing the threats presented above.

As the mountain-pine-beetle epidemic is subsiding, we no longer consider this threat to be having the high level of impact that was seen in recent years. However, given projected warming trends, we expect that conditions will remain favorable for epidemic levels of mountain pine beetle into the foreseeable future. The significant threats from white pine blister rust, fire and fire suppression, and environmental effects of climate change remain on the landscape. However, the overall magnitude of threats to whitebark pine is somewhat diminished given the current absence of epidemic levels of mountain pine beetle, and because of this, individuals with genetic resistance to white pine blister rust likely have a higher probability of survival. Survival and reproduction of genetically resistant trees are critical to the persistence of the species given the imminent, ubiquitous presence of white pine blister rust on the landscape. Overall, the threats to the species are ongoing, and therefore imminent, and are moderate in magnitude. We find the current LPN of 8 is appropriate.

Solanum conocarpum (marron bacora)—The following summary is based on information in our files and in the petition we received on November 21, 1996. *Solanum conocarpum* is a dry-forest shrub in the island of St. John, U.S. Virgin Islands. Its current distribution includes eight localities in the island of St. John, each ranging from 1 to 144 individuals. The species has been reported to occur on dry, poor soils. It can be locally abundant in exposed topography on sites disturbed by erosion, areas that have received moderate grazing, and around ridgelines as an understory component in diverse woodland communities. A habitat suitability model suggests that the vast majority of *Solanum conocarpum* habitat is found in the lower-elevation coastal-scrub forest. Efforts have been conducted to propagate the species to enhance natural populations, and planting of seedlings has been conducted in the island of St. John.

Solanum conocarpum is threatened by the lack of natural recruitment, absence of dispersers, fragmented distribution, lack of genetic variation, climate change, and habitat destruction or modification by exotic mammal species. These threats are evidenced by the reduced number of individuals, low number of populations, and lack of connectivity between populations. Overall, the threats are of high magnitude because they are leading to population declines for a species that already has low population numbers and fragmented distribution; the threats are also ongoing and therefore imminent. Therefore, we assigned an LPN of 2 to *Solanum conocarpum.*

Streptanthus bracteatus (bracted twistflower)—The following summary is based on information obtained from our files, on-line herbarium databases, surveys and monitoring data, seed-collection data, and scientific publications. Bracted twistflower, an annual herbaceous plant of the Brassicaceae (mustard family), is endemic to a small portion of the Edwards Plateau of Texas. The Texas Natural Diversity Database, as revised on March 8, 2015, lists 17 element occurrences (EOs; populations) that were documented from 1989 to 2015 in five counties. Currently, 10 EOs remain with intact habitat, 2 EOs are partially intact, 2 EOs are on managed rights-of-way, and 3 EO sites have been developed and the populations are presumed extirpated. Only 8 of the intact EOs and portions of 2 EOs are in protected natural areas. Four extant EOs are vulnerable to development and other impacts. Five EOs have been partially or completely developed, including 2 EOs that were destroyed in 2012 and 2013, respectively.

The continued survival of bracted twistflower is imminently threatened by habitat destruction from urban development, severe herbivory from dense herds of white-tailed deer and other herbivores, and the increased density of woody plant cover. Additional ongoing threats include erosion and trampling from foot and mountain-bike trails, a pathogenic fungus of unknown origin, and insufficient protection by existing regulations. Furthermore, due to the small size and isolation of remaining populations, and lack of gene flow between them, several populations are now inbred and may have insufficient genetic diversity for long-term survival. Bracted twistflower populations often occur in habitats that also support the endangered golden-cheeked warbler (*Dendroica chrysoparia*), and while that does afford some protection to the plant, the two species may require different vegetation management. Bracted twistflower is potentially threatened by as-yet unknown impacts of climate change. The Service has established a voluntary memorandum of agreement with Texas Parks and Wildlife Department, the City of Austin, Travis County, the Lower Colorado River Authority, and the Lady Bird Johnson Wildflower Center to protect bracted twistflower and its habitats on tracts of Balcones Canyonlands Preserve. While the scope of this agreement does not protect the species throughout its range, the implementaiton of these responsibilities result in a moderate magnitude of threats and in the future will contribute to the species' conservation and recovery. The threats to bracted twistflower are ongoing and, therefore, imminent; consequently we maintain an LPN of 8 for this species.

Trifolium friscanum (Frisco clover)—The following summary is based on information in our files and the petition we received on July 30, 2007. Frisco clover is a narrow endemic perennial herb found only in Utah, with five known populations restricted to sparsely vegetated, pinion-juniper sagebrush communities and shallow, gravel soils derived from volcanic

gravels, Ordovician limestone, and dolomite outcrops. The majority (68 percent) of Frisco clover plants occur on private lands, with the remaining plants found on Federal and State lands.

On the private and State lands, the most significant threat to Frisco clover is habitat destruction from mining for precious metals and gravel. Active mining claims, recent prospecting, and an increasing demand for precious metals and gravel indicate that mining in Frisco clover habitats will increase in the foreseeable future, likely resulting in the loss of large numbers of plants. Other threats to Frisco clover include nonnative, invasive species in conjunction with surface disturbance from mining activities. Existing regulatory mechanisms are inadequate to protect the species from these threats. Vulnerabilities of the species include small population size and climate change.

The threats to Frisco clover are moderate in magnitude, because, while serious and occurring throughout a majority of its range, they are not acting independently or cumulatively to have a highly significant negative impact on its survival or reproductive capacity. For example, although mining for precious metals and gravel historically occurred throughout Frisco clover's range, and mining operations may eventually expand into occupied habitats, there are no active mines within the immediate vicinity of any known population. However, activity may resume at one gravel mine on State lands in the near future where expansion plans have been discussed but not submitted to the State of Utah for permitting. At this time, avoidance of occupied habitat appears to be feasible for this mine's expansion. Overall, the threats of mining activities, invasive species, inadequacy of existing regulatory mechanisms, small population size, and climate change are imminent, because the species is currently facing these threats across its entire range. Therefore, we have assigned Frisco clover an LPN of 8.

Petitions To Reclassify Species Already Listed

We previously made warranted-but-precluded findings on three petitions seeking to reclassify threatened species to endangered status. The taxa involved in the reclassification petitions are one population of the grizzly bear (*Ursus arctos horribilis*), delta smelt (*Hypomesus transpacificus*), and *Sclerocactus brevispinus* (Pariette cactus). Because these species are already listed under the ESA, they are not candidates for listing and are not included in Table 1. However, this notice and associated species assessment forms or 5-year review documents also constitute the findings for the resubmitted petitions to reclassify these species. Our updated assessments for these species are provided below. We find that reclassification to endangered status for one grizzly bear ecosystem population, delta smelt, and *Sclerocactus brevispinus* are all currently warranted but precluded by work identified above (see Findings for Petitioned Candidate Species, above). One of the primary reasons that the work identified above is considered to have higher priority is that the grizzly bear population, delta smelt, and *Sclerocactus brevispinus* are currently listed as threatened, and therefore already receive certain protections under the ESA. Those protections are set forth in our regulations: 50 CFR 17.40(b) (grizzly bear); 50 CFR 17.31, and, by reference, 50 CFR 17.21 (delta smelt); and 50 CFR 17.71, and, by reference, 50 CFR 17.61 (*Sclerocactus brevispinus*). It is therefore unlawful for any person, among other prohibited acts, to take (*i.e.,* to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such activity) a grizzly bear or a delta smelt, subject to applicable exceptions. And it is unlawful for any person, among other prohibited acts, to remove or reduce to possession *Sclerocactus brevispinus* from an area under Federal jurisdiction, subject to applicable exceptions. Other protections that apply to these threatened species even before we complete proposed and final reclassification rules include those under section 7(a)(2) of the ESA, whereby Federal agencies must insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species.

Grizzly bear (*Ursus arctos horribilis*), North Cascades ecosystem population (Region 6)—Since 1990, we have received and reviewed five petitions requesting a change in status for the North Cascades grizzly bear population (55 FR 32103, August 7, 1990; 56 FR 33892, July 24, 1991; 57 FR 14372, April 20, 1992; 58 FR 43856, August 18, 1993; 63 FR 30453, June 4, 1998). In response to these petitions, we determined that grizzly bears in the North Cascade ecosystem warrant a change to endangered status. We have continued to find that these petitions are warranted but precluded through our annual CNOR process. On February 19, 2015, in partnership with the National Park Service, we issued a notice of intent to jointly prepare a North Cascades Ecosystem Grizzly Bear Restoration Plan and Environmental Impact Statement to determine how to restore the grizzly bear to the North Cascades ecosystem (80 FR 8894; February 19, 2015). Natural recovery in this ecosystem is challenged by the absence of a verified population (only three confirmed observations in the last 20 years), as well as isolation from any contiguous population in British Columbia and the United States.

In 2016, we continue to find that reclassifying grizzly bears in this ecosystem as endangered is warranted but precluded, and we continue to assign an LPN of 3 for the uplisting of the North Cascades population based on high-magnitude threats, including very small population size, incomplete habitat protection measures (motorized-access management), and population fragmentation resulting in genetic isolation. However, we also acknowledge the possibility that there is no longer a population present in the ecosystem, and restoration efforts (possibly including designation of an experimental population under section 10(j) of the ESA) may be used to establish a viable population in this recovery zone. The threats are high in magnitude, because the limiting factors for grizzly bears in this recovery zone are human-caused mortality and extremely small population size. The threats are ongoing, and thus imminent. However, higher-priority listing actions, including court-approved settlements, court-ordered and statutory deadlines for petition findings and listing determinations, emergency listing determinations, and responses to litigation, continue to preclude reclassifying grizzly bears in this ecosystem. Furthermore, proposed rules to reclassify threatened species to endangered are a lower priority than listing currently unprotected species (*i.e.,* candidate species), as species currently listed as threatened are already afforded protection under the ESA and the implementing regulations. We continue to monitor grizzly bears in this ecosystem and will change their status or implement an emergency uplisting if necessary.

Delta smelt (*Hypomesus transpacificus*) (Region 8) (see 75 FR 17667, April 7, 2010, for additional information on why reclassification to endangered is warranted but precluded)—The following summary is based on information contained in our files and the petition we received on March 8, 2006. Delta smelt are slender-bodied fish, generally about 60 to 70

millimeters (mm) (2 to 3 inches (in)) long, although they may reach lengths of up to 120 mm (4.7 in). Delta smelt are in the Osmeridae family (smelts). Live fish are nearly translucent and have a steely blue sheen to their sides. Delta smelt feed primarily on small planktonic (free-floating) crustaceans, and occasionally on insect larvae. Delta smelt are endemic to the San Francisco Bay and Sacramento-San Joaquin Delta Estuary (Delta) in California. Studies indicate that delta smelt require specific environmental conditions (freshwater flow, water quality) and habitat types within the estuary for migration, spawning, egg incubation, rearing, and larval and juvenile transport from spawning to rearing habitats. Delta smelt are a euryhaline (tolerate a wide range of salinities) species; however, they rarely occur in water with salinities more than 10–12 (about one-third seawater). Feyrer et al. found that relative abundance of delta smelt was related to fall salinity and turbidity (water clarity). Laboratory studies found that delta smelt larval feeding increased with increased turbidity.

Delta smelt have been in decline for decades, and numbers have trended precipitously downward since the early 2000s. In the wet water year of 2011, the Fall Mid-Water Trawl (FMWT) index for delta smelt increased to 343, which is the highest index recorded since 2001. It immediately declined again in 2012 to 42 and continued to decline in 2013 and 2014, when the index was 18 and 9, respectively. A new all-time low was reached in 2015 with an index of 7. Eleven of the last 12 years have seen FMWT indexes that have been the lowest ever recorded, and the 2015–2016 results from all five of the surveys analyzed in this review have been the lowest ever recorded for the delta smelt.

The primary known threats cited in the 12-month finding to reclassify the delta smelt from threatened to endangered (75 FR 17667; April 7, 2010) are: Entrainment by State and Federal water export facilities; summer and fall increases in salinity due to reductions in freshwater flow and summer and fall increases in water clarity; and effects from introduced species, primarily the overbite clam and *Egeria densa.* Additional threats included predation, entrainment into power plants, contaminants, and the increased vulnerability to all these threats resulting from small population size. Since the 2010 warranted 12-month finding, we have identified climate change as a threat; climate change was not analyzed in the 2010 12-month finding. Since the 2010 12-month finding, one of the two power plants within the range of the delta smelt using water for cooling has shut down, and power plants are no longer thought to be a threat to the population as a whole. We have identified a number of existing regulatory mechanisms that provide protective measures that affect the stressors acting on the delta smelt. Despite these existing regulatory mechanisms and other conservations efforts, the decrease in population levels makes clear that the stressors continue to act on the species such that it is warranted for uplisting under the ESA.

We are unable to determine with certainty which threats or combinations of threats are directly responsible for the decrease in delta smelt abundance. However, the apparent low abundance of delta smelt in concert with ongoing threats throughout its range indicates that the delta smelt is now in danger of extinction throughout its range. The threats to the species are of a high magnitude, and imminent. Therefore, we retained an LPN of 2 for uplisting this species.

Sclerocactus brevispinus (Pariette cactus) (Region 6) (see 72 FR 53211, September 18, 2007, and the species assessment form (see **ADDRESSES**) for additional information on why reclassification to endangered is warranted but precluded)—Pariette cactus is restricted to clay badlands of the Uinta geologic formation in the Uinta Basin of northeastern Utah. The species is restricted to one population with an overall range of approximately 16 miles by 5 miles in extent. The species' entire population is within a developed and expanding oil and gas field. The location of the species' habitat exposes it to destruction from road, pipeline, and well-site construction in connection with oil and gas development. The species may be illegally collected as a specimen plant for horticultural use. Recreational off-road vehicle use and livestock trampling are additional threats. The species is currently federally listed as threatened (44 FR 58868, October 11, 1979; 74 FR 47112, September 15, 2009). The threats are of a high magnitude, because any one of the threats has the potential to severely affect the survival of this species, a narrow endemic with a highly limited range and distribution. Threats are ongoing and, therefore, are imminent. Thus, we assigned an LPN of 2 to this species for uplisting. However, higher-priority listing actions, including court-approved settlements, court-ordered and statutory deadlines for petition findings and listing determinations, emergency listing determinations, and responses to litigation, continue to preclude reclassifying the Pariette cactus. Furthermore, proposed rules to reclassify threatened species to endangered are generally a lower priority than listing currently unprotected species (*i.e.,* candidate species), as species currently listed as threatened are already afforded the protection of the ESA and the implementing regulations.

Current Notice of Review

We gather data on plants and animals native to the United States that appear to merit consideration for addition to the Lists of Endangered and Threatened Wildlife and Plants (Lists). This document identifies those species that we currently regard as candidates for addition to the Lists. These candidates include species and subspecies of fish, wildlife, or plants, and DPSs of vertebrate animals. This compilation relies on information from status surveys conducted for candidate assessment and on information from State Natural Heritage Programs, other State and Federal agencies, knowledgeable scientists, public and private natural resource interests, and comments received in response to previous notices of review.

Tables 1 and 2 list animals arranged alphabetically by common names under the major group headings, and list plants alphabetically by names of genera, species, and relevant subspecies and varieties. Animals are grouped by class or order. Plants are subdivided into two groups: (1) Flowering plants and (2) ferns and their allies. Useful synonyms and subgeneric scientific names appear in parentheses with the synonyms preceded by an ''equals'' sign. Several species that have not yet been formally described in the scientific literature are included; such species are identified by a generic or specific name (in italics), followed by ''sp.'' or ''ssp.'' We incorporate standardized common names in these notices as they become available. We sort plants by scientific name due to the inconsistencies in common names, the inclusion of vernacular and composite subspecific names, and the fact that many plants still lack a standardized common name.

Table 1 lists all candidate species, plus species currently proposed for listing under the ESA. We emphasize that in this notice we are not proposing to list any of the candidate species; rather, we will develop and publish proposed listing rules for these species in the future. We encourage State agencies, other Federal agencies, and other parties to give consideration to these species in environmental planning.

In Table 1, the ''category'' column on the left side of the table identifies the status of each species according to the following codes:

PE—Species proposed for listing as endangered. Proposed species are those species for which we have published a proposed rule to list as endangered or threatened in the **Federal Register**. This category does not include species for which we have withdrawn or finalized the proposed rule.

PT—Species proposed for listing as threatened.

PSAT—Species proposed for listing as threatened due to similarity of appearance.

C—Candidates: Species for which we have on file sufficient information on biological vulnerability and threats to support proposals to list them as endangered or threatened. Issuance of proposed rules for these species is precluded at present by other higher priority listing actions. This category includes species for which we made a 12-month warranted-but-precluded finding on a petition to list. We made new findings on all petitions for which we previously made ''warranted-but-precluded'' findings. We identify the species for which we made a continued warranted-but-precluded finding on a resubmitted petition by the code ''C*'' in the category column (see *Findings for Petitioned Candidate Species* for additional information).

The ''Priority'' column indicates the LPN for each candidate species, which we use to determine the most appropriate use of our available resources. The lowest numbers have the highest priority. We assign LPNs based on the immediacy and magnitude of threats, as well as on taxonomic status. We published a complete description of our listing priority system in the **Federal Register** (48 FR 43098, September 21, 1983).

The third column, ''Lead Region,'' identifies the Regional Office to which you should direct information, comments, or questions (see addresses under Request for Information at the end of the **SUPPLEMENTARY INFORMATION** section).

Following the scientific name (fourth column) and the family designation (fifth column) is the common name (sixth column). The seventh column provides the known historical range for the species or vertebrate population (for vertebrate populations, this is the historical range for the entire species or subspecies and not just the historical range for the distinct population segment), indicated by postal code abbreviations for States and U.S. territories. Many species no longer occur in all of the areas listed.

Species in Table 2 of this notice are those we included either as proposed species or as candidates in the previous CNOR (published December 24, 2015, at 80 FR 80584) that are no longer proposed species or candidates for listing. Since December 24, 2015, we listed 78 species, withdrew 1 species from proposed status, and removed 18 species from the candidate list. The first column indicates the present status of each species, using the following codes (not all of these codes may have been used in this CNOR):

E—Species we listed as endangered.

T—Species we listed as threatened.

Rc—Species we removed from the candidate list, because currently available information does not support a proposed listing.

Rp—Species we removed from the candidate list, because we have withdrawn the proposed listing.

The second column indicates why the species is no longer a candidate or proposed species, using the following codes (not all of these codes may have been used in this CNOR):

A—Species that are more abundant or widespread than previously believed and species that are not subject to the degree of threats sufficient that the species is a candidate for listing (for reasons other than that conservation efforts have removed or reduced the threats to the species).

F—Species whose range no longer includes a U.S. territory.

I—Species for which the best available information on biological vulnerability and threats is insufficient to support a conclusion that the species is an endangered species or a threatened species.

L—Species we added to the Lists of Endangered and Threatened Wildlife and Plants.

M—Species we mistakenly included as candidates or proposed species in the last notice of review.

N—Species that are not listable entities based on the ESA's definition of ''species'' and current taxonomic understanding.

U—Species that are not subject to the degree of threats sufficient to warrant issuance of a proposed listing and therefore are not candidates for listing, due, in part or totally, to conservation efforts that remove or reduce the threats to the species.

X—Species we believe to be extinct.

The columns describing lead region, scientific name, family, common name, and historical range include information as previously described for Table 1.

Request for Information

We request you submit any further information on the species named in this notice as soon as possible or whenever it becomes available. We are particularly interested in any information:

(1) Indicating that we should add a species to the list of candidate species;

(2) Indicating that we should remove a species from candidate status;

(3) Recommending areas that we should designate as critical habitat for a species, or indicating that designation of critical habitat would not be prudent for a species;

(4) Documenting threats to any of the included species;

(5) Describing the immediacy or magnitude of threats facing candidate species;

(6) Pointing out taxonomic or nomenclature changes for any of the species;

(7) Suggesting appropriate common names; and

(8) Noting any mistakes, such as errors in the indicated historical ranges.

Submit information, materials, or comments regarding a particular species to the Regional Director of the Region identified as having the lead responsibility for that species. The regional addresses follow:

Region 1. Hawaii, Idaho, Oregon, Washington, American Samoa, Guam, and Commonwealth of the Northern Mariana Islands. Regional Director (TE), U.S. Fish and Wildlife Service, Eastside Federal Complex, 911 NE. 11th Avenue, Portland, OR 97232–4181 (503/231–6158).

Region 2. Arizona, New Mexico, Oklahoma, and Texas. Regional Director (TE), U.S. Fish and Wildlife Service, 500 Gold Avenue SW., Room 4012, Albuquerque, NM 87102 (505/248–6920).

Region 3. Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. Regional Director (TE), U.S. Fish and Wildlife Service, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458 (612/713–5334).

Region 4. Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the U.S. Virgin Islands. Regional Director (TE), U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (404/679–4156).

Region 5. Connecticut, Delaware, District of Columbia, Maine,

Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. Regional Director (TE), U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035–9589 (413/253–8615).

Region 6. Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming. Regional Director (TE), U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225–0486 (303/236–7400).

Region 7. Alaska. Regional Director (TE), U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503–6199 (907/786–3505).

Region 8. California and Nevada. Regional Director (TE), U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W2606, Sacramento, CA 95825 (916/414–6464).

HQ (Foreign). Chief, Branch of Foreign Species, U.S. Fish and Wildlife Service Headquarters, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803 (703/358–2370).

We will provide information we receive to the Region having lead responsibility for each candidate species mentioned in the submission. We will likewise consider all information provided in response to this CNOR in deciding whether to propose species for listing and when to undertake necessary listing actions (including whether emergency listing under section 4(b)(7) of the ESA is appropriate). Information and comments we receive will become part of the administrative record for the species, which we maintain at the appropriate Regional Office.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your submission, be advised that your entire submission—including your personal identifying information—may be made publicly available at any time. Although you can ask us in your submission to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Authority

This notice is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 14, 2016.

Stephen Guertin,

Acting Director, Fish and Wildlife Service.

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

Status		Lead region	Scientific name	Family	Common name	Historical range
Category	Priority					
MAMMALS						
C*	6	R2	*Tamias minimus atristriatus.*	Sciuridae	Chipmunk, Peñasco least	U.S.A. (NM).
C*	3	R8	*Vulpes vulpes necator*	Canidae	Fox, Sierra Nevada red (Sierra Nevada DPS).	U.S.A. (CA, OR).
C*	9	R1	*Arborimus longicaudus*	Cricetidae	Vole, Red (north Oregon coast DPS).	U.S.A. (OR).
C*	9	R7	*Odobenus rosmarus divergens.*	Odobenidae	Walrus, Pacific	U.S.A. (AK), Russian Federation (Kamchatka and Chukotka).
PT	6	R6	*Gulo gulo luscus*	Mustelidae	Wolverine, North American (Contiguous U.S. DPS).	U.S.A. (CA, CO, ID, MT, OR, UT, WA, WY).
BIRDS						
PT		R1	*Drepanis coccinea*	Fringillidae	Iiwi (honeycreeper)	U.S.A. (HI).
C*	2	R2	*Amazona viridigenalis*	Psittacidae	Parrot, red-crowned	U.S.A. (TX), Mexico.
REPTILES						
PT	5	R4	*Pituophis ruthveni*	Colubridae	Snake, Louisiana pine	U.S.A. (LA, TX).
C*	8	R4	*Gopherus polyphemus*	Testudinidae	Tortoise, gopher (eastern population).	U.S.A. (AL, FL, GA, LA, MS, SC).
PE	6	R2	*Kinosternon sonoriense longifemorale.*	Kinosternidae	Turtle, Sonoyta mud	U.S.A. (AZ), Mexico.
AMPHIBIANS						
C*	8	R4	*Notophthalmus perstriatus.*	Salamandridae	Newt, striped	U.S.A. (FL, GA).
C*	8	R4	*Gyrinophilus gulolineatus*	Plethodontidae	Salamander, Berry Cave	U.S.A. (TN).
PE	2	R4	*Necturus alabamensis*	Proteidae	Waterdog, black warrior (= Sipsey Fork).	U.S.A. (AL).
FISHES						
PT	8	R2	*Gila nigra*	Cyprinidae	Chub, headwater	U.S.A. (AZ, NM).
PT	9	R2	*Gila robusta*	Cyprinidae	Chub, roundtail (Lower Colorado River Basin DPS).	U.S.A. (AZ, CO, NM, UT, WY).

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

Status		Lead region	Scientific name	Family	Common name	Historical range
Category	Priority					
PE	2	R5	*Crystallaria cincotta*	Percidae	Darter, diamond	U.S.A. (KY, OH, TN, WV).
PT	8	R4	*Percina aurora*	Percidae	Darter, Pearl	U.S.A. (LA, MS).
C*	3	R8	*Spirinchus thaleichthys*	Osmeridae	Smelt, longfin (San Francisco Bay–Delta DPS).	U.S.A. (AK, CA, OR, WA), Canada.
PSAT	N/A	R1	*Salvelinus malma*	Salmonidae	Trout, Dolly Varden	U.S.A. (AK, WA), Canada, East Asia.
CLAMS						
C*	2	R2	*Lampsilis bracteata*	Unionidae	Fatmucket, Texas	U.S.A. (TX).
C*	2	R2	*Truncilla macrodon*	Unionidae	Fawnsfoot, Texas	U.S.A. (TX).
PE	8	R2	*Popenaias popei*	Unionidae	Hornshell, Texas	U.S.A. (NM, TX), Mexico.
C*	8	R2	*Quadrula aurea*	Unionidae	Orb, golden	U.S.A. (TX).
C*	8	R2	*Quadrula houstonensis*	Unionidae	Pimpleback, smooth	U.S.A. (TX).
C*	2	R2	*Quadrula petrina*	Unionidae	Pimpleback, Texas	U.S.A. (TX).
SNAILS						
C*	2	R4	*Planorbella magnifica*	Planorbidae	Ramshorn, magnificent	U.S.A. (NC).
INSECTS						
PE		R3	*Bombus affinis*	Apidae	Bee, rusty patched bumble.	U.S.A. (CT, DE, DC, GA, IL, IN, IA, KY, ME, MD, MA, MI, MN, MO, NH, NJ, NY, NC, ND, OH, , PA, RI, SC, SD, TN, VT, VA, WV, WI, Canada (Ontario, Quebec).
C*	5	R8	*Lycaena hermes*	Lycaenidae	Butterfly, Hermes copper	U.S.A. (CA).
C*	3	R1	*Euchloe ausonides insulanus.*	Pieridae	Butterfly, Island marble	U.S.A. (WA).
C*	2	R4	*Atlantea tulita*	Nymphalidae	Butterfly, Puerto Rican harlequin.	U.S.A. (PR).
C*	8	R3	*Papaipema eryngii*	Noctuidae	Moth, rattlesnake-master borer.	U.S.A. (AR, IL, KY, NC, OK).
C*	5	R6	*Arsapnia (= Capnia) arapahoe.*	Capniidae	Snowfly, Arapahoe	U.S.A. (CO).
PT	5	R6	*Lednia tumana*	Nemouridae	Stonefly, meltwater lednian.	U.S.A. (MT).
PT		R6	*Zapada glacier*	Nemouridae	Stonefly, western glacier	U.S.A. (MT).
CRUSTACEANS						
PE	8	R5	*Stygobromus kenki*	Crangonyctidae	Amphipod, Kenk's	U.S.A. (DC).
FLOWERING PLANTS						
C*	8	R6	*Astragalus microcymbus*	Fabaceae	Milkvetch, skiff	U.S.A. (CO).
C*	8	R6	*Astragalus schmolliae*	Fabaceae	Milkvetch, Chapin Mesa	U.S.A. (CO).
C*	8	R6	*Boechera (= Arabis) pusilla.*	Brassicaceae	Rockcress, Fremont County or small.	U.S.A. (WY).
PT	12	R4	*Chamaesyce deltoidea pinetorum.*	Euphorbiaceae	Sandmat, pineland	U.S.A. (FL).
PT	6	R8	*Chorizanthe parryi* var. *fernandina.*	Polygonaceae	Spineflower, San Fernando Valley.	U.S.A. (CA).
C*	8	R2	*Cirsium wrightii*	Asteraceae	Thistle, Wright's	U.S.A. (AZ, NM), Mexico.
PT	3	R4	*Dalea carthagenensis* var. *floridana.*	Fabaceae	Prairie-clover, Florida	U.S.A. (FL).
PT	5	R4	*Digitaria pauciflora*	Poaceae	Crabgrass, Florida pineland.	U.S.A. (FL).
C*	8	R6	*Eriogonum soredium*	Polygonaceae	Buckwheat, Frisco	U.S.A. (UT).
PE	11	R2	*Festuca ligulata*	Poaceae	Fescue, Guadalupe	U.S.A. (TX), Mexico.
C*	8	R6	*Lepidium ostleri*	Brassicaceae	Peppergrass, Ostler's	U.S.A. (UT).
C*	8	R6	*Pinus albicaulis*	Pinaceae	Pine, whitebark	U.S.A. (CA, ID, MT, NV, OR, WA, WY), Canada (AB, BC).
PE	2	R1	*Sicyos macrophyllus*	Cucurbitaceae	Anunu	U.S.A. (HI).

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

Status		Lead region	Scientific name	Family	Common name	Historical range
Category	Priority					
PT	12	R4	*Sideroxylon reclinatum austrofloridense.*	Sapotaceae	Bully, Everglades	U.S.A. (FL).
C*	2	R4	*Solanum conocarpum*	Solanaceae	Bacora, marron	U.S.A. (PR).
C*	8	R2	*Streptanthus bracteatus*	Brassicaceae	Twistflower, bracted	U.S.A. (TX).
C*	8	R6	*Trifolium friscanum*	Fabaceae	Clover, Frisco	U.S.A. (UT).

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

Status		Lead region	Scientific name	Family	Common name	Historical range
Code	Expl.					
MAMMALS						
E	L	R1	*Emballonura semicaudata semicaudata.*	Emballonuridae	Bat, Pacific sheath-tailed (American Samoa DPS).	U.S.A. (AS), Fiji, Independent Samoa, Tonga, Vanuatu.
Rp	A	R8	*Martes pennanti*	Mustelidae	Fisher (west coast DPS)	U.S.A. (CA, CT, IA, ID, IL, IN, KY, MA, MD, ME, MI, MN, MT, ND, NH, NJ, NY, OH, OR, PA, RI, TN, UT, VA, VT, WA, WI, WV, WY), Canada.
Rc	U	R1	*Urocitellus washingtoni*	Sciuridae	Squirrel, Washington ground.	U.S.A. (WA, OR).
BIRDS						
Rc	A	R1	*Porzana tabuensis*	Rallidae	Crake, spotless (American Samoa DPS).	U.S.A. (AS), Australia, Fiji, Independent Samoa, Marquesas, Philippines, Society Islands, Tonga.
E	L	R1	*Gallicolumba stairi*	Columbidae	Ground-dove, friendly (American Samoa DPS).	U.S.A. (AS), Independent Samoa.
E	L	R1	*Oceanodroma castro*	Hydrobatidae	Storm-petrel, band-rumped (Hawaii DPS).	U.S.A. (HI), Atlantic Ocean, Ecuador (Galapagos Islands), Japan.
E	L	R1	*Gymnomyza samoensis*	Meliphagidae	Ma'oma'o	U.S.A. (AS), Independent Samoa.
Rc	U	R8	*Synthliboramphus hypoleucus.*	Alcidae	Murrelet, Xantus's	U.S.A. (CA), Mexico.
Rc	A	R6	*Anthus spragueii*	Motacillidae	Pipit, Sprague's	U.S.A. (AR, AZ, CO, KS, LA, MN, MS, MT, ND, NE, NM, OK, SD, TX), Canada, Mexico.
T	L	R4	*Dendroica angelae*	Emberizidae	Warbler, elfin-woods	U.S.A. (PR).
REPTILES						
PT	8	R3	*Sistrurus catenatus*	Viperidae	Massasauga (= rattlesnake), eastern.	U.S.A. (IA, IL, IN, MI, MN, MO, NY, OH, PA, WI), Canada.
T	L	R1	*Chelonia mydas*	Cheloniidae	Sea turtle, green (Central North Pacific DPS).	Central North Pacific Ocean.
E	L	R1	*Chelonia mydas*	Cheloniidae	Sea turtle, green (Central South Pacific DPS).	Central South Pacific Ocean.
E	L	R1	*Chelonia mydas*	Cheloniidae	Sea turtle, green (Central West Pacific DPS).	Central West Pacific Ocean.
T	L	HQ (Foreign)	*Chelonia mydas*	Cheloniidae	Sea turtle, green (East Indian-West Pacific DPS).	Eastern Indian and Western Pacific Oceans.
T	L	R8	*Chelonia mydas*	Cheloniidae	Sea turtle, green (East Pacific DPS).	East Pacific Ocean.
E	L	HQ (Foreign)	*Chelonia mydas*	Cheloniidae	Sea turtle, green (Mediterranean DPS).	Mediterranean Sea.

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

Status		Lead region	Scientific name	Family	Common name	Historical range
Code	Expl.					
T	L	R4	*Chelonia mydas*	Cheloniidae	Sea turtle, green (North Atlantic DPS).	North Atlantic Ocean.
T	L	HQ (Foreign)	*Chelonia mydas*	Cheloniidae	Sea turtle, green (North Indian DPS).	North Indian Ocean.
T	L	R4	*Chelonia mydas*	Cheloniidae	Sea turtle, green (South Atlantic DPS).	South Atlantic Ocean.
T	L	HQ (Foreign)	*Chelonia mydas*	Cheloniidae	Sea turtle, green (Southwest Indian DPS).	Southwest Indian Ocean.
T	L	HQ (Foreign)	*Chelonia mydas*	Cheloniidae	Sea turtle, green (Southwest Pacific DPS).	Southwest Pacific Ocean.
AMPHIBIANS						
Rc	U	R8	*Lithobates onca*	Ranidae	Frog, relict leopard	U.S.A. (AZ, NV, UT).
Rc	N	R2	*Hyla wrightorum*	Hylidae	Treefrog, Arizona (Huachuca/Canelo DPS).	U.S.A. (AZ), Mexico (Sonora).
FISHES						
Rc	A	R6	*Etheostoma cragini*	Percidae	Darter, Arkansas	U.S.A. (AR, CO, KS, MO, OK).
T	L	R4	*Etheostoma spilotum*	Percidae	Darter, Kentucky arrow	U.S.A. (KY).
Rc	U	R4	*Moxostoma* sp.	Catostomidae	Redhorse, sicklefin	U.S.A. (GA, NC, TN).
CLAMS						
T	L	R4	*Medionidus walkeri*	Unionidae	Moccasinshell, Suwannee	U.S.A. (FL, GA).
SNAILS						
Rc	N	R4	*Elimia melanoides*	Pleuroceridae	Mudalia, black	U.S.A. (AL).
E	L	R1	*Eua zebrina*	Partulidae	Snail, no common name	U.S.A. (AS).
E	L	R1	*Ostodes strigatus*	Potaridae	Snail, no common name	U.S.A. (AS).
Rc	A	R2	*Pyrgulopsis thompsoni*	Hydrobiidae	Springsnail, Huachuca	U.S.A. (AZ), Mexico.
INSECTS						
E	L	R1	*Hylaeus anthracinus*	Colletidae	Bee, Hawaiian yellow-faced.	U.S.A. (HI).
E	L	R1	*Hylaeus assimulans*	Colletidae	Bee, Hawaiian yellow-faced.	U.S.A. (HI).
E	L	R1	*Hylaeus facilis*	Colletidae	Bee, Hawaiian yellow-faced.	U.S.A. (HI).
E	L	R1	*Hylaeus hilaris*	Colletidae	Bee, Hawaiian yellow-faced.	U.S.A. (HI).
E	L	R1	*Hylaeus kuakea*	Colletidae	Bee, Hawaiian yellow-faced.	U.S.A. (HI).
E	L	R1	*Hylaeus longiceps*	Colletidae	Bee, Hawaiian yellow-faced.	U.S.A. (HI).
E	L	R1	*Hylaeus mana*	Colletidae	Bee, Hawaiian yellow-faced.	U.S.A. (HI).
Rc	A	R4	*Pseudanophthalmus caecus.*	Carabidae	Cave beetle, Clifton	U.S.A. (KY).
Rc	A	R4	*Pseudanophthalmus frigidus.*	Carabidae	Cave beetle, icebox	U.S.A. (KY).
Rc	A	R4	*Pseudanophthalmus troglodytes.*	Carabidae	Cave beetle, Louisville	U.S.A. (KY).
Rc	X	R4	*Pseudanophthalmus parvus.*	Carabidae	Cave beetle, Tatum	U.S.A. (KY).
E	L	R1	*Megalagrion xanthomelas*	Coenagrionidae	Damselfly, orangeblack Hawaiian.	U.S.A. (HI).
Rc	X	R2	*Heterelmis stephani*	Elmidae	Riffle beetle, Stephan's	U.S.A. (AZ).
Rc	A	R4	*Cicindela highlandensis*	Cicindelidae	Tiger beetle, highlands	U.S.A. (FL).
E	L	R4	*Cicindelidia floridana*	Cicindelidae	Tiger beetle, Miami	U.S.A. (FL).
CRUSTACEANS						
T	L	R5	*Cambarus callainus*	Cambaridae	Crayfish, Big Sandy	U.S.A. (KY, VA, WV).

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

Status		Lead region	Scientific name	Family	Common name	Historical range
Code	Expl.					
E	L	R5	*Cambarus veteranus*	Cambaridae	Crayfish, Guyandotte River.	U.S.A. (WV).
E	L	R1	*Procaris hawaiana*	Procarididae	Shrimp, anchialine pool	U.S.A. (HI).
FLOWERING PLANTS						
T	L	R4	*Argythamnia blodgettii*	Euphorbiaceae	Silverbush, Blodgett's	U.S.A. (FL).
Rc	A	R1	*Artemisia borealis* var. *wormskioldii.*	Asteraceae	Wormwood, northern	U.S.A. (OR, WA).
E	L	R1	*Calamagrostis expansa*	Poaceae	Reedgrass, Maui	U.S.A. (HI).
E	L	R4	*Chamaecrista lineata* var. *keyensis.*	Fabaceae	Pea, Big Pine partridge	U.S.A. (FL).
E	L	R4	*Chamaesyce deltoidea serpyllum.*	Euphorbiaceae	Spurge, wedge	U.S.A. (FL).
E	L	R1	*Cyanea kauaulaensis*	Campanulaceae	No common name	U.S.A. (HI).
E	L	R1	*Cyperus neokunthianus*	Cyperaceae	No common name	U.S.A. (HI).
E	L	R1	*Cyrtandra hematos*	Gesneriaceae	Haiwale	U.S.A. (HI).
Rc	N	R5	*Dichanthelium hirstii*	Poaceae	Panic grass, Hirst Brothers'.	U.S.A. (DE, GA, NC, NJ).
E	L	R1	*Exocarpos menziesii*	Santalaceae	Heau	U.S.A. (HI).
E	L	R1	*Festuca hawaiiensis*	Poaceae	No common name	U.S.A. (HI).
E	L	R1	*Gardenia remyi*	Rubiaceae	Nanu	U.S.A. (HI).
E	L	R1	*Joinvillea ascendens ascendens.*	Joinvilleaceae	Ohe	U.S.A. (HI).
E	L	R1	*Kadua (= Hedyotis) fluviatilis.*	Rubiaceae	Kampuaa	U.S.A. (HI).
E	L	R1	*Kadua haupuensis*	Rubiaceae	No common name	U.S.A. (HI).
E	L	R1	*Labordia lorenciana*	Loganiaceae	No common name	U.S.A. (HI).
E	L	R1	*Lepidium orbiculare*	Brassicaceae	Anaunau	U.S.A. (HI).
T	L	R1	*Lepidium papilliferum*	Brassicaceae	Peppergrass, slickspot	U.S.A. (ID).
E	L	R4	*Linum arenicola*	Linaceae	Flax, sand	U.S.A. (FL).
E	L	R1	*Myrsine fosbergii*	Myrsinaceae	Kolea	U.S.A. (HI).
E	L	R1	*Nothocestrum latifolium*	Solanaceae	Aiea	U.S.A. (HI).
E	L	R1	*Ochrosia haleakalae*	Apocynaceae	Holei	U.S.A. (HI).
E	L	R1	*Phyllostegia brevidens*	Lamiaceae	No common name	U.S.A. (HI).
E	L	R1	*Phyllostegia helleri*	Lamiaceae	No common name	U.S.A. (HI).
E	L	R1	*Phyllostegia stachyoides*	Lamiaceae	No common name	U.S.A. (HI).
T	L	R4	*Platanthera integrilabia*	Orchidaceae	Orchid, white fringeless	U.S.A. (AL, GA, KY, MS, NC, SC, TN, VA).
E	L	R1	*Portulaca villosa*	Portulacaceae	Ihi	U.S.A. (HI).
E	L	R1	*Pritchardia bakeri*	Arecaceae	Loulu (= Loulu lelo)	U.S.A. (HI).
E	L	R1	*Pseudognaphalium (= Gnaphalium) sandwicensium* var. *molokaiense.*	Asteraceae	Enaena	U.S.A. (HI).
E	L	R1	*Ranunculus hawaiensis*	Ranunculaceae	Makou	U.S.A. (HI).
E	L	R1	*Ranunculus mauiensis*	Ranunculaceae	Makou	U.S.A. (HI).
E	L	R1	*Sanicula sandwicensis*	Apiaceae	No common name	U.S.A. (HI).
E	L	R1	*Santalum involutum*	Santalaceae	Iliahi	U.S.A. (HI).
E	L	R1	*Schiedea diffusa* ssp. *diffusa.*	Caryophyllaceae	No common name	U.S.A. (HI).
E	L	R1	*Schiedea pubescens*	Caryophyllaceae	Maolioli	U.S.A. (HI).
E	L	R1	*Sicyos lanceoloideus*	Cucurbitaceae	Anunu	U.S.A. (HI).
E	L	R1	*Solanum nelsonii*	Solanaceae	Popolo	U.S.A. (HI).
E	L	R1	*Stenogyne kaalae* ssp. *sherffii.*	Lamiaceae	No common name	U.S.A. (HI).
E	L	R1	*Wikstroemia skottsbergiana.*	Thymelaceae	Akia	U.S.A. (HI).
FERNS AND ALLIES						
E	L	R1	*Asplenium diellaciniatum*	Aspleniaceae	No common name	U.S.A. (HI).
E	L	R1	*Cyclosorus boydiae*	Thelypteridaceae	Kupukupu makalii	U.S.A. (HI).
E	L	R1	*Deparia kaalaana*	Athyraceae	No common name	U.S.A. (HI).
E	L	R1	*Dryopteris glabra* var. *pusilla.*	Dryopteridaceae	Hohiu	U.S.A. (HI).
E	L	R1	*Huperzia (= Phlegmariurus) stemmermanniae.*	Lycopodiaceae	No common name	U.S.A. (HI).

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

Status		Lead region	Scientific name	Family	Common name	Historical range
Code	Expl.					
E	L	R1	*Hypolepis hawaiiensis* var. *mauiensis*.	Dennstaedtiaceae	Olua	U.S.A. (HI).
E	L	R1	*Microlepia strigosa* var. *mauiensis (= Microlepia mauiensis)*.	Dennstaedtiaceae	No common name	U.S.A. (HI).

[FR Doc. 2016–28817 Filed 12–1–16; 8:45 am]

BILLING CODE 4333–15–P

FEDERAL REGISTER

Vol. 81 Friday,

No. 232 December 2, 2016

Part IV

Federal Communications Commission

47 CFR Part 64

Protecting the Privacy of Customers of Broadband and Other Telecommunications Services; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 16–106; FCC 16–148]

Protecting the Privacy of Customers of Broadband and Other Telecommunications Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts final rules based on public comments applying the privacy requirements of the Communications Act of 1934, as amended, to broadband Internet access service (BIAS) and other telecommunications services. In adopting these rules the Commission implements the statutory requirement that telecommunications carriers protect the confidentiality of customer proprietary information. The privacy framework in these rules focuses on transparency, choice, and data security, and provides heightened protection for sensitive customer information, consistent with customer expectations. The rules require carriers to provide privacy notices that clearly and accurately inform customers; obtain opt-in or opt-out customer approval to use and share sensitive or non-sensitive customer proprietary information, respectively; take reasonable measures to secure customer proprietary information; provide notification to customers, the Commission, and law enforcement in the event of data breaches that could result in harm; not condition provision of service on the surrender of privacy rights; and provide heightened notice and obtain affirmative consent when offering financial incentives in exchange for the right to use a customer's confidential information. The Commission also revises its current telecommunications privacy rules to harmonize today's privacy rules for all telecommunications carriers, and provides a tailored exemption from these rules for enterprise customers of telecommunications services other than BIAS.

DATES: Effective January 3, 2017, except for §§ 64.2003, 64.2004, 64.2006, and 64.2011(b) which contain information collection requirements that have not yet been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date of these rules upon approval. Section 64.2005 is effective March 2, 2017.

FOR FURTHER INFORMATION CONTACT: For further information about this proceeding, please contact Sherwin Siy, FCC Wireline Competition Bureau, Competition Policy Division, Room 5–C225, 445 12th St. SW., Washington, DC 20554, (202) 418–2783, *sherwin.siy@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order in WC Docket No. 16–106, FCC 16–148, adopted October 27, 2016 and released November 2, 2016. The full text of this document is available for public inspection during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington DC 20554. It is available on the Commission's Web site at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-148A1.pdf.* The Commission will send a copy of this 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).

Synopsis

I. Introduction

1. In this Report and Order (Order), we apply the privacy requirements of the Communications Act of 1934, as amended (the Act) to the most significant communications technology of today—broadband Internet access service (BIAS). Privacy rights are fundamental because they protect important personal interests—freedom from identity theft, financial loss, or other economic harms, as well as concerns that intimate, personal details could become the grist for the mills of public embarrassment or harassment or the basis for opaque, but harmful judgments, including discrimination. In adopting section 222 of the Communications Act, Congress recognized the importance of protecting the privacy of customers using telecommunications networks. Section 222 requires telecommunications carriers to protect the confidentiality of customer proprietary information. By reclassifying BIAS as telecommunications service, we have an obligation to make certain that BIAS providers are protecting their customers' privacy while encouraging the technological and business innovation that help drive the many benefits of our increasingly Internet-based economy.

2. Internet access is a critical tool for consumers—it expands our access to vast amounts of information and countless new services. It allows us to seek jobs and expand our career horizons; find and take advantage of educational opportunities; communicate with our health care providers; engage with our government; create and deepen our ties with family, friends and communities; participate in online commerce; and otherwise receive the benefits of being digital citizens. Broadband providers provide the ''on ramp'' to the Internet. These providers therefore have access to vast amounts of information about their customers including when we are online, where we are physically located when we are online, how long we stay online, what devices we use to access the Internet, what Web sites we visit, and what applications we use.

3. Without appropriate privacy protections, use or disclosure of information that our broadband providers collect about us would be at odds with our privacy interests. Through this Order, we therefore adopt rules that give broadband customers the tools they need to make informed choices about the use and sharing of their confidential information by their broadband providers, and we adopt clear, flexible, and enforceable data security and data breach notification requirements. We also revise our existing rules to provide harmonized privacy protections for voice and broadband customers—bringing privacy protections for voice telephony and other telecommunications services into the modern framework we adopt today.

4. In response to the Notice of Proposed Rulemaking (*NPRM),* we received more than 275,000 submissions in the record of this proceeding, including comments, reply comments, and *ex parte* communications from consumers; broadband and voice providers and their associations; public interest groups; academics; federal, state, and local governmental entities; and others. We have listened and learned from the record. In adopting final rules, we rely on that record and in particular we look to the privacy and data security work done by the Federal Trade Commission (FTC), as well as our own work adopting and revising rules under section 222. We have also taken into account the concepts that animate the Administration's Consumer Privacy Bill of Rights (CPBR), and existing privacy and data security best practices.

5. The privacy framework we adopt today focuses on transparency, choice,

and data security, and provides heightened protection for sensitive customer information, consistent with customer expectations. In adopting these rules we honor customer's privacy rights and implement the statutory requirement that carriers protect the confidentiality of customer proprietary information. These rules do not prohibit broadband providers from using or sharing customer information, but rather are designed to protect consumer choice while giving broadband providers the flexibility they need to continue to innovate. By bolstering customer confidence in broadband providers' treatment of confidential customer information, we also promote the virtuous cycle of innovation in which new uses of the network lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses, business growth, and innovation.

II. Executive Summary

6. Today we adopt rules protecting the privacy of broadband customers. We also revise our current rules to harmonize our rules for all telecommunications carriers. In this Order, we first offer some background, explaining the need for these rules, and then discuss the scope of the rules we adopt. In discussing the scope of the rules, we define ''telecommunications carriers'' that are subject to our rules and the ''customers'' those rules are designed to protect. We also define the information protected under section 222 as customer proprietary information (customer PI). We include within the definition of customer PI three types of information collected by telecommunications carriers through their provision of broadband or other telecommunications services that are not mutually exclusive: (i) Individually identifiable Customer Proprietary Network Information (CPNI) as defined in section 222(h); (ii) personally identifiable information (PII); and (iii) content of communications. We also adopt and explain our multi-part approach to determining whether data has been properly de-identified and is therefore not subject to the customer choice regime we adopt for customer PI.

7. We next adopt rules protecting consumer privacy using the three foundations of privacy—transparency, choice, and security:

8. *Transparency.* Recognizing the fundamental importance of transparency to enable consumers to make informed purchasing decisions, we require carriers to provide privacy notices that clearly and accurately inform customers about what confidential information the carriers collect, how they use it, under what circumstances they share it, and the categories of entities with which they will share it. We also require that carriers inform their customers about customers' rights to opt in to or opt out (as the case may be) of the use or sharing of their confidential information. We require that carriers present their privacy notice to customers at the point of sale, and that they make their privacy policies persistently available and easily accessible on their Web sites, applications, and the functional equivalents thereof. Finally, consistent with FTC best practices and with the requirements in the CPBR, we require carriers to give their customers advance notice of material changes to their privacy policies.

9. *Choice.* We find that because broadband providers are able to view vast swathes of customer data, customers must be empowered to decide how broadband providers may use and share their data. In this section, we adopt rules that give customers of BIAS and other telecommunications services the tools they need to make choices about the use and sharing of customer PI, and to easily adjust those choices over the course of time. Section 222 addresses the conditions under which carriers may ''use, disclose, or permit access to'' customer information. For simplicity throughout this document we sometimes use the terms ''disclose'' or ''share'' in place of ''disclose or permit access to.'' In adopting rules governing customer choice, we look to the best practices framework recommended by the FTC in its 2012 Privacy Report as well as the choice framework in the Administration's CPBR and adopt a framework that provides heightened protections for sensitive customer information. For purposes of the sensitivity-based customer choice framework we adopt today, we find that sensitive customer PI includes financial information, health information, Social Security numbers, precise geo-location information, information pertaining to children, content of communications, web browsing history, application usage history, and the functional equivalents of web browsing history or application usage history. With respect to voice services, we also find that call detail information is sensitive information. We also adopt a tiered approach to choice, by reference to consumer expectations and context that recognizes three categories of approval with respect to use of customer PI obtained by virtue of providing the telecommunications service:

- *Opt-in Approval.* We adopt rules requiring carriers to obtain customers' opt-in approval for use and sharing of sensitive customer PI (and for material retroactive changes to carriers' privacy policies). A familiar example of opt-in practices appears when a mobile application asks for permission to use geo-location information.
- *Opt-out Approval.* Balancing important governmental interests in protecting consumer privacy and the potential benefits that may result from the use of non-sensitive customer PI, we adopt rules requiring carriers to obtain customers' opt-out approval for the use and sharing of non-sensitive customer PI.
- *Congressionally-Recognized Exceptions to Customer Approval Requirements.* Consistent with the statute, we adopt rules that always allow broadband providers to use and share customer data in order to provide broadband services (for example to ensure that a communication destined for a particular person reaches that destination), and for certain other purposes.

10. *Data Security and Breach Notification.* At its most fundamental, the duty to protect the confidentiality of customer PI requires telecommunications carriers to protect the customer PI they collect and maintain. We encourage all carriers to consider data minimization strategies and to embrace the principle of privacy by design. To the extent carriers collect and maintain customer PI, we require BIAS providers and other telecommunications carriers to take reasonable measures to secure customer PI. To comply with this requirement, a carrier must adopt security practices appropriately calibrated to the nature and scope of its activities, the sensitivity of the underlying data, the size of the provider, and technical feasibility. We decline to mandate specific activities that carriers must undertake in order to meet the reasonable data security requirement. We do, however, offer guidance on the types of data security practices we recommend providers strongly consider as they seek to comply with our data security requirement, while recognizing that what constitutes ''reasonable'' data security evolves over time.

11. We also adopt data breach notification requirements. In order to ensure that affected customers and the appropriate federal agencies receive notice of data breaches that could result in harm, we adopt rules requiring BIAS

providers and other telecommunications carriers to notify affected customers, the Commission, and the FBI and Secret Service unless the carrier is able to reasonably determine that a data breach poses no reasonable risk of harm to the affected customers. In the interest of expedient law enforcement response, such notice must be provided to the Commission, the FBI, and Secret Service within seven business days of when a carrier reasonably determines that a breach has occurred if the breach impacts 5,000 or more customers; and must be provided to the applicable federal agencies at least three days before notice to customers. For breaches affecting fewer than 5,000 customers, carriers must notify the Commission without unreasonable delay and no later than thirty (30) calendar days following the carrier's reasonable determination that a breach has occurred. In order to allow carriers more time to determine the specifics of a data breach, carriers must provide notice to affected customers without unreasonable delay, but within no more than 30 days.

12. *Particular Practices that Raise Privacy Concerns.* Next, we find that take-it-or-leave-it offerings of broadband service contingent on surrendering privacy rights are contrary to the requirements of sections 222 and 201 of the Act, and therefore prohibit that practice. We also adopt heightened disclosure and affirmative consent requirements for BIAS providers that offer customers financial incentives, such as lower monthly rates, in exchange for the right to use the customers' confidential information. Because the record contains very little about financial incentive practices of voice providers, this section of the Order is limited to BIAS providers.

13. Next we address several other issues raised in our rulemaking, including dispute resolution; the request for an exemption for enterprise customers of telecommunications services other than BIAS; federal preemption; and the timeline for implementation.

14. *Dispute Resolution.* We reaffirm customers' right to use the Commission's existing dispute resolution procedures and commit to initiating a rulemaking on the use of mandatory arbitration requirements in consumer contracts for broadband and other communications services, acting on a notice of proposed rulemaking in February 2017.

15. *Exemption for Enterprise Customers of Telecommunications Services other than BIAS.* Recognizing that enterprise customers of telecommunications services other than BIAS have different privacy concerns and the capacity to protect their own interests, we find that a carrier that contracts with an enterprise customer for telecommunications services other than BIAS need not comply with the privacy and data security rules we adopt today if the carrier's contract with that customer specifically addresses the issues of transparency, choice, data security, and data breach and provides a mechanism for the customer to communicate with the carrier about privacy and data security concerns. As with the existing, more limited business customer exemption from our existing authentication rules, carriers will continue to be subject to the statutory requirements of section 222 even where this exemption applies.

16. *Preemption.* In this section, we adopt the proposal in the *NPRM* and announce our intent to continue to preempt state privacy laws, including data security and data breach laws, *only* to the extent that they are inconsistent with any rules adopted by the Commission. This limited application of our preemption authority is consistent with our precedent in this area and with our long appreciation for the valuable role the states play in protecting consumer privacy.

17. *Implementation Timeline.* The Order provides a timeline for orderly transition to the new rules with additional time given for small carriers to the extent that they may need to change their practices.

18. *Legal Authority.* Finally, the Order closes by discussing our legal authority to adopt the rules.

III. Establishing Baseline Privacy Protections for Customers of Telecommunications Services

19. In this section, we adopt a set of rules designed to protect the privacy of customers of BIAS and other telecommunications services. The rules we adopt today find broad support in the record, and are consistent with and build on existing regulatory and stakeholder-driven frameworks, including the Commission's prior decisions and existing section 222 rules, other federal privacy laws, state privacy laws, and recognized best practices. The framework for our baseline privacy protections focuses on providing transparency of carriers' privacy practices; ensuring customers have meaningful choice about the use and disclosure of their private information; and requiring carriers to adopt robust data security practices for customer information. In this section, we explain the rules we adopt to protect the privacy of customers of BIAS and other telecommunications services.

A. Background and Need for the Rules

20. The Commission has a long history of protecting customer privacy in the telecommunications sector. Section 705 of the Communications Act, for example, is one of the most fundamental and oldest sector-specific privacy requirements, and protects the privacy of information carried by communications service providers. As early as the 1960s the Commission began to wrestle with the privacy implications of the use of communications networks to provide shared access to computers and the sensitive, personal data they often contained. Throughout the 1980s and 1990s, the Commission imposed limitations on incumbent telephone companies' use and sharing of customer information.

21. Then, in 1996, Congress enacted Section 222 of the Communications Act providing statutory protections to the privacy of the data that all telecommunications carriers collect from their customers. Congress recognized that telecommunications networks have the ability to collect information from consumers who are merely using networks as conduits to move information from one place to another ''without change in the form or content'' of the communications. Specifically, Congress sought to ensure ''(1) the right of consumers to know the specific information that is being collected about them; (2) the right of consumers to have proper notice that such information is being used for other purposes; and (3) the right of consumers to stop the reuse or sale of that information.''

22. Section 222(a) imposes a duty on all telecommunications carriers to protect the confidentiality of their customers' ''proprietary information,'' or PI. Section 222(c) imposes restrictions on telecommunications carriers' use and sharing of customer proprietary network information (CPNI) without customer approval, subject to certain exceptions including as necessary to provide the telecommunications service (or services necessary to or used in providing that telecommunications service), and as otherwise provided for by law. While we recognize, applaud, and encourage existing and continued marketplace self-regulation and privacy innovations, Congress has made clear that telecommunications carriers' privacy practices must comply with the obligations imposed by section 222. We

therefore reject arguments that we rely entirely on self-regulatory mechanisms.

23. Over the last two decades, the Commission has promulgated, revised, and enforced privacy rules for telecommunications carriers that are focused on implementing the CPNI requirements of Section 222. As practices have changed, the Commission has refined its section 222 rules. For example, after the emergence and growth of an industry made possible by ''pretexting''—the practice of improperly accessing and selling details of residential telephone calls—the Commission strengthened its section 222 rules to add customer authentication and data breach notification requirements. The current section 222 rules focus on transparency, choice, data security, and data breach notification.

24. Meanwhile, as consumer use of the Internet exploded, the FTC, using its authority under section 5 of the FTC Act to prohibit ''unfair or deceptive acts or practices in or affecting commerce,'' has entered into a series of precedent-setting consent orders addressing privacy practices on the Internet, held workshops and conferences, and issued influential reports about privacy. Taken together, the FTC's privacy work has focused on the importance of transparency; honoring consumers' expectations about the use of their personal information and the choices they have made about sharing that information; and the obligation of companies that collect personal information to adopt reasonable data security practices. Because common carriers subject to the Communications Act are exempt from the FTC's section 5 authority, the responsibility falls to this Commission to oversee their privacy practices consistent with the Communications Act.

25. Last year the Administration proposed a Consumer Privacy Bill of Rights. The goal of the CPBR is to ''establish baseline protections for individual privacy in the commercial arena and to foster timely, flexible implementations of these protections through enforceable codes of conduct developed by diverse stakeholders.'' It recognizes that Americans ''cherish privacy as an element of their individual freedom,'' and that ''[p]reserving individuals' trust and confidence that personal data will be protected appropriately, while supporting flexibility and the free flow of information, will promote continued innovation and economic growth in the networked economy.''

26. Prior to 2015, BIAS was classified as an information service, which excluded such services from the ambit of Title II of the Act, including section 222, and the Commission's CPNI rules. Instead, broadband providers were subject to the FTC's unfair and deceptive acts and practices authority. In the *2015 Open Internet Order,* we reclassified BIAS as a telecommunications service subject to Title II of the Act, an action upheld by the D.C. Circuit in *United States Telecom Ass'n* v. *FCC.* While we granted BIAS forbearance from many Title II provisions, we concluded that application and enforcement of the privacy protections in section 222 to BIAS is in the public interest and necessary for the protection of consumers. However, we questioned whether ''the Commission's current rules implementing section 222 necessarily would be well suited to broadband Internet access service,'' and forbore from the application of these rules to broadband service, ''pending the adoption of rules to govern broadband Internet access service in a separate rulemaking proceeding.''

27. In March 2016, we adopted the *Broadband Privacy NPRM,* which proposed a framework for applying the longstanding privacy requirements of the Act to BIAS. In the *NPRM,* we proposed rules protecting customer privacy using the three foundations of privacy—transparency, choice, and security—and also sought comment on, among other things, whether we should update rules that govern the application of section 222 to traditional telephone service and interconnected VoIP service in order to harmonize them with the results of this proceeding.

28. A number of broadband providers, their associations, as well as some other commenters argue that because broadband providers are part of a larger online eco-system that includes edge providers, they should not be subject to a different set of regulations. These arguments ignore the particular role of network providers and the context of the consumer/BIAS provider relationship, and the sector specific privacy statute that governs the use and sharing of information by providers of telecommunications services. Based on our review of the record, we reaffirm our earlier finding that a broadband provider ''sits at a privileged place in the network, the bottleneck between the customer and the rest of the Internet''—a position that we have referred to as a gatekeeper. As such, BIAS providers can collect ''an unprecedented breadth'' of electronic personal information.

29. We disagree with commenters that argue that BIAS providers' insight into customer online activity is no greater than large edge providers because customers' Internet activity is ''fractured'' between devices, multiple Wi-Fi hotspots, and different providers at home and at work. As commenters have explained, ''customers who hop between ISPs on a daily basis often connect to the same networks routinely,'' and as such, over time, ''each ISP can see a substantial amount of that user's Internet traffic.''

30. While we recognize that there are other participants in the Internet ecosystem that can also see and collect consumer data, the record is clear that BIAS providers' gatekeeper position allows them to see every packet that a consumer sends and receives over the Internet while on the network, including, absent encryption, its contents. By contrast, edge providers only see a slice of any given consumers Internet traffic. As explained in the record, edge providers' visibility into consumers' web browsing activity is necessarily limited. According to the record, only three companies (Google, Facebook, and Twitter) have third party tracking capabilities across more than 10 percent of the top one million Web sites, and none of those have access to more than approximately 25 percent of Web pages. By ''third party tracking capability,'' we mean any method by which one party injects a tracking mechanism into a customer's traffic in order to monitor the customer's activity when the customer interacts with other parties. Cookies are a common third party tracker, but there are many other methods. In contrast, a BIAS provider sees 100 percent of a customer's unencrypted Internet traffic.

31. At the same time, users have much more control over tracking by web third parties than over tracking by BIAS providers. A range of browser extensions are largely effective at blocking prominent third parties, ''but these tools do nothing to stop data collection on the wire.'' Further, Professor Nick Feamster explains that unlike other Internet participants that see Domain Name System (DNS) lookups only to their own domains (*e.g., google.com, facebook.com, netflix.com*), BIAS providers can see DNS lookups every time a customer uses the service to go to a new site.

32. Return Path explains additional unique data to which only BIAS providers have access:

> Many BIAS customers are assigned a dynamic ('changing') IP address when they connect to their provider. In these cases, each time a consumer's computer (or router) is rebooted, the ISP dynamically assigns a new IP address to the networking device. While the BIAS provider will have a record of

precisely which user was connected to an IP address at a specific point in time, any third party will not, unless they subpoena the BIAS provider for data.

Furthermore, as Mozilla explains, ''[b]ecause these are paid services, [the broadband provider has] the subscriber's name, address, phone number and billing history. The combination gives ISPs a very unique, detailed and comprehensive view of their users that can be used to profile them in ways that are commercially lucrative.''

33. We agree with commenters that point out that encryption can significantly help protect the privacy of consumer content from BIAS providers. However, even with encryption, by virtue of providing BIAS, BIAS providers maintain access to a significant amount of private information about their customers' online activity, including what Web sites a customer has visited, how long and during what hours of the day the customer visited various Web sites, the customer's location, and what mobile device the customer used to access those Web sites. Moreover, research shows that encrypted web traffic can be used to infer the pages within an encrypted site that a customer visits, and that the amount of data transmitted over encrypted connections can also be used to infer the pages a customer visits.

34. The record also indicates that truly pervasive encryption on the Internet is still a long way off, and that many sites still do not encrypt. We observe that several commenters rely on projections that 70 percent of Internet traffic will be encrypted by the end of 2016. However, a significant amount of this encrypted data is video traffic from Netflix, which, according to commenters, accounts for 35 percent of North American Internet traffic. Moreover, ''raw packets make for a misleading metric.'' As further explained by one commenter ''watching the full Ultra HD stream of The *Amazing Spider-Man* could generate more than 40GB of traffic, while retrieving the WebMD page for 'pancreatic cancer' generates less than 2MB.'' What's more, research shows that approximately 84 percent of health Web sites, 86 percent of shopping Web sites, and 97 percent of news Web sites remain unencrypted. These types of Web sites generate less Internet traffic but contain ''much more personalized data.'' We encourage continued efforts to encrypt personal information both in transit and at rest. At the same time, our policy must account for the fact that encryption is not yet ubiquitous and, in any event, does not preclude BIAS providers from having unique access to customer data.

35. Thus, the record reflects that BIAS providers are not, in fact, the same as edge providers in all relevant respects. In addition to having access to all unencrypted traffic that passes between the user and edge services while on the network, customers' relationships with their broadband provider is different from those with various edge providers, and their expectations concomitantly differ. For example, customers generally pay a fee for their broadband service, and therefore do not have reason to expect that their broadband service is being subsidized by advertising revenues as they do with other Internet ecosystem participants. In addition, consumers have a choice in deciding each time whether to use—and thus reveal information—to an edge provider, such as a social network or a search engine, whereas that is not an option with respect to their BIAS provider when using the service.

36. While some customers can switch BIAS providers, others do not have the benefit of robust competition, particularly in the fixed broadband market. Moreover, we have previously observed that ''[b]roadband providers have the ability to act as gatekeepers even in the absence of 'the sort of market concentration that would enable them to impose substantial price increases on end users.' '' Their position is strengthened by the high switching costs customers face when seeking a new service, which could deter customers from changing BIAS providers if they are unsatisfied the providers' privacy policies. Moreover, even if a customer was willing to switch to a new broadband provider, the record shows consumers often have limited options. We note, as stated in the 2016 *Broadband Progress Report,* approximately 51 percent of Americans still have only one option for a provider of fixed broadband at speeds of 25 Mbps download/3 Mbps upload. Given all of these factors, we conclude that, contrary to assertions in the record, BIAS providers hold a unique position in the Internet ecosystem, and disagree with commenters that assert that rules to protect the privacy of broadband customers are unnecessary.

37. As discussed above and throughout this Order, our sector-specific privacy rules are necessary to address the distinct characteristics of telecommunications services. The record demonstrates that strong customer privacy protections will encourage broadband usage and, in turn investment. We further find that when consumers are confident that their privacy is protected, they will be more likely to adopt and use broadband services. As aptly explained by Mozilla, ''[t]he strength of the Web and its economy rests on a number of core building blocks that make up its foundational DNA. When these building blocks are threatened, the overall health and well-being of the Web are put at risk. Privacy is one of these building blocks.'' The privacy framework we adopt today will bolster consumer trust in the broadband ecosystem, which is essential for business growth and innovation.

B. Scope of Privacy Protections Under Section 222

38. In adopting rules to protect the privacy of customers of BIAS and other telecommunications services, we must begin by specifying the entities and information at issue. We look to the language of the statute to determine the appropriate scope of our implementing rules. As discussed above, section 222(a) specifies that telecommunications carriers have a duty to protect the confidentiality of proprietary information of and relating to their customers, while section 222(c) provides direction about protections to be accorded ''customer proprietary network information.'' We therefore first adopt rules identifying the set of ''telecommunications carriers'' that are subject to our rules and define the ''customers'' these rules protect. Next we define ''customer proprietary information'' and include within that definition ''individually identifiable customer proprietary network information,'' ''personally identifiable information,'' and content of communications.

1. The Rules Apply to Telecommunications Carriers and Interconnected VoIP Providers

39. For purposes of the rules we adopt today to implement section 222, we adopt a definition of ''telecommunications carrier'' that includes all telecommunications carriers providing telecommunications services subject to Title II, including broadband Internet access service (BIAS). We also include interconnected VoIP services, which have been covered since 2007. Although not limited to voice services, our existing rules have been focused on voice services. When we reclassified BIAS as a telecommunications service, we recognized that our existing CPNI rules were not necessarily well suited to the broadband context, and we therefore forbore from applying the existing section 222 rules to BIAS. As part of this

rulemaking we have explored what privacy and data security rules we should adopt for BIAS and whether we can harmonize our rules for voice and BIAS. Throughout this Order we find that it is in the interests of consumers and providers to harmonize our voice and broadband privacy rules. We therefore adopt a single definition of telecommunications carrier for purposes of these rules, and except as otherwise provided, adopt harmonized rules governing the privacy and data security practices of all such telecommunications carriers.

40. Because we adopt a single definition of telecommunications carrier we need not change the definitions of ''telecommunications carrier or carrier'' currently in our rules implementing section 222. In accordance with these definitions, we continue to consider entities providing interconnected VoIP service to be telecommunications carriers for the purposes of these rules. The Commission has not classified interconnected VoIP service as telecommunications service or information service as those terms are defined in the Act, and we need not and do not make such a determination today. We do amend the definition of telecommunications service to conform to the definition of telecommunications carrier. We also observe that because BIAS is now a telecommunications service, BIAS providers are now telecommunications carriers within the meaning of those rules. To remove any doubt as to the scope of these rules, we define BIAS for purposes of our rules pursuant to section 222 identically to our definition in the *2015 Open Internet Order.* We define ''broadband Internet access service provider'' or ''BIAS provider'' to mean a person engaged in the provision of BIAS. As used in the foregoing sentence and in the definition of ''customer'' below, a ''person'' includes any individual, group of individuals, corporation, partnership, association, unit of government, or legal entity, however organized. Under the *2015 Open Internet Order*'s definition of BIAS, the term BIAS provider does not include ''premises operators—such as coffee shops, bookstores, airlines, private end-user networks (*e.g.,* libraries and universities), and other businesses that acquire broadband Internet access service from a broadband provider to enable patrons to access the Internet from their respective establishments.'' Moreover, consistent with the *2015 Open Internet Order,* our rules do not govern information that BIAS providers obtain by virtue of providing other non-telecommunications services, such as edge services that the BIAS provider may offer like email, Web sites, cloud storage services, social media sites, music streaming services, and video streaming services (to name a few).

2. The Rules Protect Customers' Confidential Information

41. Section 222 governs how telecommunications carriers treat the ''proprietary'' and ''proprietary network'' information of their ''customers.'' For purposes of the rules we adopt today implementing section 222, we define ''customer'' as (1) a current or former subscriber to a telecommunications service; or (2) an applicant for a telecommunications service. We adopt a single definition of customer, because we agree with those commenters that argue that harmonizing the definition of ''customer'' for both BIAS and other telecommunications services will ease consumer expectations, reduce confusion, and streamline compliance costs for BIAS providers, especially small providers. We also find that voice and BIAS customers face similar issues related to the protection of their private information when they apply for, subscribe to, and terminate their telecommunications services.

42. In adopting this definition of customer, we find that BIAS providers' and other telecommunications carriers' duty to protect customer proprietary information under section 222 begins when a person applies for service and continues after a subscriber terminates his or her service. Our existing rules for voice services apply only to current customers. We are, however, persuaded by commenters that argue that the existing rule's limitation to current subscribers is too narrow. As data storage costs decrease and computing power increases, previous barriers to data analysis based on cost, time, or feasibility are receding. BIAS providers and other telecommunications carriers have the technical ability to retain and use applicant and customer information long after the application process or termination of service. If our rules do not protect applicants, consumers would lack basic privacy protections when they share any confidential information in order to apply for a telecommunications service. Similarly, current customers would be penalized for switching providers given that the ''losing'' carrier would be free to stop protecting the confidentiality of any private information it retains. These outcomes would run counter to our firm commitment to promote broadband adoption, competition, and innovation. Making this change is consistent with the 2014 Notice of Apparent Liability issued in *TerraCom,* in which we explained that that ''the carrier/customer relationship commences when a consumer applies for service.''

43. We disagree with commenters that assert that including prospective and former customers within the definition of customer could unduly burden providers. If carriers want to limit their obligations with respect to applicants and former customers, they can and should adopt data minimization practices and destroy applicants' and former customers' confidential information as soon as practicable, in a manner consistent with any other applicable legal obligations.

44. In addition, for purposes of these rules, we find it appropriate to attribute all activity on a subscription to the subscriber. We recognize that multiple people often use the BIAS or voice services purchased by a single subscriber. For example, residential fixed broadband and voice services often have a single named account holder, but all household members and their guests may use the Internet connection and voice service purchased by that subscriber. Likewise, enterprise customers may have many users on the same account. And, for mobile services, multiple users using separate devices may share one account. However, treating each individual user as a separate customer would be burdensome because the provider does not have a separate relationship with each of those users, outside of the relationship with the subscriber. To minimize burdens on both providers and customers, we find it is reasonable to define ''customer'' to include users of the subscription (such as household members and their guests), but treat the subscriber as the person with authority to make privacy choices for all of the users of the service. As such, we disagree with commenters who argue that every individual using a BIAS subscription should qualify as a distinct customer with separate privacy controls.

45. We recognize that some BIAS or voice subscriptions identify multiple users. For example, some mobile BIAS providers offer group plans in which each person has their own identified device, user ID, and/or telephone number. If a BIAS or other telecommunications provider is already treating each user as distinct and the subscriber authorizes the other users to control their account settings, we encourage carriers to give these users individualized privacy controls.

3. Scope of Customer Information Covered by These Rules

46. In this section, we define the scope of information covered by the rules implementing section 222. Specifically, we import the statutory definition of customer proprietary network information (CPNI) into our implementing rules, and define customer proprietary information (customer PI) as including individually identifiable CPNI, personally identifiable information (PII), and content of communications. We recognize that these categories are not mutually exclusive, but taken together they identify the types of confidential customer information BIAS providers and other telecommunications carriers may collect or access in connection with their provision of service. Below, we provide additional guidance on the scope of these categories of customer information in the telecommunications context.

a. Customer Proprietary Network Information

47. Consistent with the preexisting voice rules, we adopt the statutory definition of customer proprietary network information (CPNI) for all telecommunications services, including BIAS. Since this is our first opportunity to address this definition's application to BIAS, to offer clarity we provide guidance on the meaning of CPNI as it applies to BIAS. We focus on section 222(h)(1), which defines CPNI as information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; as well as information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier, but does not include subscriber list information. We agree with commenters that, due to its explicit focus on telephone exchange and telephone toll service, section 222(h)(1)(B) is not relevant to BIAS.

48. We interpret the phrase ''made available to the carrier by the customer solely by virtue of the carrier-customer relationship'' in section 222(h)(1)(A) to include any information falling within a CPNI category that the BIAS provider collects or accesses in connection with the provision of BIAS. This includes information that may also be available to other entities. We disagree with commenters who propose that the phrase ''made available to the carrier by the customer solely by virtue of the carrier-customer relationship'' means that *only* information that is *uniquely* available to the BIAS provider may satisfy the definition of CPNI. These commenters contend that if a customer's information is available to a third party, it cannot qualify as CPNI, focusing on the term ''solely'' in the clause. However, the term ''solely'' modifies the phrase ''by virtue of,'' *not* the phrase ''made available to the carrier.'' We therefore conclude that ''solely by virtue of the carrier-customer relationship'' means that information constitutes CPNI under section 222(h)(1)(A) if the provider acquires the information as a product of the relationship and not through an independent means. We note, for clarity, that both inbound and outbound traffic are made available to the carrier by the customer solely by virtue of the carrier-customer relationship. The directionality of the traffic is irrelevant as to whether it satisfies the statutory definition of CPNI.

49. We also agree with the Center for Democracy and Technology that the fact that third-parties might gain access to the same data when a consumer uses their services ''does not negate the fact that the BIAS provider has gained access to the data only because the customer elected to use the BIAS provider's telecommunications service.'' The statute is silent as to whether such information might be available to other parties, which indicates that Congress did not intend for the definition of CPNI to hinge on such information being solely available to the customers' carrier. Indeed, in the voice context, CPNI certainly is available to other parties besides the customer's carrier and section 222 protects that data. For example, when a customer calls someone else, CPNI is also made available to the recipient's carrier and intermediaries facilitating the completion of the call. Furthermore, we find that commenters' narrow definition of CPNI is inconsistent with the privacy-protective purpose of the statute. We agree with some commenters' assertions that when a BIAS provider acquires information wholly apart from the carrier-customer relationship, such as purchasing public records from a third party, that information is not CPNI.

50. However, consistent with the Commission's *2013 CPNI Declaratory Ruling,* we find that information that a BIAS provider causes to be collected or stored on a customer's device, including customer premises equipment (CPE) and mobile stations, also meets the statutory definition of CPNI. The ''fact that CPNI is on a device and has not yet been transmitted to the carrier's own servers also does not remove the data from the definition of CPNI, if the collection has been done at the carrier's direction.''

51. BIAS providers also have the ability, by virtue of the customer-carrier relationship, to create and append CPNI to a customer's Internet traffic. For example, if a carrier inserts a unique identifier header (UIDH), that UIDH is CPNI because, as we will discuss in greater detail below, it is information in the application layer header that relates to the technical configuration, type, destination, and amount of use of a telecommunications service.

52. We do not believe it is necessary to categorize all personally identifiable information (PII) as CPNI, as suggested by Public Knowledge. While we agree with Public Knowledge's sentiment that PII is confidential information that deserves protection under the Act, and we agree that some information is both PII and CPNI, we find that the Act categorizes and protects all PII as proprietary information, under section 222(a), as discussed below.

(i) Guidance Regarding Information That Meets the Statutory Definition of CPNI in the Broadband Context

53. In keeping with the Commission's past practice, we decline to set out a comprehensive list of data elements that do or do not satisfy the statutory definition of CPNI in the broadband context. We agree with commenters that ''no definition of CPNI should purport or aim to be comprehensive and exhaustive, as technology changes quickly and business models continually seek new ways to monetize and market user data.'' In the past, the Commission has enumerated certain data elements that it considers to be voice CPNI—including call detail records (including caller and recipient phone numbers, and the frequency, duration, and timing of calls) and any services purchased by the customer, such as call waiting; these data continue to be voice CPNI going forward. Similarly, we follow past practice and identify a non-exhaustive list of the types of information that we consider to constitute CPNI in the BIAS context. We find that such guidance will help provide direction regarding the scope of providers' obligations and help to increase customers' confidence in the security of their confidential information as technology continues to advance. We find that the following types of information relate to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service

subscribed to by any customer of a telecommunications carrier, and as such constitute CPNI when a BIAS provider acquires or accesses them in connection with its provision of service:

- Broadband Service Plans
- Geo-location
- MAC Addresses and Other Device Identifiers
- IP Addresses and Domain Name Information
- Traffic Statistics
- Port Information
- Application Header
- Application Usage
- Application Payload
- Customer Premises Equipment and Device Information

54. We will first give a brief overview of the structure of Internet communications, to help put these terms in context, and then discuss why each of these types of information, and other related components of Internet Protocol packets, qualify as CPNI.

(a) Background—Components of an Internet Protocol Packet

55. The layered architecture of Internet communications informs our analysis of CPNI in the broadband context. While the concept of layering is not unique to the Internet, layering plays a uniquely prominent role for Internet-based communications and devices. For that reason, we begin with a brief technical overview of the layered structure of Internet communications.

56. Multiple layers—often represented as a vertical stack—comprise every Internet communication. Each layer in the stack serves a particular logical function and uses a network protocol that standardizes communication between systems, enabling rapid innovation in Internet-based protocols and applications. Within one device, information is typically transmitted vertically through the various layers. Across all devices, equivalent layers perform the equivalent functions. This compatibility and interoperability is typically represented as horizontal relationships. When an application sends data over the Internet, the process begins with application data moving downwards through the layers. Each layer adds additional networking information and functionality, wrapping the output of the layers above it with a ''header.'' The communication sent out over the Internet—consisting of the application data wrapped in headers from each layer—is called a ''packet.'' When a device receives data over the Internet, the reverse process occurs. Data moves upwards through the layers; each layer unwraps its associated information and passes the output upward, until the application on the recipient's device recovers the original application data. As a component of their provision of service, BIAS providers may analyze each of these layers for reasonable network management.

57. Common representations of the Internet's architecture range from four to seven layers. To highlight design properties relevant to the broadband CPNI analysis, we describe a five-layer model in this explanation. From top to bottom, the layers are: Application payload, application header, transport, network, and link. We will briefly describe each of the five layers, from top to bottom:

58. *Application Payload.* The information transmitted to and from each application a customer runs is commonly referred to as the application layer payload. The application payload is the substance of the communication between the customer and the entity with which she is communicating. Examples of application payloads include the body of a Web page, the text of an email or instant message, the video served by a streaming service, the audiovisual stream in a video chat, or the maps served by a turn-by-turn navigation app.

59. *Application Header.* The application will usually append one or more headers to the payload; these headers contain information *about* the application payload that the application is sending or requesting. For example, in web browsing, the Uniform Resource Locator (URL) of a Web page constitutes application header information. In a conversation via email, instant message, or video chat, an application header may disclose the parties to the conversation.

60. *Transport Layer.* Below the application header layer is the transport layer, which forwards data to the intended application on each device and can manage the flow of communications from one device to another device. Two transport protocols are widely deployed on the Internet: the Transmission Control Protocol (TCP), which ensures that data arrives intact, and the User Datagram Protocol (UDP), which provides fewer guarantees about data integrity. Port numbers are an example of data within the transport layer header; a port number specifies which application on a device should handle a network communication.

61. *Network Layer.* The network layer is below the transport layer, and contains information used to route packets across the Internet from one device to another device. Almost all Internet traffic uses the Internet Protocol (IP) at the network layer. IP addresses are the most common example of data at the network layer; an IP address in a network header indicates the sender or recipient of an Internet packet.

62. *Link Layer.* The final layer is the link layer, which is below the network layer. Link layer protocols route data between devices on the same local network. For example, devices on the same wired or wireless network can usually communicate directly with each other at the link layer. MAC addresses are an example of data at the link layer, and a wide range of link technologies (Ethernet, DOCSIS, Wi-Fi, and Bluetooth, among others) use them. A MAC address functions as a globally unique device identifier, ensuring that every device on a local network has a distinct address for sending and receiving data.

(b) Specific Examples of CPNI in the BIAS Context

63. With this understanding of the architecture of Internet communications, we can now examine how the components of an IP data packet map to the statutory definition of CPNI. In this section, we provide guidance on what data elements constitute CPNI; this is distinct from the question of whether a data element constitutes *individually identifiable* CPNI and is thus ''customer proprietary information.'' Below, we provide guidance addressing how various data elements constitute CPNI under section 222.

64. *Broadband Service Plans.* We find that broadband service plans meet the statutory definition of CPNI in the broadband context because they relate to the quantity, type, amount of use, location, and technical configuration of a telecommunications service. We agree with NTCA that ''information related to a customer's broadband service plan can be viewed as analogous to voice telephony service plans,'' which the Commission has long considered to be CPNI in the voice context. These plans detail subscription information, including the type of service (*e.g.,* fixed or mobile; cable or fiber; prepaid or term contract), speed, pricing, and capacity (*e.g.,* data caps). These data relate to the ''type'' of telecommunications service to which the customer subscribes, as well as how the BIAS provider will adjust the ''technical configuration'' of their network to serve that customer. Information pertaining to subscribed capacity and speed relate to the ''quantity'' of services the customer purchases, as well as the ''amount'' of services the customer consumes. Service plans often include the customer's

address (for billing purposes or to identify the address of service), which relates to the location of use of the service.

65. *Geo-location.* Geo-location is information related to the physical or geographical location of a customer or the customer's device(s), regardless of the particular technological method used to obtain this information. Providers often need to know where their customers are so that they can route communications to the proper network endpoints. The Commission has already held that geo-location is CPNI, and Congress emphasized the importance of geo-location data by adding Section 222(f).

66. We disagree with commenters who ask us to draw technology-based distinctions for what types of location information are sufficiently precise to qualify as geo-location CPNI. BIAS providers can use many types of data—either individually or in combination—to locate a customer, including but not limited to GPS, address of service, nearby Wi-Fi networks, nearby cell towers, and radio-frequency beacons. We caution that these and other forms of location information in place now or developed in the future constitute geo-location CPNI when made available to the BIAS provider solely by virtue of the carrier-customer relationship.

67. *Media Access Control (MAC) Addresses and Other Device Identifiers.* We conclude that device identifiers, such as MAC addresses, are CPNI in the broadband context because they relate to the technical configuration and destination of use of a telecommunications service. Link layer protocol headers convey MAC addresses, along with other link layer protocol information. A MAC address uniquely identifies the network interface on a device, and thus uniquely identifies the device itself (including the device manufacturer and often the model). MAC addresses relate to the technical configuration and destination of communications because BIAS providers use them to manage their networks and route data packets to the appropriate network device. We disagree with Sandvine, which argues that link layer information such as MAC addresses do not relate to the technical configuration of network traffic or the destination of packets. For the same reasons, we conclude that other device identifiers and other information in link layer protocol headers are CPNI in the broadband context because they relate to the technical configuration and destination of use of a telecommunications service.

68. *Internet Protocol (IP) Addresses and Domain Name Information.* We conclude that source and destination IP addresses constitute CPNI in the broadband context because they relate to the destination, technical configuration, and/or location of a telecommunications service. An IP address is a routable address for each device on an IP network, and BIAS providers use the end user's and edge provider's IP addresses to route data traffic between them. As such, source and destination IP addresses are roughly analogous to telephone numbers in the voice telephony context. The Commission has previously held telephone numbers dialed to be CPNI. Further, our CPNI rules for TRS providers recognize IP addresses as call data information. By this analogy, we mean only that both are ''roughly similar numerical identifiers'' used to route telecommunications. We do not intend to imply that IP addresses are or should be administered in the same manner as telephone numbers. This definitional change to our regulations in no way asserts Commission jurisdiction over the assignment or management of IP addressing.

69. We agree with those commenters that argue that the IP addresses a customer uses and those with which she exchanges packets constitute CPNI because both source and destination IP addresses relate to the destination of use of a telecommunications service; one links to the destination for inbound traffic while the other links to the destination for outbound traffic. IP addresses are also frequently used in geo-location. A BIAS provider is uniquely capable of geo-locating an IP address. Most notably, in the case of mobile broadband Internet access service, the provider knows the geo-location of the cell towers to which the customer's device connects and can use this to determine the customer's device location. As Public Knowledge explains, ''IP addresses can easily be mapped to geographic locations, meaning that both the subscriber and the service can be located.'' IP addresses relate to technical configuration because BIAS providers configure their systems to use IP addresses in the network layer to communicate data packets between senders and receivers.

70. We disagree with commenters who argue that a customer's IP address is not CPNI. Some commenters argue that a customer's IP address is not CPNI because the BIAS provider assigns the IP address to the customer, and thus it is not ''made available to the carrier by the customer solely by virtue of the carrier-customer relationship.'' This reading of the text undermines the privacy-protective purpose of the statute. First, as the Commission has previously held, information that the provider causes to be generated by a customer's device or appended to a customer's traffic, in order to allow the provider to collect, access, or use that information, can qualify as CPNI if it falls within one of the statutory categories. Second, while the provider generates and assigns the number that will become the customer's IP address, that number is ultimately just a proxy for the customer, translated into a language that Internet Protocol understands. But for the carrier-customer relationship, the customer would not have an IP address. Other commenters argue that IP addresses should not qualify as CPNI because ''this information is necessarily sent onto the open Internet in order to make the service work.'' However, as discussed above, whether information is available to third parties does not affect whether it meets the statutory definition of CPNI.

71. We also disagree with commenters who assert that dynamic IP addresses do not meet the statutory definition of CPNI. A dynamic IP address is one that the BIAS provider can change. As Return Path explains, ''[w]hile the BIAS provider will have a record of precisely which user was connected to [a dynamic] IP address at a specific point in time, any third party will not.'' A dynamic IP address may be used for a shorter period of time than a static IP address. We note that these potential privacy benefits of dynamic IP addresses depend upon the specific network configuration and practices of the BIAS provider. For example, a provider may assign a dynamic IP address to a customer for a long period of time, such that it is effectively equivalent to a static IP address. In certain configurations (*e.g.,* IPv6 without privacy extensions), a dynamic IP address can be *more* revealing than a static IP address, because it includes other network identifiers (such as a MAC address). But a dynamic IP address still meets the statutory definition of CPNI because it relates to the technical configuration, type, destination, and/or location of use of a telecommunications service, for the reasons discussed above.

72. We also conclude that information about the domain names visited by a customer constitute CPNI in the broadband context. Domain names (*e.g.,* ''fcc.gov'') are common monikers that the customer uses to identify the end point to which they seek to connect. Whether or not the customer uses the

BIAS provider's in-house DNS lookup service is irrelevant to whether domain names satisfy the statutory definition of CPNI. Domain names also translate directly into IP addresses. Because of this easy translation, domain names relate to the destination and technical configuration of a telecommunications service.

73. As discussed above, Internet traffic is communicated through a layered architecture, including a network layer that uses protocol headers containing IP addresses to route communications to the intended devices. Similar to IP addresses, other information in the network layer protocol headers is CPNI in the broadband context. BIAS providers configure their networks to use this information for routing, network management, and security purposes. These headers will also indicate the total size of the packet. As such, other information in the network layer protocol headers relates to the technical configuration and amount of use of a telecommunications service.

74. *Traffic Statistics.* We conclude that traffic statistics meet the statutory definition of CPNI in the broadband context because they relate to the amount of use, destination, and type of a telecommunications service. We use the technology-neutral term ''traffic statistics'' to encompass any quantification of the communications traffic, including short-term measurements (*e.g.,* packet sizes and spacing) and long-term measurements (*e.g.,* monthly data consumption, average speed, or frequency of contact with particular domains and IP addresses). There are many common forms of traffic statistics, such as IPFIX, and we believe it is important to focus on how BIAS providers use these data, rather than single out particular technologies. We believe that traffic statistics are analogous to call detail information regarding the ''duration[] and timing of [phone] calls'' and aggregate minutes used in the voice telephony context, both of which are CPNI. BIAS providers use traffic statistics to optimize the efficiency of their networks and protect against cyber threats, but can also use this data to draw inferences that implicate the amount of use, destination, and type of a telecommunications service. For example, BIAS providers can use traffic statistics to determine the amount of use (*e.g.,* date, time, and duration), and to identify patterns such as when the customer is at home, at work, or elsewhere, or reveal other highly personal information. Traffic statistics related to browsing history and other usage can reveal the ''destination'' of customer communications. Further, a BIAS provider could deduce the ''type'' of application (*e.g.,* VoIP or web browsing) that a customer is using based on traffic patterns, and thus the purpose of the communication.

75. *Port Information.* We conclude that port information is CPNI in the broadband context because it relates to the destination, type, and technical configuration, of a telecommunications service. A port is a logical endpoint of communication with the sender or receiver's application, and consequently relates to the ''destination'' of a communication. The transport layer protocol header of a data packet contains the destination port number, which determines which application receives the communication. Port destinations are analogous to telephone extensions in the voice context. Port numbers identify or at least provide a strong indication of the type of application used, and thus the purpose of the communication, such as email, web browsing, or other activities. Though sometimes port numbers may not reveal anything of significance, they often do, and therefore we conclude that they relate to the destination, type, or technical configuration of the service. BIAS providers configure their networks using port information for network management purposes, such as to block certain ports to ensure network security. As such, these practices relate to the ''technical configuration'' of the telecommunications service. We agree with commenters that other transport layer protocol header information is CPNI in the broadband context because it relates to the technical configuration and amount of use of a telecommunications service. BIAS providers use other header information in this layer to configure their networks and monitor for security threats. For example, because UDP headers indicate packet size, they can reveal the amount of data the customer is consuming, and because TCP headers include sequence numbers, they can reveal information about a customer's device configuration.

76. *Application Header.* We conclude that application header information is CPNI in the broadband context because it relates to the destination, type, technical configuration, and amount of use of a telecommunications service. As discussed above, the top-most layer of network architecture is the application layer; IP data packets contain application headers to instruct the recipient application on how to process the communication. Application headers contain data for application-specific protocols to help request and convey application-specific content. Application headers are analogous in the voice telephony context to a customer's choices within telephone menus used to route calls within an organization (*e.g.,* ''Push 1 for sales. Push 2 for billing.''). The application header communicates information between the application on the end user's device and the corresponding application at the other endpoint of the communication. For example, application headers for web browsing typically use the Hypertext Transfer Protocol (HTTP) and contain the Uniform Record Locator (URL), operating system, and web browser; application headers for email typically contain the source and destination email addresses. Application headers may also include information relating to persistent identifiers, use of encryption, and virtual private networks (VPNs). Email headers may also include the subject line. The type of applications used, the URLs requested, and the email destination all convey information intended for use by the edge provider to render its service. Application headers can also reveal information about the amount of data being conveyed in the packet. BIAS providers may configure their networks using application headers for network management or security purposes.

77. Consistent with our decision in the *2013 CPNI Declaratory Ruling,* we agree with commenters that any information that the BIAS provider injects into the application header, such as a unique identifier header (UIDH), is also CPNI in the broadband context. BIAS providers sometimes append information to application headers, in particular HTTP headers, in order to uniquely tag communications with a specific subscriber account. Like other application header information, these data relate to the technical configuration, type, destination, and amount of use of a telecommunications service.

78. *Application Usage.* We conclude that information detailing the customer's use of applications is CPNI in the broadband context because it relates to the type and destination of a telecommunications service. Unlike an application payload, which contains the substance of a communication in an IP packet, application usage information is data that reveals the customer's use of an application more generally. A BIAS provider often collects application usage information through its provision of service. Sometimes application usage information is quantified—similar to traffic statistics—into short-term or long-term measurements. Such

information can reveal the type of applications the customer uses and with whom she communicates. As such, to the extent that the BIAS provider directs the collection or storage of such information, we conclude that it is CPNI. For the reasons discussed above, we disagree with commenters who contend that we should not consider such information to be CPNI because it is also available to other parties.

79. *Application Payload.* We conclude that the application payload, which is the part of the IP packet containing the substance of the communication between the customer and entity with which the customer is communicating, can be considered CPNI. Examples of application payloads include the body of a Web page, the text of an email or instant message, the video shared by a streaming service, the audiovisual stream in a video chat, or the maps served by a ride-sharing app. It is available to the carrier only because of the customer-carrier relationship and can relate to technical configuration, type, destination and amount of the use of the telecommunications service. BIAS providers are technically capable of configuring their networks to scan all parts of the data packet, including the payload, to detect security threats and block malicious packets. BIAS providers also use various network management techniques to minimize network congestion while transmitting application payloads. The application payload can help identify the parties to the communication (*e.g.,* the online streaming video distributor of a streaming video, or the homepage of a news Web site), and thus the communication's destination. The payload's size and substance can also indicate the amount of data the customer is using, the type of communication, and the duration of the use of the service. Another way to think of the application payload is as the ''content of the communication.'' Because of the importance given to protecting content of communications in our legal system, we also discuss content separately as its own element of customer proprietary information.

80. *Customer Premises Equipment (CPE) and other Customer Device Information.* Information pertaining to customer premises equipment (CPE) and other customer device information, such as that relating to mobile stations, is CPNI in the broadband context because it relates to the technical configuration, type, and destination of a telecommunications service. The Act defines CPE as ''equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.'' The Commission has long-understood CPE to include customers' mobile devices, such as cell phones. Given this precedent, we believe that other consumer devices capable of being connected to broadband services, such as smartphones and tablets, also fall under the rubric of CPE, along with more traditional CPE such as a customer's computer, modem, router, videophone, or IP caption phone. However, we also observe that such devices would be considered ''mobile stations,'' which the Act defines as ''a radio-communication station capable of being moved and which ordinarily does move.'' We disagree with commenters that argue that only devices furnished by the BIAS provider can qualify as CPE; there is no such limitation in the statutory language.

81. We find that the traits of CPE and other customer devices (*e.g.,* model, operating system, software, and/or settings) a customer uses relates to the technical configuration and communications protocols the BIAS provider uses to interface that device with its network, as well as the type of service to which the customer subscribes (*e.g.,* fixed or mobile, cable or fiber). CPE and mobile station information relates to the destination of the use of BIAS because it can identify the endpoint for inbound communications.

82. We disagree with commenters who argue that we should not consider CPE and by extension other customer device information to be CPNI because CPE and other customer devices are also used for purposes other than BIAS, or because such information may be available to other parties. As discussed above, what matters is the nature of the information made available to the BIAS provider through its provision of service.

83. We disagree with NTCA, which misinterprets the Bureau-level *1998 CPNI Clarification Order* to argue that the Commission has previously found that CPE is not covered by section 222. In the *1998 CPNI Clarification Order,* the Bureau addressed the issue of ''customer information independently derived from the carrier's prior sale of CPE to the customer or the customer's subscription to a particular information service offered by the carrier in its marketing of new CPE[.]'' By contrast, here we are addressing information about the CPE itself that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship, *i.e.,* information derived in the course of providing BIAS or another telecommunications service.

84. *Other Types of CPNI.* We reiterate that the examples of CPNI discussed above are illustrative, not exhaustive. To the extent that other types of information satisfy the statutory definition of CPNI, those data may also be CPNI, either in the BIAS context or in the context of other telecommunications services.

b. Customer Proprietary Information (Customer PI)

85. Section 222(a) imposes a general duty on all telecommunications carriers ''to protect the confidentiality of proprietary information of, and relating to, . . . customers.'' ''[P]roprietary information of, and relating to, . . . customers'' is information that BIAS providers and other telecommunications carriers acquire in connection with their provision of service, which customers have an interest in protecting from disclosure. We call this information ''customer proprietary information'' or ''customer PI.'' Customer PI consists of three non-mutually-exclusive categories: (1) Individually identifiable customer proprietary network information (CPNI), (2) personally identifiable information (PII), and (3) content of communications. This interpretation of section 222(a) is consistent with other provisions of the Communications Act that use the term ''proprietary information,'' and with the Commission's use of that term before enactment of Section 222. As we discuss in more detail below, protecting PII and content is at the heart of most privacy regimes and we recognized in *TerraCom* that the Communications Act protects them as customer PI because it ''clearly encompasses private information that customers have an interest in protecting from public exposure.''

86. As we previously explained, ''[i]n the context of section 222, it is clear that Congress used the term 'proprietary information' broadly to encompass all types of information that should not be exposed widely to the public, whether because that information is sensitive for economic reasons or for reasons of personal privacy. We reaffirm our conclusion that 'proprietary information' in section 222(a), as applied to customers . . . clearly encompass[es] private information that customers have an interest in protecting from public exposure.'' As such, we disagree with commenters that argue that the word ''proprietary'' in section 222(a) means the statute only protects information the customer keeps secret from any other party. If only secret information qualified as private information, then not even Social Security numbers would be

''proprietary'' and subject to the protections of section 222 and our implementing rules. People regularly give their Social Security numbers to banks, doctors, utility companies, telecommunications carriers, employers, schools, and other parties in order to obtain various services—but this does not mean the information is not ''proprietary'' to them. To define ''proprietary'' as these commenters propose would render section 222(a) at worst meaningless and at best leaving a gap whereby sensitive proprietary information like a Social Security number would be unprotected.

87. We disagree with commenters that assert that defining the category of customer PI in this way would dramatically expand the scope of providers' duties to protect private customer information. Based on the record before us, we find that BIAS providers—like other telecommunications carriers—are already on notice that they have a duty to keep such information secure and confidential based on, among other things, FTC guidance that applied to them prior to the reclassification of broadband in the *2015 Open Internet Order.* According to FTC staff, ''[t]o date, the FTC has brought over 500 cases protecting the privacy and security of consumer information.'' We have held providers responsible for protecting these private data under section 222(a). In *TerraCom,* we also found that the failure to protect customer's private information was an unjust and unreasonable practice under section 201(b). Likewise, providers have been required to protect the content of communications for decades. Moreover, customers reasonably expect and want their providers to keep these data secure and confidential. Surveys reflect that 74 percent of Americans believe it is ''very important'' to be in control over their own information; as a Pew study found, ''[i]f the traditional American view of privacy is the 'right to be left alone,' the 21st-century refinement of that idea is the right to control their identity and information.'' We agree with the Center for Democracy & Technology that ''[e]xcluding PII from the proposed rules would be contrary to decades of U.S. privacy regulation and public policy.'' We also observe that omitting PII from the scope of these rules would result in a gap in protection for PII under the Act's primary privacy regime for telecommunications services. Thus, were PII not included within the scope of customer PI, sensitive PII like Social Security numbers or private medical records would receive fewer protections than a broadband plan's monthly data allowance, a result we do not think intended by Congress. We discuss and define PII below.

c. Personally Identifiable Information (PII)

88. Protecting personally identifiable information is at the heart of most privacy regimes. Historically, legal definitions of PII have varied. Some incorporated checklists of specific types of information; others deferred to auditing controls. Privacy protections must evolve and improve as technology—and our understanding of its potential—evolves and improves. Our definition incorporates this modern understanding of data privacy and tracks the FTC, the Administration's proposed CPBR, and National Institute of Standards and Technology (NIST) guidelines on PII.

89. We define personally identifiable information, or PII, as any information that is linked or reasonably linkable to an individual or device. Information is linked or reasonably linkable to an individual or device if it can reasonably be used on its own, in context, or in combination to identify an individual or device, or to logically associate with other information about a specific individual or device. The ''linked or reasonably linkable'' standard for determining the metes and bounds of personally identifiable information is well established and finds strong support in the record. In addition to NIST, CPBR, and the FTC, the Department of Education, the Securities and Exchange Commission, the Department of Defense, the Department of Homeland Security, the Department of Health and Human Services, and the Office of Management and Budget all use a version of this standard in their regulations and policies.

90. We agree with the FTC staff that ''[w]hile almost any piece of data *could* be linked to a consumer, it is appropriate to consider whether such a link is practical or likely in light of current technology.'' While we recognize that '' '[i]dentifiable' information is increasingly contextual''—especially when a provider can cross-reference multiple types and sources of information—anchoring the standard to a mere ''possibility of logical association'' could result in ''an overly-expansive definition.'' Thus, we adopt the recommendation of the FTC staff and others to add the term ''reasonably'' to our proposed ''linked or linkable'' definition of PII. This conclusion has broad support in the record.

91. We also adopt the FTC staff recommendation that PII should include information that is linked or reasonably linkable to a customer device. As discussed above, devices in the BIAS context include a customer's smartphone, tablet, computer, modem, router, videophone, IP caption phone, and other consumer devices capable of connecting to broadband services. We agree with the FTC staff that ''[a]s consumer devices become more personal and associated with individual users, the distinction between a device and its user continues to blur.'' The Digital Advertising Alliance likewise recognizes the connection between individuals and devices, stating in its guidance that information ''connected to or associated with a particular computer or device'' is identifiable. While some commenters argue that we should not include information linkable to a device in the definition of PII, we find that such identifiers are often and easily linkable to an individual, as we discussed above.

92. We disagree with commenters that argue that PII should only include information that is sensitive or capable of causing harm if disclosed. The ability of information to identify an individual defines the scope of PII. Whether or not any particular PII is sensitive or capable of causing harm if disclosed is a separate question from the definitional question of identifiability. We address the treatment of sensitive versus non-sensitive information below.

93. We agree with commenters that we should offer illustrative, non-exhaustive examples of PII. We have analyzed descriptions of PII in the record, our prior orders, NIST, the FTC, the Administration's proposed CPBR, and other federal and state statutes and regulations. We find that examples of PII include, but are not limited to: Name; Social Security number; date of birth; mother's maiden name; government-issued identifiers (*e.g.,* driver's license number); physical address; email address or other online contact information; phone numbers; MAC addresses or other unique device identifiers; IP addresses; and persistent online or unique advertising identifiers. Several of these data elements may also be CPNI. OTI asks us to clarify the meaning of ''other online contact information.'' The term is meant to be technology neutral and encompass other methods of BIAS-enabled direct messaging.

94. We disagree with commenters that argue that we should not consider MAC addresses, IP addresses, or device identifiers to be PII. First, as discussed above, a customer's IP address and MAC

address each identify a discrete customer and/or customer device by routing communications to a specific endpoint linked to the customer. Information does not need to reveal an individual's name to be linked or reasonably linkable to that person. A unique number designating a discrete individual—such as a Social Security number or persistent identifier—is at least as specific as a name. In many cases, a unique numerical identifier will be *more* specific than the person's actual name. Second, MAC addresses, IP addresses, and other examples of PII do not need to be able to identify an individual in a vacuum to be linked or reasonably linkable. BIAS providers can combine this information with other information to identify an individual (*e.g.,* the BIAS provider's records of which IP addresses were assigned to which customers, or traffic statistics linking MAC addresses with other data). In situations where the BIAS provider sold or leased a device to a customer—such as a smartphone, modem, or router—the provider could associate device identifiers with the customer from its records. As the Supreme Court has observed, ''[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.''

95. *Customer Contact Information—Names, Addresses, and Phone Numbers of Individuals.* Names, addresses, telephone numbers, and other information that is used to contact an individual are classic PII because they are linked or reasonably linkable to an individual or device. Some commenters argue that contact information is not protected under section 222 because ''Subscriber list information'' is exempt from the choice requirements for CPNI under section 222(e). However, subscriber list information, a relatively small subset of customer contact information, was subject to other considerations at the time of enactment.

96. Subscriber list information is defined in the statute as ''any information (A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.'' Through this definition, Congress recognized that a dispositive factor is whether the information has been published or accepted for publication in a directory format.

97. The legislative history shows that Congress created a narrow carve out from the definition of CPNI for subscriber list information in order to protect the longstanding practice of publishing telephone books and to promote competition in telephone book publishing. The legislative history is clear that Congress did not intend for subscriber list information ''to include any information identifying subscribers that is prepared or distributed within a company or between affiliates or that is provided to any person in a non-public manner.'' Instead, Congress intended subscriber list information to be ''data that local exchange carriers traditionally and routinely make public. Subscribers have little expectation of privacy in this information because, by agreeing to be listed, they have declined the opportunity to limit its disclosure.'' Based on this legislative history, we find that the phrase ''published, caused to be published, or accepted for publication in any directory format'' is best read as limited to publicly available telephone books of the type that were published when Congress enacted the statute, or their direct equivalent in another medium, such as a Web site republishing the contents of a publicly available telephone book.

98. Unlike landline voice carriers, neither mobile voice carriers nor broadband providers publish publicly-available directories of customer information. Nor does the record reflect more than speculation about any future interest in publishing directories. Because publishing of broadband customer directories is neither a common nor a long-standing practice, we find that broadband customers have no expectation that that they are consenting to the public release of their name, postal address, or telephone number when they subscribe to BIAS. We therefore conclude that a directory of BIAS customers' names, addresses, and phone numbers would not constitute information published in a ''directory format'' within the meaning of the statute, and therefore there is no ''subscriber list information'' in the broadband context. As such, we disagree with commenters who ask us to ignore the publication requirement in order to exempt names, addresses, telephone numbers, and IP addresses from these rules.

99. We recognize that the Commission has previously found that names, addresses, and telephone numbers are not CPNI, even when not published as subscriber list information. However, the Commission has not analyzed whether such customer contact information is PII, and therefore subject to protections under section 222(a). As discussed above, we make clear today that it is PII. As PII, this information is subject to our customer choice rules, discussed in detail below. Our customer choice rules will continue to allow this information to be used to publish publicly available telephone directories, consistent with the current practice of allowing customers to keep their information unlisted.

100. *Harmonization.* We agree with the American Cable Association and various small providers who urge us to harmonize our BIAS and voice definitions under Section 222. Having one uniform set of definitions will simplify compliance and reduce consumer confusion. This is especially true for small providers who collect less customer information, use it for narrower purposes, and do not have the resources to maintain a bifurcated system. Consequently, we extend this definition of PII to all section 222 contexts.

d. Content of Communications

101. We find that the Act protects the content of communications as customer PI. Content is a quintessential example of a type of ''information that should not be exposed widely to the public . . . [and] that customers expect their carriers to keep private.'' Content is highly individualistic, private, and sensitive. Except in limited circumstances where savvy customers deploy protective tools, BIAS providers often have access to at least some, if not most, content through their provision of service. BIAS providers' inability to access encrypted content is irrelevant; what matters is the information the BIAS providers *can* access. Moreover, even when traffic is encrypted, some content may remain visible or inferable to the provider. We agree with FTC staff that ''[c]ontent data can be highly personalized and granular, allowing analyses that would not be possible with less rich data sets.'' In recognition of its importance, Congress has repeatedly and emphatically protected the privacy of communications content in various legal contexts, expressly prohibiting service providers from disclosing the contents of communications they carry, subject to statutorily enumerated exceptions, since at least 1912. We agree with commenters that ''Americans do not expect their broadband providers to be reading their electronic communications any more than they expect them to be

keeping a list of their correspondents.'' The same rationale that supports the treatment of the content of BIAS communications as customer PI supports the treatment of the content carried through other telecommunications services as customer PI.

102. *Definition of Content.* At the outset, we define content as any part of the substance, purport, or meaning of a communication or any other part of a communication that is highly suggestive of the substance, purpose, or meaning of a communication. We sought comment on how to define content in the *NPRM,* but received no substantive recommendations; consequently we base our definition on the long-established terminology of ECPA and Section 705. We recognize that sophisticated monitoring techniques have blurred the line between content and metadata, with metadata increasingly being used to make valuable determinations about users previously only possible with content. This has complicated traditional notions of how to define and treat content. We intend our definition to be flexible enough to encompass any element of the BIAS communication that conveys or implies any part of its substance, purport, or meaning. As a definitional matter, content in an inbound communication is no different from content in an outbound communication. As discussed above, because the categories of customer PI are not mutually exclusive, some content may also satisfy the definitions of CPNI and/or PII. Because we conclude that section 222(a) protects content as its own category of customer PI, we need not determine which types of content are also CPNI or PII.

103. Multiple components of an IP data packet may constitute or contain BIAS content. First and foremost, we agree with commenters that the application payload is always content. As discussed above, the application payload is the part of the IP packet containing the substance of the communication between the customer and the entity with which she is communicating. Examples of application payloads include the body of a Web page, the text of an email or instant message, the video served by a streaming service, the audiovisual stream in a video chat, or the maps served by a ride-sharing app. BIAS providers' use of application payloads for network management is also one reason why BIAS content is not wholly equivalent to telephone conversations. Voice carriers do not scan a phone conversation to secure the network or reduce congestion. Application payloads in the broadband Internet context are far more sophisticated and complex than mere audio transmissions over a telephone line. However, other portions of the packet also may contain content. For example, as discussed above, the application header may reveal aspects of the application payload from which the content may be easily inferred—such as source and destination email addresses or Web site URLs. Application usage information may also reveal content by disclosing the applications customers use or the substance of how they use them. We agree with FTC Staff that BIAS content includes, but is not limited to, the ''contents of emails; communications on social media; search terms; Web site comments; items in shopping carts; inputs on web-based forms; and consumers' documents, photos, videos, books read, [and] movies watched[.]'' We emphasize that our examples of BIAS content are not exhaustive and others may manifest over time as analytical techniques improve.

104. We reject arguments that protecting BIAS content under section 222 is unnecessary or unlawful because section 705 of the Act, and the Electronic Communications Privacy Act (ECPA) or the Communications Assistance for Law Enforcement Act (CALEA), already protect content. Commenters do not claim that these various other laws are mutually exclusive with each other, belying the notion that the existence of multiple sources of authority in this area is inherently a problem. Instead, we find that section 222 complements these other laws in establishing a framework for protecting the content carried by telecommunications carriers. Given the importance of protecting content, it is reasonable to interpret section 222 as creating additional, complementary protection. Similarly, for example, both the Children's Online Privacy Protection Act and the Video Privacy Protection Act may protect videos that young children watch online.

105. We also disagree with the argument that because the data protected by section 705 ''bear scant resemblance'' to content or other forms of customer PI, our interpretation of section 222 is erroneous. Congress can enact two statutory provisions that contain different scopes, and it is a cardinal principle of statutory construction that we should attempt to give meaning to both. Any incongruity between the scope of sections 222 and 705 only demonstrates that the statutes are complementary and part of Congress's broad scheme to protect customer privacy. Sections 222 and 705 independently require telecommunications carriers to protect communications content.

4. De-Identified Data

106. In this section we describe a corollary regarding the circumstances in which information that constituted customer PI (*i.e.,* PII, content, or individually identifiable CPNI) can comfortably be said to have been de-identified. As discussed below, based on the record we are concerned that carriers not be allowed to skirt the protections of our rules by making unsupported assertions that customer PI has been ''de-identified'' and thus is not subject to our consent regime, when in fact the information remains reasonably linkable to an individual or device. As 38 public interest organizations pointed out in a joint letter, ''[i]t is often trivial to re-identify data that has supposedly been de-identified.'' We accordingly adopt a strong, multi-part approach regarding the circumstances under which carriers can properly consider data to be de-identified, using the three part test for de-identification articulated by the FTC in 2012. The Administration's CPBR also uses this standard. Specifically, we find that customer proprietary information is de-identified if the carrier (1) determines that the information is not reasonably linkable to an individual or device; (2) publicly commits to maintain and use the data in a non-individually identifiable fashion and to not attempt to re-identify the data; and (3) contractually prohibits any entity to which it discloses or permits access to the de-identified data from attempting to re-identify the data. As discussed in greater detail below, this third part of the test applies to entities with which the provider contracts to share de-identified customer information. It does not apply to the general disclosure or publication of highly aggregated summary statistics that cannot be disaggregated—for example, the use of statistics in advertisements (*e.g.,* ''We offer great coverage in rural areas, because that is where 70% of our customers live.'') We apply these requirements to both BIAS and other telecommunications services. The record does not demonstrate a need to treat de-identified information differently in the voice context versus the BIAS context. We agree with the Greenlining Institute and other commenters that a uniform regime, ''is easier for the carriers, easier [for] enforcement, and easier for customers to understand[.]''

a. Adoption of the FTC's Multi-Part Test

107. The record reflects that advances in technology and data analytics make it increasingly difficult to de-identify information such that it is not re-identifiable. The Administration's 2014 Big Data Report observed that ''[m]any technologists are of the view that de-identification of data as a means of protecting individual privacy is, at best, a limited proposition.'' As the Electronic Privacy Information Center notes, ''[w]idely-publicized anonymization failures have shown that even relatively sophisticated techniques have still permitted researchers to identify particular individuals in large data sets.'' We also agree with the FTC's conclusion in its 2012 Privacy Report that ''not only is it possible to re-identify non-PII data through various means, businesses have strong incentives to actually do so.''

108. For these reasons, our approach to de-identification establishes a strong, technology-neutral standard as well as safeguards to mitigate the incentives to re-identify customers' proprietary information. Furthermore, because companies, including BIAS providers, have incentives to re-identify customer information so that it can be further monetized, we agree with Privacy Rights Clearinghouse that the burden of proving that individual customer identities and characteristics have been removed from the data must rest with the provider. Taking this burden assignment into account, we find that our multi-part approach, grounded in FTC guidance, will ensure that as technology changes, customer information is protected, while at the same time minimizing burdens and maintaining the utility of de-identified customer information.

109. As such, we disagree with those commenters who urge us to use a different de-identification framework, such as that used in the HIPAA safe harbor context. We find that the framework we adopt enables flexibility to accommodate evolving technology and statistical methods. In contrast, we find that developing a list of identifiers that must be removed from data to render such data de-identified is not feasible given the breadth of data to which BIAS providers have access, and would also rapidly become obsolete in the evolving broadband context.

110. The three-part test we adopt today for de-identification also contemplates the statutory exception for ''aggregate customer information,'' as it defines the circumstances in which the Commission will find that ''individual customer identities and characteristics have been removed'' from collective data. Likewise, our approach addresses arguments in the record that the Commission must give meaning to the fact that the customer approval requirement of section 222(c)(1) applies to ''individually identifiable'' CPNI, as our test for de-identification addresses whether an individual's CPNI or PII will not be deemed to be individually identifiable in practice due to steps taken by the carrier prior to using or sharing the data.

(i) Part One—Not Reasonably Linkable

111. First, for information to be de-identified under our rules, we require providers to determine that the information is not linked or reasonably linkable to an individual or device. Because we are describing the scope of what is identifiable, we think it is appropriate to use the same standard that we use to define personally identifiable information (PII). Above we define PII as information that is linked or reasonably linkable to an individual or device, and conversely we find it appropriate to limit de-identified information to information that is *not* linked or reasonably linkable to an individual or device. As we discussed above in our definition of PII, we agree with commenters that the ''linked or reasonably linkable'' standard—used by the FTC in its Privacy Report—provides useful guidance on what it means for information to be individually identifiable without being either overly rigid or vague. As we discussed above, information is linked or reasonably linkable to an individual or device if it can reasonably be used on its own, in context, or in combination (1) to identify an individual or device, or (2) to logically associate with other information about a specific individual or device. New methods are increasingly capable of re-identifying information previously thought to be sufficiently anonymized. For these reasons, we will not specify an exhaustive list of identifiers, nor will we declare certain techniques to be *per se* sufficient or insufficient to achieve de-identification. The test instead focuses on the outcome required, that is, that to be de-identified, the data must no longer be linked or reasonably linkable to an individual or device. We also agree with AT&T that we should not ''dictate specific approaches to de-identifying data'' because ''[a]ny Commission-mandated approach would quickly become obsolete as new de-identification techniques are developed.''

112. We make clear that reasonableness depends on ease of *re*-identification, not the cost of *de*-identification. As discussed above, customers' privacy interests include many noncommercial values, such as avoidance of embarrassment, concern for one's reputation, and control over the context of disclosure of one's information. The decisive question here is not how difficult it is to de-identify the information, but rather the ease with which the information could be re-identified. The FTC's linkability standard aligns with our approach: ''[W]hat qualifies as a reasonable level of [de-identification] depends upon the particular circumstances, including the available methods and technologies. In addition, the nature of the data at issue and the purposes for which it will be used are also relevant.''

113. Consistent with the FTC's guidance and the carrier's burden to prove that information is in fact de-identified, if carriers choose to maintain customer PI in both identifiable and de-identified formats, they must silo the data so that one dataset is not reasonably linkable to the other. Cross-referencing the datasets links the de-identified information with an identified customer, thus rendering the de-identified information linked or reasonably linkable. We agree with Verizon that ''providers should not be allowed to use de-identification and re-identification to circumvent consumers' privacy choices.''

114. We disagree with commenters who argue that the linkability standard should apply only to individuals and should not extend to devices. As explained above, we agree with the FTC staff that ''[a]s consumer devices become more personal and associated with individual users, the distinction between a device and its user continues to blur.'' This is not an uncommon conclusion in the Internet ecosystem; the Digital Advertising Alliance also recognizes the connection between individuals and devices in its definition of de-identification, stating that ''[d]ata has been De-Identified when . . . the data cannot reasonably . . . be connected to or associated with a particular computer or device.''

115. Similarly, for the reasons discussed above, we disagree with commenters who argue that IP addresses and MAC addresses should not be considered reasonably linkable to an individual or device on the theory that ''[t]hey only identify Internet endpoints, each of which, in turn, may reach multiple people or devices.'' The question in this test is whether the information in question is reasonably linkable to an individual or device. Consider, for example, a typical fixed residential customer. The BIAS provider

assigns that customer an IP address, and associates that customer with that IP address in its records. It is difficult to portray that scenario as not involving PII. On the other hand, if the BIAS provider shares the IP address with a third party without other identifying information, it may well be the case that the provider has not shared information that is ''reasonably linkable'' to an individual or device. Again, when confronted with the question, the Commission will look at all facts available and make a pragmatic determination of whether the information in question is ''reasonably linkable'' to an individual or device. NCTA expresses concern that finding that IP addresses can constitute PII will undermine judicial precedent under the Video Privacy Protection Act. As noted, we are not making categorical findings, but rather are looking to the ''reasonably linkable'' standard in finding whether information constitutes PII. We also observe that we are confronted with interpreting section 222 of the Communications Act and its requirements concerning the protection of ''proprietary information of, and relating to, . . . customers.'' This is distinct from the language of the VPPA, which more specifically defines PII as ''information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.'' Accordingly, a Commission finding that certain information is or is not PII for purposes of section 222 of the Communications Act does not answer the question of whether or not a court should consider that information to be PII under the VPPA or any other statutory provision.

(ii) Part Two—Public Commitments

116. Second, for information to meet our definition of de-identified, carriers must publicly commit to maintain and use de-identified information in a de-identified fashion and to not attempt to re-identify the data. Such public commitments inform customers of their legal rights and the provider's practices, and ''promot[e] accountability.'' As we discussed above, this level of transparency is a cornerstone of privacy best practices generally and these rules specifically. As such, we disagree with commenters who argue that such public commitments are unnecessary. This part of the test is consistent with FTC guidance—which has broad support in the record—and the CPBR. We agree that ''[c]ompanies that can demonstrate that they live up to their privacy commitments have powerful means of maintaining and strengthening consumer trust.'' Further, we find that this requirement will impose a minimal burden on providers, as a carrier can satisfy this requirement with a statement in its privacy policy.

(iii) Part Three—Contractual Limits on Other Entities

117. Third, for information to meet our definition of de-identified, we require telecommunications carriers to contractually prohibit recipients of de-identified information from attempting to re-identify it. This requirement is consistent with the FTC's de-identification guidelines and the Administration's CPBR, as well as industry best practices. The DAA guidance also requires that these commitments from recipients of the data be passed along to any further downstream recipients as well, which we support.

118. Businesses are often in the best position to control each other's practices. For example, AT&T's Privacy FAQ explains, ''When we provide individual anonymous information to businesses, we require that they only use it to compile aggregate reports, and for no other purpose. We also require businesses to agree they will not attempt to identify any person using this information . . . .'' The record demonstrates that such contractual prohibitions are an important part of protecting consumer privacy because re-identification science is rapidly evolving. We agree with Verizon and other commenters that ''anyone with whom the provider shares such de-identified data should be prohibited from trying to re-identify it.'' It is our expectation that carriers will need to monitor their contracts to maintain the carriers' continued adherence to these requirements. Consequently, we need not adopt a separate part of the test to delineate monitoring requirements. Further, we observe that third parties will have every incentive to comply with their contractual obligations to avoid both civil liability and enforcement actions by the FTC or the Commission (depending on the agency with authority over the third party). If violations occur, we expect carriers to take steps to protect the confidentiality of customer's proprietary information.

119. We agree with commenters who recommend a narrow clarification to the third part of the de-identification framework in situations involving disclosure of highly abstract statistical information. These situations include, for example, mass market advertisements or annual reports that reference the total number of subscribers or the percentage of customers at certain speed thresholds. AT&T explains that these scenarios can involve customer information that is so ''highly abstract[ed]'' that it is, ''in many circumstances, simply impossible'' to re-identify the data. Professor Narayanan concurs, noting that when statistical data is highly abstract, there is minimal risk of re-identification. We agree. Consequently, we will not require contractual commitments when the de-identified customer information is so highly abstracted that a reasonable data science expert would not consider it possible to re-identify it.

120. A number of commenters also ask for a narrow exception to this part of the de-identification test for the purposes of various types of cybersecurity or de-identification research. As explained below, we find that certain uses and disclosures of customer PI for the purpose of conducting research to improve and protect networks and/or services are part of the telecommunications service or ''necessary to, or used in'' the provision of the telecommunications service for the purposes of these rules. Since telecommunications carriers must be able to provide secure networks to their customers, we include security research within the scope of research allowed under this limitation. Security research also falls under the exception covered in Part III.D.2.b, *infra,* regarding uses of customer PI to protect the rights and property of a carrier, or to protect users from fraud, abuse, or unlawful use of the networks.

(iv) Case-by-Case Application

121. In adopting a technology-neutral standard to determine whether otherwise personally identifiable customer PI has been de-identified, we have eschewed an approach that finds particular techniques to be *per se* acceptable or unacceptable. We accordingly need not resolve the longstanding debate in the broader privacy literature concerning the circumstances under which data may be said to be reasonably de-identified, including the specific debate in the record concerning the appropriate role of aggregation. That said, by adopting the three-part test, we have made clear that a carrier cannot ''make an end-run around privacy rules simply by removing certain identifiers from data, while leaving vast swaths of customer details largely intact.'' As Professor Ohm has stated, the FTC guidance on which we pattern our standard is ''a very aggressive and appropriately strong form of de-identification'' and it is one that requires strong technological protections as well as business processes in its implementation. The

Commission will carefully monitor carriers' practices in this area. We emphasize that carriers relying on de-identification for use and sharing of customer proprietary information should employ well-accepted, technological best practices in order to meet the three-part test described above—and employ practices that keep pace with evolving technology and privacy science.

C. Providing Meaningful Notice of Privacy Policies

122. In this section, we adopt privacy policy notice requirements for providers of broadband Internet access services and other telecommunications services. There is broad recognition of the importance of transparency as one of the core fair information practice principles (FIPPs), and it is an essential component of many privacy laws and regulations, including the Satellite and Cable Privacy Acts. Customer notification is also among the least intrusive and most effective measures at our disposal for giving consumers tools to make informed privacy decisions. In fact, it is only possible for customers to give informed consent to the use of their confidential information if telecommunications carriers give their customers easy access to clear and conspicuous, comprehensible, and not misleading information about what customer data the carriers collect; how they use it; who it is shared with and for what purposes; and how customers can exercise their privacy choices. Therefore, we adopt rules to ensure that BIAS providers' and other telecommunications carriers' privacy notices meet these essential criteria, which provide transparency and enable the exercise of choice.

123. In adopting these transparency requirements, we build on and harmonize our existing section 222 rules for voice providers with BIAS providers' existing requirement to disclose their privacy policy under the 2010 and 2015 *Open Internet Orders.* For today's rules, we look to the record in this proceeding, which includes submissions from providers, consumer advocates, other government agencies, and others about what does and does not work with respect to privacy policies. We observe in particular that notice is fundamental to the FTC's privacy regime, acting as a basis for its implementation of FIPPs and forming required components of their enforcement proceedings. Based on that record, we adopt rules that require providers to disclose their privacy practices, but decline to be prescriptive about either the format or specific content of privacy policy notices in order to provide flexibility to providers and to minimize the burden of compliance levied by this requirement. Moreover, the record reflects that many BIAS providers and other telecommunications carriers already provide thorough notice of their privacy practices. In the interest of further minimizing the burden of transparency, particularly for small providers, we also direct the Consumer Advisory Committee to convene a multi-stakeholder process to develop a model privacy policy notice that will serve as a safe harbor for our notice requirements.

124. We recognize that some commenters have criticized privacy notice requirements as providing incomplete protections for consumers. Notices by themselves do not give consumers the power to control their information; notices are not always read or understood, and newer developments in tracking and analytics can reveal more about consumers than most people realize. However, none of these criticisms eliminates the fundamental need for and benefit of privacy notices. If consumers do not have access to the information they need to understand what personal data is being collected and how their data is being used and shared, they cannot make choices about those practices. The fact that poorly written or poorly distributed notices can confound consumer understanding does not make well-formed notices useless, and while one consumer may ignore a notice, another who has a compelling desire to protect her privacy will benefit substantially from it. Notice also remains an essential part of today's privacy frameworks, even as big data analysis creates new privacy challenges. As the recent Administration Big Data Report explains, notice and choice structures may not be sufficient to account for all privacy effects of ''big data,'' but such frameworks are necessary to protect consumers from a range of active privacy threats.

125. Below we lay out the specific transparency requirements we adopt today. First, we require that those privacy notices inform customers about what confidential information the providers collect, how they use it, and under what circumstances they share it. We also require that providers inform their customers about customers' rights to opt in to or out of (as the case may be) the use or sharing of their confidential information. This information must be presented in a way that is clear and conspicuous, in language that is comprehensible and not misleading. We will consider information to be misleading if it includes material misrepresentations or omissions. Second, we require that providers present their privacy notice to customers at the point of sale prior to the purchase of service, and that they make their privacy policies persistently available and easily accessible on their Web sites, apps, and the functional equivalents thereof. Finally, we require providers to give their customers advance notice of material changes to their privacy policies. In adopting these transparency rules, we are implementing, in part, sections 222(a) and 222(c)(1), under which we find that supplying customers with the information they need to make informed decisions about the use and sharing of their personal information is an element of ''informed'' approval within the meaning of section 222, as well as necessary to protecting the confidentiality of customer proprietary information.

1. Required Privacy Disclosures

126. Customers must have access to information about the personal data that a BIAS provider or other telecommunications carrier collects, uses, and shares, in order to make decisions about whether to do business with that provider, and in order to exercise their own privacy decisions. Absent such notice, the broad range of data that a provider is capable of gathering by virtue of providing service could leave customers with only a vague concept of how their privacy is affected by their service provider. We also agree with the FTC that disclosing this information ''provides an important accountability function,'' as disclosure of this information ''constitute[s] public commitments regarding companies' data practices.'' To enable customers to exercise informed choice, and to reduce the potential for confusion, misunderstanding, and carrier abuse, we find that a carrier's privacy notices must accurately describe the carrier's privacy policies with regard to its collection, use, and sharing of its customers' data. Therefore, we adopt rules that require each telecommunications carrier's notice of privacy policies to accurately specify and describe:

- The types of customer PI that the carrier collects by virtue of its provision of service, and how the carrier uses that information;
- Under what circumstances a carrier discloses or permits access to each type of customer PI that it collects, including the categories of entities to which the carrier discloses or permits access to customer PI and the purposes for which the customer PI will be used by each category of entities; and

• How customers can exercise their privacy choices.

We address each of these requirements in turn.

127. *Types of Customer PI Collected, and How It Is Used.* In order to make informed decisions about their privacy, customers must first know *what types* of their information their provider collects through the customers' use of the service. Therefore, we require BIAS providers and other telecommunications carriers to specify the types of customer PI that they collect by virtue of provision of the telecommunications service, and how they use that information. Pursuant to the voice rules and the *2010 Open Internet Order,* all BIAS providers already provide customers with information about their privacy policies. As such, we find that this requirement will not impose a significant burden on providers, and in some cases will decrease existing burdens.

128. Likewise, customers have a right to know *how* their information is being used and under what circumstances it is being disclosed in order to make informed privacy choices. Notices that omit these explanations fail to provide the context that customers need to exercise their choices. We emphasize that the notice must be sufficiently detailed to enable a reasonable consumer to make an informed choice

129. We do not require providers to divulge the inner workings of their data use programs. Instead, we find that to the extent that the notice requires providers to divulge the existence of such programs, the benefits to the market of more complete information, as well as the benefits to customers in knowing how their information is used, outweighs any individual advantage gained by any one competitor in keeping the existence of the programs secret. We therefore disagree with commenters that argue that these descriptions of how consumers' information will be used unduly jeopardize their competitive efforts.

130. *Sharing of Customer PI with Affiliates and Third Parties.* We also require that providers' privacy policies notify customers about the types of affiliates and third parties with which they share customer information, and the purposes for which the affiliates and third parties will use that information. A critical part of deciding whether to approve of the sharing of information is knowing *who* is receiving that information and for what purposes. This information will allow customers to gauge their comfort with the privacy practices and incentives of those other entities, whether they are affiliates or third parties. It will also promote customer confidence in their telecommunications service by providing concrete information and reducing uncertainty as to how their information is being used by the various parties in the data-sharing and marketing ecosystems. While our existing CPNI rules are more specific in requiring that individual entities be disclosed, we seek to minimize customer confusion and provider burden by adopting an approach used by the FTC by allowing disclosure of categories of entities. We also encourage carriers to make these categories of entities as useful and understandable to customers as possible. By way of example, the FTC's regulations implementing the GLBA privacy rules will find a covered institution in compliance with its rules if it lists particular categories of third party entities that it shares information with, distinguishing, for instance, between financial services providers, other companies, and other entities. The FTC's rules further specify that institutions should provide examples of businesses in those categories. In the context of communications customers' information, relevant categories might include providers of communications and communications-related services, customer-facing sellers of other goods and services, marketing and advertising companies, research and development, and nonprofit organizations.

131. We find that requiring providers to disclose categories of entities with which they share customer information and the purposes for which the customer PI will be used by each category of entities balances customers' rights to meaningful transparency with the reality of changing circumstances and the need to avoid overlong or over-frequent notifications. Because we harmonize these rules across BIAS and other telecommunications services, we eliminate the requirement that telecommunications services specify the ''specific entities'' that receive customer information in their notices of privacy policies accompanying solicitations for customer approval. We therefore reject calls to mandate disclosure of a list of the specific entities that receive customer PI. While some customers may benefit from receiving such detailed information, we are persuaded by commenters who assert that requiring such granularity would be unduly burdensome on carriers and induce notice fatigue in many customers. For instance, carriers would be faced with the near-continuous need to provide new notices every time contracts with particular vendors change or if third parties alter their corporate structure—and customers, in turn, would be inconvenienced with an overabundance of notices. Furthermore, a list of specific entities may not in itself aid the average consumer in making a privacy decision more than the requirement that we adopt, which ensures that consumers understand what third parties that receive their information do as a general matter. We therefore adopt the requirement that carriers need only provide categories of entities with whom customer PI is shared, minimizing the burden on telecommunications carriers. If a provider finds that providing notice of the specific entities with which it shares customer PI would increase customer confidence, nothing prevents a provider from doing so, and we would encourage notices to include as much useful information to customers as possible, while maintaining their clarity, concision, and comprehensibility, as discussed in Part III.C.3, below. Doing so does not require bombarding customers with pages of dense legal language; providers may make use of layered privacy notices or other techniques to ease comprehension and readability as necessary.

132. *Customers' Rights with Respect to Their PI.* We also adopt our *NPRM* proposal to require BIAS provider and other telecommunications carrier privacy notices to provide certain minimum information. Carriers need not, however, repeat any of these ''rights'' statements verbatim, and we encourage carriers to adapt these statements in manners that will be most effective based on their extensive experience with their customer base. Specifically, carriers' privacy notices must:

• Specify and describe customers' opt-in and opt-out rights with respect to their own PI. This includes explaining that:

○ A denial of approval to use, disclose, or permit access to customer PI for purposes other than providing telecommunications service will not affect the provision of the telecommunications services of which they are a customer.

○ any approval, denial, or withdrawal of approval for use of the customer PI for any purposes other than providing telecommunications service is valid until the customer affirmatively revokes such approval or denial, and that the customer has the right to deny or withdraw access to such PI at any time. However, the notice should also explain that the carrier may be compelled, or permitted, to disclose a customer's PI

when such disclosure is provided for by other laws.

• Provide access to a simple, easy-to-use mechanism for customers to provide or withdraw their consent to use, disclose, or permit access to customer PI as required by these rules.

133. These notice requirements are intended to ensure that providers inform their customers that they have the right to opt into or out of the use and sharing of their information, as well as how to make those choices known to the provider. We discuss the choice mechanism itself in Part III.D.4, *infra.* Requiring providers to describe in a single place how information is collected, used, and shared, as well as what the consumers' rights are to control that collection, use, and sharing, enhances the opportunity for customers to make informed decisions. Likewise, requiring the notice to provide access to the choice mechanism ensures that the mechanism is easily available and accessible as soon as the customer receives the necessary privacy information. This is important, since studies have shown that ''adding just a 15-second delay between the notice and the loading of [a] Web page where subjects choose whether to reveal their information eliminates the privacy-protective effect of the notice.'' As discussed further below, we decline to specify particular formats for carriers to provide access to their choice mechanisms, recognizing that different forms of access to the choice mechanism (*e.g.,* a link to a Web site, a mobile dashboard, or a toll-free number) may be more appropriate depending on the context in which the notice may be given (*e.g.,* on a provider's Web site, in a provider's app, or in a paper disclosure presented in a provider's store).

134. Studies have shown that customers are often resigned to an inability to control their information, and may be under a mistaken impression that exercising their rights may result in degraded service. Thus, we require providers' notice of privacy policies to also inform customers that denying a provider the ability to use or share customer PI will not affect their ability to receive service. As noted below, this provision does not mean that carriers categorically cannot engage in financial incentive practices. This parallels the existing section 222 rules, which require carriers to ''clearly state that a denial of approval will not affect the provision of any services to which the customer subscribes.'' Since providers drafting their notices have clear incentives to encourage customers to permit the use and sharing of customer PI, it can be easy for customers to misconstrue exactly what is conditioned upon their permission. These provisions are intended to make customers aware that the offer of choice is not merely *pro forma.*

135. We permit providers to make clear and neutral statements about potential consequences when customers decline to allow the use or sharing of their personal information. We require that any such statements be clear and neutral in order to prevent them from obscuring the basic fact of the customer's right to prevent the use of her information without loss of service. Allowing difficult-to-read or biased statements would run counter to our goal of ensuring that notices overall are clear and conspicuous, comprehensible, and not misleading. NTCA recommends that we remove or modify from the *NPRM's* proposal the requirement that the explanation be brief. In the interest of allowing more flexibility, we remove this requirement, with the understanding that brevity is often, but not always, a component of clarity.

136. We require providers to inform customers that their privacy choices will remain in effect until the customers change them, and that customers have the right to change them at any time. We acknowledge that ''[c]ustomers may make hasty decisions in the moment simply to obtain Internet access . . . [and] therefore appreciate the reminder that they have the opportunity to change their mind.'' We expect carriers' privacy promises to customers and the privacy choices customers make to be honored, including, for example, in connection with a carrier's bankruptcy. As the FTC has done in its groundbreaking work in this area, the FCC will be vocal in support of customer privacy interests that a carrier's bankruptcy may raise.

2. Timing and Placement of Notices

137. There is broad agreement that, in order to be useful, privacy policy notices must be clearly, conspicuously, and persistently available, and not overly burdensome to the carrier or fatiguing to the customer. We therefore require telecommunications carriers to provide notices of privacy policies at the point of sale prior to the purchase of service, and also to make them clearly, conspicuously, and persistently available on carriers' Web sites and via carriers' apps that are used to manage service, if any. We also eliminate periodic notice requirements from the voice CPNI rules.

138. *Point of Sale.* We agree with commenters that requiring notices at the point of sale ensures that notices are relevant in the context in which they are given, since this is a time when a customer can still decide whether or not to acquire or commit to paying for service, and it also allows customers to exercise their privacy choices when the carrier begins to collect information from them. In this, we agree with the FTC, which finds that the most relevant time is when consumers sign up for service. The proximity in time between sale and use of information means that a point-of-sale notice, in many if not most instances, serves the same function as a just-in-time notice—that of providing information at the most relevant point in time. Consumer groups such as the Center for Digital Democracy and providers such as Sprint also appear to agree on this point. The point-of-sale requirement is also consistent with the transparency requirements of the *2010 Open Internet Order,* which requires disclosure of privacy policies at the point of sale. As such, we find that this requirement will impose a minimal incremental burden on BIAS providers. The record further indicates that providing notice at the point of sale can be less burdensome for a carrier, in part because it allows the provider to walk a customer through the terms of the agreement. Providing notice at the point of sale, and not after a customer has committed to a subscription, can also allow carriers to compete on privacy.

139. We clarify that a ''point of sale'' need not be a physical location. Where the point of sale is over voice communications, we require providers to give customers a means to access the notice, either by directing them to an easily-findable Web site, or, if the customer lacks Internet access, providing the text of the notice of privacy policies in print or some other way agreed upon by the customer. We find that this requirement adequately addresses record concerns about the burdens associated with communicating polices orally to customers.

140. *Clear, Conspicuous, and Persistent Notice.* We also require telecommunications carriers to make their notices persistently available through a clear and conspicuous link on the carrier's homepage, through the provider's application (if it provides one for account management purposes), and any functional equivalents of the homepage or application. This requirement also reflects the transparency requirements in the *2010 Open Internet Order,* which mandate ''at a minimum, the prominent display of disclosures on a publicly available . . . Web site,'' and as such, should add a minimal burden for BIAS providers. Persistent and visible availability is critical; customers must be able to

review the notice and understand the carrier's privacy practices at any time since they may wish to reevaluate their privacy choices as their use of services change, as their personal circumstances change, or as they evaluate and learn about the programs offered by the provider. Persistent access to the notice of privacy policies also ensures that customers need not rely upon their memory of the notice that they viewed at the point of sale; so long as they have access to the provider's Web site, app, or equivalent, they can review the notice. As such, we require providers to at least provide a link to the web-hosted notice in a clear and conspicuous location on its homepage, to ensure that customers who visit the homepage may easily find it.

141. We require the notice of privacy policies to be clearly and conspicuously present not only on the provider's Web site, but to be accessible via any application (''app'') supplied to customers by the provider that serves as a means of managing their subscription to the telecommunications service. As more consumers rely upon mobile devices to access online information, a provider's Web site may become less of a central resource for information about the provider's policies and practices. Certain mobile apps serve much the same function as a mobile Web site interface, giving customers tools to manage their accounts with their providers. As a significant point of contact with the customer, such apps are an ideal place for customers to be able to find the notice of privacy policies. We do not, however, expect that every app supplied by a provider must carry the notice of privacy policies for the entire service—for instance, a mobile broadband provider that bundles a sports news app or a mobile game with its phones and services would not need to provide the privacy notice we require here with those apps. Nor do we require providers who lack an app to develop one. However, we require carriers that provide apps that manage a customer's billing or data usage, or otherwise serve as a functional equivalent to a provider's Web site, to ensure that those apps provide at least a link to a viewable notice of privacy policies.

142. Providing the notice both via the app and on the provider's Web site increases customers' ability to access and find the policy regardless of their primary point of contact with the provider. We do, however, wish to ensure that customers can still reach notices even as providers may develop other channels of contact with their customers, and thus require that the notice be made available on any functional equivalents of the Web site or app that may be developed. While we anticipate that all BIAS providers and most other telecommunications providers have a Web site, those that do not may provide their notices to customers in paper form or some other format agreed upon by the customer.

143. *No Periodic Notice Requirement.* We decline to require periodic notice on an annual or bi-annual basis. While periodic notices might serve to remind customers of their ability to exercise privacy choices, we remain mindful of the potential for notice fatigue and find that notices at the point of sale, supplemented by persistently available notices on providers' Web sites, and notices of material change to privacy policies, is sufficient to keep customers informed. Additionally, we believe that periodic notices might distract from notices of material changes, reducing the amount of customer attention to such changes. We find that annual or periodic notices are unnecessary or even counterproductive in this context, and we reduce burdens on all telecommunications carriers—including smaller carriers—by eliminating the pre-existing every-two-year notice requirement from our section 222 rules.

3. Form and Format of Privacy Notices

144. Recognizing the importance of flexibility in finding successful ways to communicate privacy policies to consumers, we decline to adopt any specific form or format for privacy notices. We agree with commenters that, in addition to running the risk of providing insufficient flexibility, mandated standardized requirements may unnecessarily increase burdens on providers, and prevent consumers from benefitting from notices tailored to a specific provider's practices. For example, the record reflects concerns that mandated standardized requirements can increase burdens on providers, and can also create a number of problems, including a lack of flexibility to account for the fact that different carriers may have different needs, such as creating comprehensive policies across different services. This concern is especially prevalent for smaller carriers. At the same time, we agree with commenters that whatever form of privacy notices a provider adopts, in order to adequately inform customers of their privacy rights, such privacy notices must clearly and conspicuously provide information in language that is comprehensible and not misleading, and be provided in the language used by the carrier to transact business with its customer. We therefore require providers to implement these general principles in formatting their privacy policy notices.

145. These basic requirements for the form and format of privacy policies build on existing Commission precedent regarding notice requirements for voice providers and open Internet transparency requirements for BIAS providers, and incorporate FTC guidance on customer notice standards. These basic principles are well suited to accommodating providers' and customers' changing needs as new business models develop or as providers develop and refine new ways to convey complex information to customers. Within these basic guidelines, providers may use any format that conveys the required information, including layering and adopting alternative methods of structuring the notice or highlighting its provisions. We note that as standard business practices for conveying complex information improve, we expect notices of providers' privacy policies to keep pace. We encourage innovative approaches to educating customers about privacy practices and choices.

146. While we decline to mandate a standardized notice at this time, the record demonstrates that voluntary standardization can benefit both customers and providers. As such, as described below, we adopt a voluntary safe harbor for a disclosure format that carriers may use in meeting the rules' standards for being clear and conspicuous, comprehensible, and not misleading.

147. *Clear, Conspicuous, Comprehensible and Not Misleading.* Consistent with existing best practices, we require providers' privacy notices to be readily available and written and formatted in ways that ensure the material information in them is comprehensible and easily understood. The record reflects broad agreement that providers' privacy practices ''should be easily available [and] written in a clear way.'' A number of commenters noted that certain practices frustrate the ability of customers to find and identify the important parts of privacy notices, observing, for example, that notices could be presented among or alongside distracting material, use unclear or obscure language, presented with significant delays in ability for consumers to act, or be placed only at the bottom of ''endless scrolling'' pages. By mandating that notices be clear, conspicuous, comprehensible, and not misleading, we prohibit such practices and others that render notices unclear, illegible, inaccessible, or needlessly obtuse.

148. The *NPRM* framed these requirements in several ways, including that notices be ''clear and conspicuous,'' as well as ''clearly legible, use sufficiently large type, and be displayed in an area so as to be readily apparent to the consumer.'' In adopting these rules, we streamline these requirements by interpreting ''conspicuous'' to include requirements for prominent display, and eliminate the requirement for ''sufficiently large type,'' based upon the understanding that insufficiently large type would not be ''comprehensible'' or ''clear and conspicuous.'' Removing this specific requirement also preserves the ability for providers who may be able to convey the necessary information through images or other non-textual means.

149. We agree with the FTC's observation that existing notices of privacy policies are frequently too long and unclear; overlong notices are often inherently less comprehensible. As T-Mobile states, ''today's busy consumers often have limited ability to fully review the hundreds of privacy policies that apply to the apps, Web sites, and services they use, and prefer simpler notices that provide meaningful information.'' We recognize that providers must balance conveying the required information in a comprehensive and comprehensible manner, and therefore encourage, but do not require, providers to make their notices as concise as possible while conveying the necessary information. Layered notices, lauded by a few commenters, may be one of several ways to achieve these parallel objectives.

150. The record also reflects that transparency is only effective in preventing deception when the information shared is meaningful to the recipient. We agree with the California Attorney General that companies should ''alert consumers to potentially unexpected data practices,'' and as such require that providers' notices not be misleading in addition to being comprehensible. This requirement is also consistent with FTC precedent.

151. *Other Languages.* We agree with the FTC that providers should convey notices to their customers in a language that the customers can understand. We therefore require providers to convey their entire notices of privacy policies to customers in another language, if the telecommunications carrier transacts business with the customer in that other language. This requirement ensures that customers who are advertised to in a particular language may also understand their privacy rights in that same language. We note that for the purposes of this rule, ''language'' also includes American Sign Language, meaning that if the customer transacts business with the carrier in American Sign Language, the notice would need to be made available in that language. We conclude that this obligation appropriately balances accommodating customers who primarily use languages other than English and reducing the burden on providers, especially small providers, to translate notices into languages that are unused by their particular customers.

152. *Mobile-Specific Considerations.* We decline to mandate any additional requirements for notices displayed on mobile devices. The record indicates that providers desire flexibility to adapt notices to be usable in the mobile environment for their customers, while consumer advocates stress that the requirements for usability must be met in some way, regardless of the specific formatting. So long as notices on mobile devices meet the above guidelines and convey the necessary information, they will comply with the rules. Providers are free to experiment within those broad guidelines and the capabilities of mobile display technology to find the best solution for their customers.

153. *Safe Harbor for Standardized Privacy Notices.* To encourage adoption of standardized privacy notices without mandating a particular form, we direct the Consumer Advisory Committee, which is composed of both industry and consumer interests, to formulate a proposed standardized notice format, based on input from a broad range of stakeholders, within six months of the time that its new membership is reconstituted, but, in any event, no later than June 1, 2017. There is strong support in the record for creation of standardized notice, and for use of multi-stakeholder processes. Standardized notices can assist consumers in interpreting privacy policies, and allow them to better compare the privacy policies of different providers, allowing increased competition in privacy protections. Standardized notices can also reduce compliance costs for providers, especially small providers, by ensuring they can easily adopt a compliant form and format for their notices.

154. The CAC has significant expertise in developing standard broadband disclosures and other consumer disclosure issues. We find that the Committee's experience makes it an ideal body to recommend a notice format that will be sufficiently clear and easy to read to allow consumers to easily understand and compare the privacy practices of different providers. To ensure that the notice will be clear and easy to read for all customers, it must also be accessible to persons with disabilities. We delegate authority to the Wireline Competition Bureau, Wireless Telecommunications Bureau, and Consumer & Governmental Affairs Bureau to work with the CAC on the draft standardized notice. If the CAC recommends a form or format that do not meet the Bureaus expectations, the Bureaus may ask the CAC to consider changes and submit a revised proposal for the Bureaus' review within 90 days of the Bureaus' request. The Bureaus may also seek public comment, as they deem appropriate, on any standardized notice the CAC recommends. We also delegate authority to the Bureaus to issue a Public Notice announcing any proposed format or formats that they conclude meet our expectations for the safe harbor for making consumer-facing disclosures.

155. Providers that voluntarily adopt a privacy notice format developed by the CAC and approved by the Bureaus will be deemed to be in compliance with the rules' requirements that notices be clear, conspicuous, comprehensible, and not misleading. As with the *Open Internet* BIAS transparency rules, use of the safe harbor notice is a safe harbor with respect to the format of the required disclosure to consumers. A provider meeting the safe harbor could still be found to be in violation of the rules, for example, if the content of that notice is misleading, otherwise inaccurate, or fails to include all mandated information.

4. Advance Notice of Material Changes to Privacy Policies

156. We require telecommunications carriers to provide advance notice of material changes to their privacy policies to their existing customers, via email or other means of active communication agreed upon by the customer. As with our requirements for the notice of privacy policy, if a carrier does not have a Web site, it may provide notices of material change notices to customers in paper form or some other format agreed upon by the customer. As with a provider's privacy policy notice, any advance notice of material changes to a privacy policy must be clear, conspicuous, comprehensible, and not misleading. The notice also must be completely translated into a language other than English if the telecommunications carrier transacts business with the customer in that language. This notice must inform customers of both (1) the changes being made; and (2) customers' rights with respect to the material change as it relates to their customer PI. In doing so, we follow our own precedent and that

of the FTC in recognizing the need for consumers to have up-to-date and relevant information upon which to base their choices. This requirement to notify customers of material change finds strong support in the record.

157. The record reflects strong justifications for requiring providers to give customers advance notice of material changes to their privacy policies. In order to ensure that customer approval to use or share customer PI is ''informed'' consent, customers must have accurate and up-to-date information of what they are agreeing to in privacy policies. The notice of material change requirement that we adopt is consistent with the transparency requirements of the *2015 Open Internet Order,* which require providers to disclose material changes in, among other things, ''commercial terms,'' which includes privacy policies. Notices of material change are essential to respecting customers' informed privacy choices; if a provider substantially changes its privacy practices after a customer has agreed to a different set of practices, the customer cannot be said to have given informed consent, consistent with Section 222. This is particularly important when providers are seeking a customer's opt-out consent, since the customer's privacy rights could change whether or not they had actual knowledge of the change in policy. We therefore disagree that such a requirement is outweighed by the risk of notice fatigue; to the extent that providers are frequently changing their policies materially, they should alert their customers to that fact, or risk rendering their earlier efforts at transparency fruitless.

158. For the purposes of this rule, we consider a ''material change'' to be any change that a reasonable customer would consider important to her decisions on her privacy. This parallels the consumer interest-focused definition of ''material change'' used in the *2015 Open Internet Order.* The definition differs from that in the *2015 Open Internet Order* in two respects: the customer's interest is defined by the customer's decisions on privacy, and not choice of provider, service, or application; and the reference to edge providers, which are not relevant to the material changes at issue, has been removed. Such changes would primarily include any changes to the types of customer PI at issue, how each type of customer PI is used or shared and for what purpose, or the categories of entities with which the customer PI is shared. To provide guidance on the standard above, at minimum, if any of the required information in the initial privacy notification changes, then the carrier must provide the required update notice. We adopt this guidance because the initial notice contains the information on which customers are making their privacy decisions, and changes to that information may alter how consumers grant permissions to their carriers. We also limit carriers' requirements under this section to existing customers, since only existing customers (and not new applicants) would have a current privacy policy that could be materially changed.

159. *Delivering Notices of Material Changes.* For consumers to understand carriers' privacy practices, carriers must keep them up to date and persistently available, but must also ensure that customers' knowledge of them is up to date. It is not reasonable, for instance, to expect consumers to visit carriers' privacy policies on a daily basis to see if anything has changed. Therefore, we require telecommunications carriers to notify an affected customer of material changes to their privacy policies by contacting the customer with an email or some other form of active communication agreed upon by the customer.

160. We require active forms of communication with the customer because merely altering the text of a privacy policy on the carrier's Web site alone is insufficient. There is little chance that, absent some form of affirmative contact, a customer would periodically visit and review a provider's notices of privacy policies for any changes. We also recommend, but do not require, providers to solicit customers' contact preferences to enable customers to choose their preferred method of active contact (such as email, text messaging, or some other form of alert), as not all customers have the same contact preferences. This is particularly true for voice services, where it may be less likely that customers will visit a provider's Web site, and providers may not have a customer's email address. While this does require each provider to have some means of contacting the customer, it does not require gathering more customer information, since, by virtue of providing service, a provider will necessarily be able to contact a customer, whether by email, text message, voice message, or postal mail. Some commenters have expressed concern that requiring carriers to send multiple notices in different formats for each material change would present ''significant logistical challenges.'' The rules do not require multiple formats for each notice of material change, but allow carriers to use one method, whether that is email or some other active method agreed upon by the customer.

161. The active notice requirements reflect the rationale behind the transparency requirements of the *2015 Open Internet Order,* which require directly notifying end users if the provider is about to engage in a network practice that will significantly affect a user's use of the service. As explained in that *Order,* the purpose is to ''provide the affected [] users with sufficient information . . . '' to make choices that will affect their usage of the service. Given these existing obligations, we disagree with commenters who suggest that providing more than one notice is overly burdensome.

162. In addition to the active notice required above, we encourage providers to include notices of changes in customers' billing statements, whether a customer has selected electronic billing, paper bills, or some other billing format. Providing notice via bills can help ensure that customers will receive the notice, and makes it more likely that they will correctly attribute the notice as coming from their provider.

163. *Contents of Advance Notice of Material Changes.* As proposed in the *NPRM,* the advance notice of material change must specify and describe the changes made to the provider's privacy policies, including any changes to what customer PI the provider collects; how it uses, discloses, or permits access to such information; and the categories of entities with which it shares that information. This explanation should also include whether any changes are retroactive (*i.e.,* they will involve the use or sharing of past customer PI that the provider can access). As discussed in Part III.D.1.a(ii) below, if the material change affects previously collected information, then, consistent with FTC precedent and recommendations, the carrier must obtain opt-in consent for that new use of previously collected information. The entire notice must be clear and conspicuous, comprehensible, and not misleading. The notice of material change need not contain the entirety of the provider's privacy policies, so long as it accurately conveys the relevant changes and provides easy access to the full policies. Moreover, the notice of material change must not simply provide fully updated privacy policies without specifically identifying the changes—as stated above, the changes must be identified clearly, conspicuously, comprehensibly, and in a manner that is not misleading. For the same reasons that we impose this requirement with respect to the notice of privacy policies, we also require that

the notice of material change be translated into a language other than English if the telecommunications carrier transacts business with the customer in that language. As with the initial notice of privacy policies, the notice of material change must also explain the customer's rights with regard to this information. We do not, however, require that carriers use any particular language in these explanations, and encourage carriers to adapt their notices in ways that best suit their customers. We decline to specify how much advance notification providers must give their customers before making material changes to their privacy policies, recognizing that the appropriate amount of time will vary, *inter alia,* based on the scope of the change or the sensitivity of the information at issue. However, BIAS providers and other telecommunications carriers must give customers sufficient advance notice to allow the customers to exercise meaningful choice with respect to those changed policies.

5. Harmonizing Voice Rules

164. As noted above, we apply these rules to all providers of telecommunications services. Harmonizing the rules for broadband and other telecommunications services will allow providers that offer multiple (and frequently bundled) services within this category to operate under a more uniform set of privacy rules, reducing potential compliance costs. For example, our rules will enable providers to provide the necessary notices for both voice and broadband services at the point of sale, allowing the information to be conveyed in one interaction for customers purchasing bundles, minimizing burdens on providers and customers alike. Furthermore, this consistency also enhances the ability of customers purchasing BIAS and other telecommunications services from a single provider to make informed choices regarding the handling of their information.

165. In harmonizing our notice rules across BIAS and other telecommunications services, we are able to reduce burdens on providers by eliminating certain existing requirements that we find are no longer necessary. For instance, because we require that notice of privacy practices be readily available on providers' Web sites, an already common practice, we eliminate the requirement that notices of privacy practices be re-sent to customers every 2 years. Further, because the record evinces the growing need for flexibility in applying the principles of transparency, we eliminate requirements that notices provide that ''the customer has a right, and the carrier has a duty, under federal law, to protect the confidentiality of CPNI'' —a requirement that has apparently been interpreted as requiring that language to appear verbatim in privacy policies. Similarly, we eliminate requirements that emails containing notices of material changes contain specific subject lines, leaving to providers the means by which they can meet the general requirements that any communication must be clear and conspicuous, comprehensible, and not misleading. We find that in lieu of these more prescriptive requirements, the common-sense rules we adopt above better ensure that customers receive truly informative notices without unnecessary notice fatigue or unnecessary regulatory burdens on carriers.

D. Customer Approval Requirements for the Use and Disclosure of Customer PI

166. In this section, we adopt rules that give customers of BIAS and other telecommunications services the tools they need to make choices about the use and sharing of their personal information, and to easily adjust those choices over the course of time. Respecting the choice of the individual is central to any privacy regime, and a fundamental component of FIPPs. In adopting section 222, Congress imposed a duty on telecommunications carriers to protect the confidentiality of their customers' information, and specifically required that carriers obtain customer approval for use and sharing of individually identifiable customer information. In adopting rules to implement these statutory requirements, we look to the record, which includes substantial discussion about customers' expectations in the context of the broader Internet ecosystem, as well as existing regulatory, enforcement, and best practices guidance. We are persuaded that sensitivity-based choice rules are the best way to implement the mandates of section 222, honor customer expectations, and provide carriers the ability to engage their customers.

167. We therefore adopt rules that require express informed consent (opt-in approval) from the customer for the use and sharing of sensitive customer PI. As described in greater detail below, our rules treat the following information as sensitive: Precise geo-location, health, financial, and children's information; Social Security numbers; content; and web browsing and application usage histories and their functional equivalents. For voice providers, our rules also treat call detail information as sensitive. With respect to non-sensitive customer PI, carriers must, at a minimum, provide their customers the ability to opt out of the carrier's use or sharing of that non-sensitive customer information. Carriers must also provide their customers with an easy-to-use, persistent mechanism to adjust their choice options. As discussed below, we do not consider a carrier's sharing of customer PI with the carrier's own agents to constitute sharing with third parties that requires either opt-in or opt-out consent.

168. The sensitivity-based choice approach we adopt is not monolithic. We recognize certain congressionally-directed exceptions to customer approval rights. Most obviously, carriers can, and indeed must, use and share customer PI in order to provide the underlying telecommunications service, to bill and collect payment for that service, and for certain other limited purposes by virtue of delivering the service. Congress also recognized that there are other laws and regulations that allow or require carriers to use and share customer PI without consent. Therefore, we adopt exceptions to our choice framework that allow carriers to use and share information for the congressionally directed purposes outlined in the Communications Act, and as otherwise required or authorized by law.

169. In the first part of this section, we discuss our application of a sensitivity-based framework to the use and sharing of customer PI. We explain what we consider to be sensitive customer PI, and how our rules apply the sensitivity-based framework. In the second part of this section, we explain and implement the limitations and exceptions to that choice framework.

170. In the next parts of this section, we discuss the mechanisms for customer approval provided for in our rules. We explain how and when carriers must solicit and obtain customer approval to use and share the customer's PI under the framework we adopt today, and require carriers to provide customers with easy access to a choice mechanism that is simple, easy-to-use, clearly and conspicuously disclosed, persistently available, and made available at no additional cost to the customer. Finally, we eliminate the requirements that telecommunications providers keep particular records of their use of customer PI and periodically report compliance to the Commission.

171. These rules apply both to BIAS and other telecommunications services.

The record reflects strong support for consistency between privacy regimes for all telecommunications services, both to reduce possible consumer confusion, and to decrease compliance burdens for all affected telecommunications carriers, particularly small providers. Therefore, within the scope of our authority over telecommunications carriers, we apply these rules to all BIAS providers and other telecommunications carriers.

1. Applying a Sensitivity-Based Customer Choice Framework

172. Except as otherwise provided by law and subject to the congressionally-directed exceptions discussed below, we adopt a customer choice framework that distinguishes between sensitive and non-sensitive customer information. We adopt rules that require BIAS providers and other telecommunications carriers to obtain a customer's opt-in consent before using or sharing sensitive customer PI. We also require carriers to obtain customer opt-in consent for material retroactive uses of customer PI, as discussed below. We also adopt rules requiring carriers to, at a minimum, offer their customers the ability to opt out of the use and sharing of non-sensitive customer information. Carriers may also choose to obtain opt-in approval from their customers to use or share non-sensitive customer PI. To ensure that consumers have effective privacy choices, we require carriers to provide their customers with a persistent, easy-to-access mechanism to opt in to or opt out of their carriers' use or sharing of customer PI.

173. In adopting a sensitivity-based framework, we move away from the purpose-based framework—in which the purpose for which the information will be used or shared determines the type of customer approval required—in the current rules and in the rules we proposed in the *NPRM.* Having sought comment on a sensitivity-based framework in the *NPRM,* and having received substantial support for it in the record, we find that incorporating a sensitivity element into our framework allows our rules to be more properly calibrated to customer and business expectations. This approach is also consistent with the framework recommended by the FTC in its comments and its 2012 staff report, and used by the FTC in its settlements. We make this transition for both BIAS and other telecommunications services because the record demonstrates that a sensitivity-based framework better reflects customer expectations regarding how their privacy is handled by their communications carriers.

174. Some commenters argue that all customer information is sensitive, and that subjecting only certain information to opt-in approval imposes an unnecessary burden on consumers who want to protect the privacy of their information to opt-out. While we appreciate that consumers are not monolithic in their preferences, as discussed below, we think the rule we adopt today strikes the right balance and gives consumers control over the use and sharing of their information. We decline to conclude that all customer PI is sensitive by default, and instead identify specific types of sensitive information, consistent with the FTC. Other commenters express concern that drawing a distinction between sensitive and non-sensitive information requires a broadband provider to analyze a customer's web browsing history and content to identify sensitive information, rendering the point of the distinction moot. Some commenters argue that carriers can use a system of whitelists to determine sensitive versus non-sensitive Web sites. This argument mistakenly presumes that the sensitivity of a customer's traffic relies upon the type or contents of the sites visited, and not simply the fact of the customer having visited them. However, this dispute and the concerns underlying it are themselves mooted by our decision to treat content, browsing history, and application usage history as sensitive and subject to opt-in consent. Thus, recognizing customer expectations and the comments reflecting them in the record, we adopt rules that base the level of approval carriers must obtain from customers upon the sensitivity of the customer PI at issue.

175. Adopting this choice framework implements the requirement in section 222(c)(1) that carriers, subject to certain exceptions, must obtain customer approval before using, sharing, or permitting access to individually identifiable CPNI. Further, we find that except where a limitation or exception discussed below applies, obtaining consent prior to using or sharing customer PI is a necessary component of protecting the confidentiality of customer PI pursuant to section 222(a). We also observe that drawing distinctions that allow opt-out or opt-in approval is well-grounded in our section 222 precedent and numerous other privacy statutes and regimes. The Commission has long held that allowing a customer to grant partial use of CPNI is consistent with one of the underlying principles of section 222: To ensure that customers maintain control over their own information.

176. Below, we explain the framework and its application. First, we define the scope of sensitive customer PI and explain our reasons for requiring opt-in consent to use or share sensitive customer PI. Consistent with FTC enforcement work and best practices guidance, we also require telecommunications carriers that seek to make retroactive material changes to their privacy policies to obtain opt-in consent from customers. Next, we discuss our reasons for allowing carriers to use and share non-sensitive customer PI subject to opt-out approval.

a. Approval Requirements for the Use and Sharing of Sensitive Customer PI

(i) Defining Sensitive Customer PI

177. For purposes of the sensitivity-based customer choice framework we adopt today, we find that sensitive customer PI includes, at a minimum, financial information; health information; Social Security numbers; precise geo-location information; information pertaining to children; content of communications; call detail information; and a customer's web browsing history, application usage history, and their functional equivalents. Although a carrier can be in compliance with our rules by providing customers with the opportunity to opt in to the use and sharing of these specifically identified categories of information, we encourage each carrier to consider whether it collects, uses, and shares other types of information that would be considered sensitive by some or all of its customers, and subject the use or sharing of that information to opt-in consent.

178. In identifying these categories as sensitive and subject to opt-in approval, we draw on the record and consider the context, which is the customer's relationship with his broadband or other telecommunications provider. The record demonstrates strong support for designating these specific categories of information as sensitive: Health information, financial information, precise geo-location information, children's information, and Social Security numbers. The FTC explicitly regards these categories of information as sensitive, as well. Despite some commenters' assertions to the contrary, the FTC does not claim to define the outer bounds of sensitive information with this list. For example, in its 2009 Staff Report on online behavioral advertising and in its comments to this proceeding, the FTC clearly indicated that its list was non-exhaustive. Furthermore, Commission precedent and consumer expectations demonstrate

strong support for certain additional categories of sensitive information. For instance, the Commission has also afforded enhanced protection to call detail information for voice services. Consumer research also supports identifying several types of information as sensitive: The 2016 Pew study, noted by a number of commenters in the record, found that large majorities of Americans considered Social Security numbers, health information, communications content (including phone conversations, email, and texts), physical locations over time, phone numbers called or texted, and web history to be sensitive. Each of these categories has a clear and well attested case in the record and in federal law for being considered sensitive.

179. Consistent with the FTC and the record, we conclude that precise geo-location information is sensitive customer PI. Congress specifically amended section 222 to protect the privacy of wireless location information as the privacy impacts of it became clear. Real-time and historical tracking of precise geo-location is both sensitive and valuable for marketing purposes due to the granular detail it can reveal about an individual. Such data can expose ''a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.'' In some cases, a BIAS provider can even pinpoint in which part of a store a customer is browsing. The FTC has found that precise geo-location data ''includ[es] but [is] not limited to GPS-based, WiFi-based, or cell-based location information.'' As noted above in paragraph 66, we do not draw distinctions between technologies used to determine precise geo-location. We make clear, however, that we do not consider a customer's postal or billing address to be sensitive precise geo-location information, but rather to be non-sensitive customer PI when used in context as customer contact information.

180. The record also reflects the historical and widely-held tenet that the content of communications is particularly sensitive. Like financial and health information, Congress recognized communications as being so critical that their content, information about them, and even the fact that they have occurred, are all worthy of privacy protections. This finding is strongly supported by the record, and consistent with FTC guidance. As the FTC explains, ''content data can be highly personalized and granular, allowing analyses that would not be possible with less rich data sets.'' We therefore concur with the large number of commenters who assert that content must be protected and agree with Access Now in finding that ''the use or sharing . . . of the content of user communications is a clear violation of the right to privacy.'' As such, we consider communications contents to be sensitive information. Designating content as sensitive customer PI will not, despite NCTA's concerns, require a carrier to obtain additional customer approval to accept or respond to communications with its customers.

181. We also add to the list of sensitive customer PI a customer's web browsing and application usage history, and their functional equivalents. A customer's web browsing and application usage history frequently reveal the contents of her communications, but also constitute sensitive information on their own—particularly considering the comprehensiveness of collection that a BIAS provider can enjoy and the particular context of the BIAS provider's relationship with the subscriber. The Commission has long considered call detail information sensitive, regardless of whether a customer called a restaurant, a family member, a bank, or a hospital. The confidentiality of that information, and its sensitivity, do not rely upon what category of entity the customer is calling. The same is true of a customer's web browsing and application usage histories. We therefore decline to define a subset of non-sensitive web browsing and application usage history, as a number of commenters urge. Some commenters raise the issue of cases drawing distinctions between ''content'' and ''metadata'' in the context of ECPA as standing for the proposition that all non-content data is non-sensitive. We disagree. While the text of ECPA requires a court to make determinations of what is and is not ''content'' of communications to determine that statute's applicability, neither the statute nor the case law interpreting it suggests that information other than content cannot be considered sensitive under the Communications Act.

182. Web browsing and application usage history, and their functional equivalents are also sensitive within the particular context of the relationship between the customer and the BIAS provider, in which the BIAS provider is the on-ramp to the Internet for the subscriber and thus sees all domains and IP addresses the subscriber visits or apps he or she uses while using BIAS. This is a different role than even the large online ad networks occupy—they may see many sites a subscriber visits, but rarely see all of them. The notion is that before a BIAS provider tracks the Web sites or other destinations its customer visits the customer should have the right to decide upfront if he or she is comfortable with that tracking for the purposes disclosed by the provider.

183. As EFF explains, BIAS providers can acquire a lot of information ''about a customer's beliefs and preferences—and likely future activities—from Web browsing history or Internet usage history, especially if combined with port information, application headers, and related information about a customer's usage or devices.'' For instance, a user's browsing history can provide a record of her reading habits—well-established as sensitive information—as well as information about her video viewing habits, or who she communicates with via email, instant messaging, social media, and video and voice tools. The cable and satellite privacy provisions of the Act were created in significant part to protect the privacy of video viewing habits. Video rental records have also been recognized by Congress as worthy of particular privacy protection. As such, we disagree with Google's assertions that web browsing has not traditionally been considered sensitive information. Furthermore, the domain names and IP addresses may contain potentially detailed information about the type, form, and content of a communication between a user and a Web site. In some cases, this can be extremely revealing: For instance, query strings within a URL may include the contents of a user's search query, the contents of a web form, or other information. Browsing history can easily lead to divulging other sensitive information, such as when and with what entities she maintains financial or medical accounts, her political beliefs, or attributes like gender, age, race, income range, and employment status. More detailed analysis of browsing history can more precisely determine detailed information, including a customer's financial status, familial status, race, religion, political leanings, age, and location. The wealth of information revealed by a customer's browsing history indicates that it, even apart from communications content, deserves the fullest privacy protection.

184. Web browsing, however, is only one form of sensitive information about a customer's online activities. The use of other applications besides web browsers also provides a significant amount of insight into a user's behavior. Any of the information transmitted to and from a customer via a browser can

just as easily be transmitted via a company-specific or use-specific application. Whether on a mobile device or a desktop computer, the user's newsreader application will give indications of what he is reading, when, and how; an online video player's use will transmit information about the videos he is watching in addition to the video contents themselves; an email, video chat, or over-the-top voice application will transmit and receive not only the messages themselves, but the names and contact information of his various friends, family, colleagues, and others; a banking or insurance company application will convey information about his health or finances; even the mere existence of those applications will indicate who he does business with. A customer using ride-hailing applications, dating applications, and even games will reveal information about his personal life merely through the fact that he uses those apps, even before the information they contain (his location, his profile, his lifestyle) is viewed.

185. Considering the particular visibility of this information to telecommunications carriers, we therefore find that web browsing history and application usage history, and their functional equivalents, are sensitive customer PI. We do not take a position on how sensitive this information would be in other contexts, or what levels of customer approval would be appropriate in those circumstances. Web browsing history and application usage history includes information from network traffic related to web browsing or other applications (including the application layer of such traffic), and information from network traffic indicating the Web site or party with which the consumer is communicating (*e.g.,* their domains and IP addresses). We include their functional equivalents to ensure that the privacy of customers' online activities (today most frequently encompassed by browsing and application usage history) will be protected regardless of the specific technology or architecture used. We expect this to be particularly significant as the Internet of Things continues to develop. While a customer may expect that the people and businesses she interacts with will know some things about her—her bookstore will know what she's bought by virtue of having sold it to her—this is distinct from having her voice or broadband provider extract that information from her communications paths and therefore knowing every store she has visited and everything she has purchased. Furthermore, as mentioned above, a carrier not only has the technical ability to access the information about the customer's calls to the bookstore or visits to its Web site; it could also, unlike the store, associate that information with the customer's other communications. Edge providers, even those that operate ad networks, simply do not have sufficient access to an individual to put together such a comprehensive view of a consumer's online behavior. And, to the extent a customer wants to prevent edge providers from collecting information about her, she can adopt a number of readily available privacy-enhancing technologies. While the knowledge of any one fact from a customer's online history (the use of an online app) may be known to several parties (including the BIAS provider, the app itself, the server of an in-app advertisement), the BIAS provider has the technical ability to access the most complete and most unavoidable picture of that history. We therefore disagree with commenters who believe that browsing history or application usage are not sensitive in the context of the customer/BIAS provider relationship.

186. Also, contrary to some commenters' arguments, the existence of encryption on Web sites or even in apps does not remove browsing history from the scope of sensitive information. As noted above, encryption is far from fully deployed; the volume of encrypted data does not represent a meaningful measure or privacy protection; and carriers have access to a large and broad amount of user data even when traffic is encrypted, including, frequently, the domains and IP addresses that a customer has visited. Comcast notes that few dispute on the record that a growing volume of traffic is encrypted. However, the volume of encrypted data is not indicative of how much customer privacy is protected. For instance, a very small amount of browsing information can reveal that a customer is visiting a site devoted to a particular disease, while many times that data, unencrypted, would only reveal that the user had streamed a particular video. Comcast argues that because BIAS providers are limited to this information, they have less access to information overall. While the record indicates that BIAS providers have a less granular view of encrypted web traffic than unencrypted, it does not change the breadth of the carrier's view or the fact that it acquires this information by virtue of its privileged position as the customer's conduit to the internet. Nor does it change the fact that this still constitutes a record of the customer's online behavior, which, as noted above, can reveal details of a customer's life even at the domain level.

187. In deciding to treat broadband customers' web browsing history, application history, and their functional equivalents as sensitive information, we agree with commenters, including technical experts, who explain that attempting to neatly parse customer data flowing through a network connection into sensitive and non-sensitive categories is a fundamentally fraught exercise. As a number of commenters have noted, a network provider is ill-situated to reliably evaluate the cause and meaning of a customer's network usage. We therefore disagree with the suggestion made by some commenters that web browsing is not sensitive, because providers have established methods of sorting data which do not require them to ''manually inspect'' the contents of packets.

188. This remains true even when providers do not attempt to classify customers' browsing and application usage as they use BIAS, but instead employ blacklists or whitelists of sensitive or non-sensitive sites and applications. Although commenters cite various industry attempts to categorize consumer interests, and identify the sensitive categories among those, the definitions vary significantly between them. Even within one set of classifications, the lines between what is and is not considered sensitive information can be difficult to determine. For instance, as Common Sense Kids Action points out, determining when browsing information belongs to a child, teen, or adult customer or user would require more than knowing the user's online destination. Further, as OTI notes, something that is non-sensitive to a majority of people may nevertheless be sensitive to a minority, which may have the unintended consequence of disparately impacting the privacy rights of racial and ethnic minorities and other protected classes. By treating all web browsing data as sensitive, we give broadband customers the right to opt in to the use and sharing of that information, while relieving providers of the obligation to evaluate the sensitivity and be the arbiter of any given piece of information.

189. We also observe that treating web browsing and application usage history as sensitive in the context of the BIAS/customer relationship is consistent with industry norms among BIAS providers. Until recently, for example, to participate in AT&T's GigaPower Premium Offer (*i.e.,* to receive the fixed

broadband service GigaPower at a lower cost), customers had to opt in to AT&T Internet Preferences. Under AT&T's Internet Preferences, ''you agree to share with us your individual browsing, like the search terms you enter and the Web pages you visit, so we can tailor ads and offers to your interests.'' AT&T explained that ''AT&T Internet Preferences works independently of your browser's privacy settings regarding cookies, do-not-track and private browsing'' and that ''[i]f you opt-in to AT&T Internet Preferences, AT&T will still be able to collect and use your Web browsing information independent of those settings.'' In short, AT&T appears to have tracked web browsing history only pursuant to customer opt-in. Similarly, participation in Verizon's Verizon Selects program is on an opt-in basis. That opt-in program uses web browsing and application usage data, along with location, to develop marketing information about its customers. We provide these examples only to demonstrate that BIAS providers already treat web browsing and application usage history as sensitive and as subject to opt-in consent, and we do not mean to suggest that these existing or past programs are reasonable or consistent with the rules and standards we discuss in this Order.

190. We disagree with the assertions made by a number of advertising trade associations that web browsing history should not be considered sensitive customer PI because courts have ''found that the advertising use of web browsing histories tied to device information does not harm or injure consumers.'' We find this to be inapposite to the task we confront in applying Section 222 of the Act. These cases deal with a factually different, and significantly narrower, scenarios than we address through web browsing history in this Order. For instance, in both cases, the courts found that plaintiffs had failed to allege that they had suffered ''loss'' as that term is narrowly defined under the Computer Fraud and Abuse Act. We do not adopt the CFAA's definitions of ''damage'' or ''loss'' for the purposes of this Order.

191. We recognize that there are other types of information that a carrier could add to the list of sensitive information, for example information that identifies customers as belonging to one or more of the protected classes recognized under federal civil rights laws. Commenters also describe as sensitive other forms of governmental identification, biometric identifiers, and electronic signatures. Other privacy frameworks, both governmental and commercial, identify other types of information as particularly sensitive, such as race, religion, political beliefs, criminal history, union membership, genetic data, and sexual habits or sexual orientation. Most of these categories already overlap with our established categories, or the use or sharing of such information would be subject to opt-in requirements pursuant to the requirement to obtain opt-in consent for the use and sharing of content and web browsing and application usage history. Moreover, as explained above, carriers are welcome to give their customers the opportunity to provide opt-in approval for the use and sharing of additional types of information. However, we recognize that as technologies and business practices evolve, the nature of what information is and is not sensitive may change, and as customer expectations or the public interest may require us to refine the categories of sensitive customer PI, we will do so. For instance, some commenters have suggested that information considered non-sensitive at one point might reveal through later analysis information about protected classes.

(ii) Opt-In Approval Required for Use and Sharing of Sensitive Customer PI and Retroactive Material Changes in Use of Customer PI

192. As the FTC recognizes, ''the more sensitive the data, the more consumers expect it to be protected and the less they expect it to be used and shared without their consent.'' We therefore require BIAS providers and other telecommunications carriers to obtain a customer's opt-in consent before using, disclosing, or permitting access to his or her sensitive customer PI, except as otherwise required by law and subject to the other exceptions outlined in Part III.D.2.

193. Consistent with the Commission's existing CPNI rules and wider precedent, opt-in approval requires that the carrier obtain affirmative, express consent from the customer for the requested use, disclosure, or access to the customer PI. Because section 222(a) requires protection of the confidentiality of all customer PI, we include all types of sensitive customer PI, and not just sensitive, individually identifiable CPNI, within the definition of opt-in approval. The broad support in the record for protecting sensitive information nearly unanimously argues that use and sharing of sensitive customer information be subject to customer opt-in approval. The record demonstrates that customers expect that their sensitive information will not be shared without their affirmative consent, and sensitive information, being more likely to lead to more serious customer harm, requires additional protection. For instance, the FTC recognizes that consumer expectations drive increased protections for sensitive information. We find that requiring opt-in approval for the use and sharing of sensitive customer PI reasonably balances burdens between carriers and their customers. If a carrier's uses or sharing of customers' sensitive personal information benefits those customers, the customer has every incentive to make that choice, and the carrier has every incentive to make the benefits of that choice clear to the customer. We anticipate that this will increase the amount of clear and informative information that customers will have about the costs and benefits of participation in these programs. Carriers' incentives to encourage customer opt-in will likely be tempered by carriers' desire to avoid alienating customers with too-frequent solicitations to opt in.

194. In contrast, we find that opt-out consent would be insufficient to protect the privacy of sensitive customer PI. Research has shown that default choices can be ''sticky,'' meaning that consumers will remain in the default position, even if they would not have actively chosen it. Further, opt-in regimes provide additional incentives for a company to invest in making notices clear, conspicuous, comprehensible, and direct. Additionally, empirical evidence shows that relatively few customers opt out even though a larger number express a preference not to share their information, suggesting that they did not receive notice or were otherwise frustrated in their ability to exercise choice. In an opt-in scenario, however, we anticipate that many consumers, solicited by carriers incentivized to provide and improve access to their notice and choice mechanisms, will wish to affirmatively exercise choice options around the use and sharing of sensitive information. Although we recognize that opt-in imposes additional costs, based on these factors we find that opt-in is warranted to maximize opportunities for informed choice about sensitive information.

195. *Material Retroactive Changes.* Notwithstanding the fact that our choice framework generally differentiates between sensitive and non-sensitive information, we agree with the FTC and other commenters that material retroactive changes require a customer's opt-in consent for changes to the use and sharing of both sensitive and non-sensitive information. The record demonstrates widespread conviction

that material retroactive changes to privacy policies should require opt-in approval from customers. Retroactive changes in privacy policies particularly risk violating customers' privacy expectations because they result in a carrier using or sharing information already collected from a customer for one purpose or set of purposes for a different purpose. Because of this, we require that telecommunications carriers obtain customers' opt-in approval before making retroactive material changes to privacy policies. It is a ''bedrock principle'' of the FTC that ''companies should provide prominent disclosures and obtain affirmative express consent before using data in a manner materially different than claimed at the time of collection.'' This means that, whether customer PI is sensitive or non-sensitive, a telecommunications carrier must obtain opt-in permission if it wants to use or share data that it collected before the time that the change was made. For instance, if a carrier wanted to change its policy to share a customer's past monthly data volumes with third party marketers, it would need to obtain the customer's opt-in permission. In contrast, if the carrier changes its policy to share the customer's future monthly data volumes with those same marketers, it would only need the customer's opt-out consent.

b. Approval Requirements for the Use and Sharing of Non-Sensitive Customer PI

196. We recognize that customer concerns about the use and sharing of their non-sensitive customer PI will be less acute than sharing of sensitive PI, and that there are significant benefits to customers and to businesses from some use and sharing of non-sensitive customer PI. However, we reject suggestions that consumers should be denied choice about the use and sharing of any of their non-sensitive information. Empowering consumers by providing choice is a standard component of privacy frameworks. Further, ensuring choice is necessary as a part of effectuating the duty to protect the confidentiality of customer PI under section 222(a) and the duty to obtain the approval of the customer before using, disclosing, or permitting access to individually identifiable CPNI under section 222(c)(1). Therefore, consistent with the FTC privacy framework, we require BIAS providers and other telecommunications carriers to obtain the customer's opt-out approval to use, disclose, or permit access to non-sensitive customer PI. We note that our requirements for customer opt-out approval serve as a floor, not a ceiling, to the level of customer approval to be provided. Thus, a carrier may set up its programs to solicit and receive customer opt-in approval if it so chooses.

197. We define opt-out approval as a means for obtaining customer consent to use, disclose, or permit access to the customer's proprietary information under which a customer is deemed to have consented to the use, disclosure, or access to the customer's covered information if the customer has failed to object thereto after the carrier's request for consent. This definition, based on the existing CPNI voice rules, applies to all non-sensitive customer PI for all covered telecommunications carriers. The current CPNI rules define opt-out approval to require a thirty-day waiting period before a carrier can consider a customer's opt-out approval effective. We eliminate this requirement, and similarly decline to apply it to BIAS providers or other telecommunications carriers. As borne out in the record, we find that requiring carriers to enable customers to opt out at any time and with minimal effort will reduce the likelihood that customers' privacy choices would not be respected. As such, we believe that the 30-day waiting period is no longer necessary and provide additional regulatory flexibility by eliminating it. We make clear, however, that while we do not adopt a specific timeframe for effectuating customers' opt-out approval choices, we do not expect carriers to assume that a customer has granted opt-out consent when a reasonable customer would not have had an opportunity to view the solicitation. We conclude that this flexible standard will appropriately account for the faster pace of electronic transactions, while preventing carriers from using customer PI before customers have had the opportunity to opt out.

198. We agree with commenters who assert that non-sensitive information naturally generates fewer privacy concerns for customers, and as such does not require the same level of customer approval as for sensitive customer PI. From this, we conclude that an opt-out approval regime for use and sharing of non-sensitive customer PI would likely meet customers' privacy expectations. We agree with ANA that ''[a]n opt-out framework for uses of non-sensitive information also matches consumers' expectations regarding treatment of their data,'' and CTIA that ''[b]y tying its rules to the sensitivity of the data, the Commission will ensure that they align with consumer expectations and what consumers know to be fair.'' While an opt-out regime places a greater burden than an opt-in regime upon customers who do not wish for their carrier to use or share their non-sensitive information, research suggests that those same customers will likely be more motivated to actively exercise their opt-out choices. Further, we conclude that permitting carriers to use and share non-sensitive data with customers' opt-out approval—rather than opt-in approval—grants carriers flexibility to make improvements and innovations based on customer PI. For example, ACA notes that an opt-out framework can allow ''providers, including small providers, to explore, market, and deploy innovative, value-added services to their consumers, including home security and home automation services that will drive the 'Internet of Things.' '' Thus, we reject arguments that ''opt-out is not an appropriate mechanism to obtain user approval'' in any circumstances.

199. We disagree with commenters who assert that customer approval to use and share customer PI for the purposes of all first party marketing is generally implied in Section 222. We find that allowing carriers to use or share customer PI for all first party marketing does not comport with section 222's customer approval and data protection requirements. Section 222(c)(1) explicitly requires customer approval to use and share CPNI for purposes other than providing the telecommunications service, and subject to certain other limited exceptions. Likewise, section 222(a) imposes a duty on carriers to protect the confidentiality of customer PI. We conclude that permitting carriers to use and share customer PI to market all carrier and affiliate services based on inferred customer approval is inconsistent with these statutory obligations. Our conclusion is also consistent with Commission precedent and FTC Staff comments. This same rationale applies to other telecommunications carriers. We note that, as discussed below, limited types of first-party marketing (of categories of service to which a customer subscribes, and services necessary to, or used in, those services) do not require customer approval. While some comments assert that customers expect some degree of targeted marketing absent explicit customer approval, the record also indicates that customers expect choice with regard to the privacy of their online communications. Inferring consent for all first-party marketing would leave consumers without the right to opt out of receiving any manner of marketing from their telecommunications carrier—

violating that basic precept recognized by Justice Louis Brandeis of the ''right of the individual to be let alone.'' We accordingly adopt an opt-out regime for first-party marketing that relies on non-sensitive customer PI to fulfill Section 222 and provide customers with the choice that they desire without unduly hindering the marketing of innovative services.

200. Giving consumers control of the use and disclosure of their information, even for first-party marketing, is consistent with other consumer protection laws and regulations adopted by both the FTC and FCC. For instance, the popular and familiar National Do Not Call registry, created by the FTC, the FCC, and the states empowers consumers to opt out of most telemarketing calls. Consumers have registered over 222 million phone numbers with the Do Not Call Registry in order to stop unwanted marketing calls. Also, pursuant to rules adopted by both the FTC and the FCC, consumers to have the right to opt out of receiving calls even from companies with which they have a prior business relationship, with businesses required to place the consumer on a do-not-call list upon the consumer's request. The CAN SPAM Act of 2003, and the rules the FTC adopted under CAN SPAM, also give consumers the right to opt out of the receipt of future commercial email from and require senders of commercial email to provide a working mechanism in their email to facilitate those opt-outs. Our rules follow these many models.

2. Congressionally-Recognized Exceptions to Customer Approval Requirements for Use and Sharing of Customer PI

201. In this section, we detail the scope of limitations and exceptions to the customer approval framework discussed above. In the first part of this section, based on our review of the record and our analysis of the best way to implement section 222, we find that no additional customer consent is needed in order for a BIAS provider or other telecommunications carrier to use and share customer PI in order to provide the telecommunications service from which such information is derived or provide services necessary to, or used in, the provision of such telecommunications service. These limitations on customer approval requirements allow a variety of necessary activities beyond the bare provision of services, including research to improve or protect the network or telecommunications, and limited first-party marketing of services that are part of, necessary to, or used in the provision of the telecommunications service. In the second part of this section, we apply the statutory exceptions detailed in section 222(d) to all customer PI, allowing telecommunications carriers to use and share customer PI to: (1) Initiate, render, bill, and collect for telecommunications services; (2) protect the rights or property of the carrier, or to protect users and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, telecommunications services; (3) provide any inbound telemarketing, referral, or administrative services to the customer for the duration of a call; and (4) provide customer location information and non-sensitive customer PI in certain specified emergency situations. We also take this opportunity to clarify that our rules do not prevent use and sharing of customer PI to the extent such use or sharing is allowed or required by other law.

202. The statutory mandate of confidentiality is not an edict of absolute secrecy. The need to use and share customer information to provide telecommunications services, to initiate or render a bill, to protect the network, and to engage in the other practices identified above are inherent in a customer's subscription. While Congress specified this in the context of its more detailed provisions on customer approval for CPNI in sections 222(c)–(d), it left to the Commission the details of determining the scope of the duty of confidentiality. We therefore exercise our authority to adopt implementing rules in order to harmonize the application in our rules of section 222(a) as to customer PI with the limitations and exceptions of sections 222(c)–(d). Doing so ensures that carriers are not burdened with disparate or duplicative approval requirements based upon whether a particular piece of information is classified as CPNI, PII, or both. We disagree with commenters who argue that extending these limitations and exceptions to approval requirements unduly risk customers' privacy. We make clear that carriers using or sharing customer PI should remain particularly cognizant of their obligation to comply with the data security standards in Part III.E, below. We also emphasize that carriers should be particularly cautious about using sensitive customer PI, especially the content of communications, and carriers should carefully consider whether its use is necessary before making use of it subject to these limitations and exceptions. Furthermore, we observe that BIAS providers and other telecommunications carriers remain subject to all other applicable laws and regulations that affect their collection, use, or disclosure of communications, including but not limited to, the Electronic Communications Privacy Act (ECPA), the Communications Assistance for Law Enforcement Act (CALEA), section 705 of the Communications Act, and the Cybersecurity Information Sharing Act (CISA).

a. Provision of Service and Services Necessary to, or Used in, Provision of Service

203. Section 222 makes clear that no additional customer consent is needed to use customer PI to provide the telecommunications service from which it was derived, and services necessary to, or used in the telecommunications service. Consent to use customer PI for the provision of service is implied in the service relationship. We note that the need for providers to transmit and disclose certain types of customer PI (including IP addresses and the contents of communications) in the course of providing service in no way obviates customers' privacy interests in this information. Customers expect their information to be used in the provision of service—after all, customers fully intend for their communications to be transmitted to and from recipients—and they necessarily give their information to the carrier for that purpose. For instance, a number of commenters objected to our inclusion of IP addresses as forms of customer PI, because they are necessary to route customers' communications, or otherwise provide telecommunications service. This concern is misplaced; while a BIAS provider needs to share its customer's IP address to provide the broadband service, there is no basis to share that information for other non-exempt purposes absent customer consent. Indeed, because of the explicit limitation described by section 222(c)(1)(A) and implemented here, we do not need to exclude IP addresses or other forms of information from the scope of customer PI in order to allow the provision of telecommunications service, or services necessary to or used in providing telecommunications service. Thus, we import these statutory mandates into our rules and apply them to all customer PI.

204. We continue to find, as did previous Commissions, that telecommunications customers expect their carriers to market them improved service offerings within the scope of service to which they already subscribe, and as such, conclude that such limited first-party marketing is part of the provision of the telecommunications

service within the meaning of Section 222(c)(1)(A). As with earlier CPNI orders, we decline to enumerate a definitive list of ''services necessary to, or used in, the provision of . . . telecommunications service'' within the meaning of section 222(c)(1). However, we provide guidance with respect to certain services raised in the record, and specifically find that this exception includes the provision and marketing of communications services commonly bundled together with the subscriber's telecommunications service, customer premises equipment, and services formerly known as ''adjunct-to-basic services.'' We further find that the provision of inside wiring and technical support; reasonable network management; and research to improve and protect the network or the telecommunications either fall within this category or constitute part of the provision of telecommunications service.

205. *Services that are Part of, Necessary to, or Used in the Provision of Telecommunications Service.* The Commission has historically recognized that, as a part of providing service, carriers may, without customer approval, use and share CPNI to market service offerings among the categories of service to which the customer already subscribes. We therefore adopt a variation of our proposal, which mirrored the existing rule, and permit telecommunications carriers to infer approval to use and share non-sensitive customer PI to market other communications services commonly marketed with the telecommunications service to which the customer already subscribes. For example, the carrier could infer consent to market voice (whether fixed and/or mobile) and video service to a customer of its broadband Internet access service. We limit this exception to the use and sharing of non-sensitive information, because we agree with a number of commenters that this type of marketing remains part of what customers expect from their telecommunications carrier when subscribing to a service. For example, under our rules, a BIAS provider can offer customers new or different pricing or plans for the customers' existing subscriptions (*e.g.,* a carrier may, without the customer's approval, use the fact that the customer regularly reaches a monthly usage cap to market a higher tier of service to the customer). This exception also allows carriers to conduct internal analyses of non-sensitive customer PI to develop and improve their products and services and to develop or improve their offerings or marketing campaigns generally, apart from using the customer PI to target specific customers.

206. The Commission also has historically recognized certain functions offered by telecommunications carriers as inherently part of, or necessary to, or used in, the provision of telecommunications service. Consistent with Commission precedent, we reaffirm that services formerly known as ''adjunct-to-basic,'' including, but not limited to, speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking, call return, repeat dialing, call tracking, call waiting, caller ID, call forwarding, and certain centrex features, are either part of the provision of telecommunications service or are ''necessary to, or used in'' the provision of that telecommunications service. Similarly, the Commission has, in prior orders, recognized that the provision and marketing of certain other services as being ''necessary to, or used in'' the provision of service, such as call answering, voice mail or messaging, voice storage and retrieval services, fax storage and retrieval services, and protocol conversion, and we continue to do so today. In the *2015 Open Internet Order,* we concluded that DNS, caching, and network-oriented, security-related blocking functions including parental controls and firewalls fall within the telecommunications systems management exception and are akin to adjunct-to-basic services. Likewise, we continue to find that CPE, as well as other customer devices, inside wiring installation, maintenance, and repair, as well as technical support, serve as illustrative examples of services that are either part of the telecommunications service or are ''necessary to, or used in'' the provision of the underlying telecommunications service for the purposes of these rules. In each case here and below, whether the particular function is a part of the telecommunications service or a separate service ''necessary to, or used in'' the telecommunications service may depend on the particular circumstances of the underlying telecommunications service and the customer, and we need not address this distinction to determine that the statutory limitation applies. Customers require working inside wiring to receive service, and often depend upon technical support to fully utilize their services. As such, carriers may use and share non-sensitive customer PI, without additional customer approval, to provide and market such services.

207. In importing these historical findings into the rules we adopt today and applying them to the current telecommunications environment, we make clear that our rules no longer permit CMRS providers to use or share customer PI to market all information services without customer approval. In first making these findings, the Commission noted the potential to revisit this decision if it became apparent that customer expectations, and the public interest, changed. The *1999 CPNI Reconsideration Order* interpreted section 222(c)(1) as permitting CMRS providers to market information services in general to their customers without customer approval, but limited the information services for which wireline carriers could infer approval. That decision was made when the mobile information services market was in its infancy. As the third party mobile application market has developed, we can no longer find that such an exception is consistent with giving consumers meaningful choice over the use and sharing of their information. Moreover, we have a strong interest in our rules being technologically neutral.

208. *Reasonable Network Management.* We agree with commenters asserting that BIAS providers need to use customer PI to engage in reasonable network management. We have previously explained that a network practice is ''reasonable if it primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband service.'' As we further elaborated in the *2015 Open Internet Order,* reasonable network management includes, but is not limited to network management practices that are primarily used for, and tailored to, ensuring network security and integrity, including by addressing traffic that is harmful to the network; network management practices that are primarily used for, and tailored to, addressing traffic that is unwanted by end users; and network practices that alleviate congestion without regard to the source, destination, content, application, or service. We recognize that reasonable network management plays an important role in providing BIAS, and consider reasonable network management to be part of the telecommunications service or ''necessary to, or used in'' the provision of the telecommunications service. As such, we clarify that BIAS providers may infer customer approval to use, disclose, and permit access to customer PI to the extent necessary for reasonable

network management, as we defined that term in the *2015 Open Internet Order.*

209. *Research to Improve and Protect Networks or Telecommunications.* We also find that certain uses and disclosures of customer PI for the purpose of conducting research to improve and protect networks or telecommunications are part of the telecommunications service or ''necessary to, or used in'' the provision of the telecommunications service for the purposes of these rules. Since telecommunications carriers must be able to provide secure networks to their customers, we include security research within the scope of research allowed under this limitation. Security research also falls under the exception covered in Part III.D.2.b, *infra,* regarding uses of customer PI to protect the rights and property of a carrier, or to protect users from fraud, abuse, or unlawful use of the networks. For instance, Professor Feamster explains that ''network research fundamentally depends on cooperative data sharing agreements with ISPs,'' and that, lack of access to certain types of customer PI, ''will severely limit vendors' and developers' ability to build and deploy network technology that functions correctly, safely, and securely.'' Comcast also emphasizes the need to share customer PI with ''trusted vendors, researchers, and academics . . . under strict confidentiality agreements . . . to improve both the integrity and reliability of the service.'' NCTA also argues that carriers must be able to use customer data for internal operational purposes such as improving network performance. Some commenters, such as CDT, caution that a research exemption, read too broadly, might permit privacy violations. We share these concerns, and emphasize that in the interest of protecting the confidentiality of customer PI, carriers should seek to minimize privacy risks that may stem from using and disclosing customer PI for the purpose of research, and should ensure that the entities to which they disclose customer PI will likewise safeguard customer privacy. Telecommunications carriers and researchers should design research projects that incorporate principles of privacy-by-design, and agree not to publish or otherwise publicly share individually identifiable data without customer consent. This would include, for instance, practicing data minimization and not using more identifiable information than necessary for the research task. In addition, the existing rules permit CMRS providers to infer customer approval to use and share CPNI for the purpose of conducting research on the health effects of CMRS. We retain this limited provision, extending it to all customer PI. We reiterate that that carriers should endeavor to minimize privacy risks to customers.

b. Specific Exceptions

210. In addition to the activities included in the provision of service and services necessary to, or used in, provision of service, carriers do not need to seek customer approval to engage in certain specific activities that represent important policy goals detailed in section 222(d). We apply those exceptions to the customer approval framework to all customer PI.

211. *Initiate, Render, Bill, and Collect for Service.* We import into our rules and apply to all customer PI the statutory exception permitting carriers to use, disclose, and permit access to CPNI ''to initiate, render, bill, and collect for telecommunications services'' without obtaining additional customer consent. As the Rural Wireless Association explains, carriers frequently need to share ''certain customer information'' ''with billing system vendors, workforce management system vendors, consultants that assist with certain projects, help desk providers, and system monitoring solutions providers.'' Also, as noted below, to the extent that the carrier is using an agent to perform acts on its behalf, the carrier's agents, acting in the scope of their employment, stand in the place of the carrier, both in terms of rights and liabilities.

212. *Protection of Rights and Property.* We also import into our rules and apply to all customer PI the statutory provision permitting carriers to use, disclose, and permit access to CPNI ''to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services'' without obtaining specific customer approval. We agree with the broad set of commenters who expressed the opinion that this exception should be incorporated into the rules, and further agree that it should also apply to customer PI beyond CPNI. We also find that these rules comport with the Cybersecurity Information Sharing Act of 2015 (CISA), which permits certain sharing of cyber threat indicators between telecommunications providers and the federal government or private entities, ''notwithstanding any other provision of law.'' We do not assume that the scope of our exception is coterminous with the definition of cyber threat information in CISA. As noted, however, to the extent information is allowed to be shared pursuant to CISA, our rules do not inhibit such sharing. Moreover, to the extent that other federal laws, such as CISA, permit or require use or sharing of customer PI, our rules expressly do not prohibit such use or sharing.

213. We also agree with commenters that this provision of our rules encompasses the use and sharing of customer PI to protect against spam, malware such as viruses, and other harmful traffic, including fraudulent, abusive, or otherwise unlawful robocalls. As proposed, this includes any form of customer PI, not merely calling party phone numbers. We caution that carriers using or sharing customer PI pursuant to this section of the rules should remain vigilant about limiting such use and sharing to the purposes of protecting their networks and users, and complying with their data security requirements. We acknowledge Access Now's concern that an overbroad reading of this exception could result in carriers actively and routinely monitoring and reporting on customers' behavior and traffic, and make clear that the rule does not allow carriers to share their customers' information wholesale on the possibility that doing so would enhance security; use and sharing of customer PI for these purposes must be reasonably tailored to protecting the network and its users.

214. We agree with commenters that recommend that we consider this provision of our rules to encompass not only actions taken to combat immediate security threats, but also uses and sharing to research and develop network and cybersecurity defenses. When combined with the immunity granted by CISA, this exception addresses carriers' concerns about participating in cybersecurity sharing initiatives. As noted above, CISA permits the sharing of cybersecurity threat indicators ''notwithstanding any other provision of law.'' These provisions should also alleviate the concern expressed in the interim update on information sharing from the Communications Security, Reliability, and Interoperability Council (CSRIC), that our rules may conflict with CISA. Security is an essential part of preventing bad actors from gaining unauthorized access to the system or making abusive use of it with spam, malware, or denial of service attacks. Research and development into new techniques and technologies for addressing fraud and abuse may require internal use of customer PI, but also disclosures to third-party researchers

and other collaborators. However, as with other applications of this exception, carriers should not disclose more information than is reasonable to achieve this purpose, and should take reasonable steps to ensure that the parties with which they share information use this information only for the purposes for which it was disclosed. Feamster et al. suggest that security research receive a specific exemption, so long as security disclosures be limited to those that: Promote security, stability, and reliability of networks; do not violate privacy; and benefit research in a way that outweighs privacy risks. They also highlight particular categories of researchers to whom disclosure represents less privacy risk. While we decline to include this specific exemption and its criteria, we note that similar steps to mitigate privacy risks and determine trustworthy recipients can be useful factors in determining reasonableness.

215. *Providing Inbound Services to Customers.* Customers expect that a carrier will use their customer PI when they initiate contact with the carrier in order to ask for support, referral, or new services in a real-time context. Therefore, within the limited context of the particular interaction, carriers can use customer PI to render the services that the customer requests without receiving additional approval from the customer. This provision represents a more generalized version of the exception in section 222(d)(3), which specifies that carriers may use customer PI ''for the duration of [a support, referral, or request for new services] call.'' Under the rule we adopt today, carriers may use customer PI for the duration of any real-time interaction, including voice calls, videoconferencing, and online chats. However, given the less formal nature of such requests, a carrier's authorization to use the customer PI without additional permission should only last as long as that particular interaction does, and not persist longer. We find that this provision will achieve the same purpose as existing section 64.2008(f) of our rules, which allows carriers to waive certain notice requirements for one-time usage of customer PI. We believe that carriers' ability to use customer PI for these purposes without additional customer permission obviates the need for streamlined notice and consent requirements in one-time interactions.

216. Some commenters have argued that our rules should permit a carrier to share customer PI with its agents absent customer approval, noting the need to share customer PI with agents to provide customer support, billing, or other tasks. We agree that such sharing is often necessary, and the limitations and exceptions outlined above allow carriers to share customer PI with their agents without additional customer approval. To the extent that a carrier needs to share customer PI with an agent for a non-exempt task, it needs no more customer approval than it would have needed in order to perform that task itself. This is consonant with the Communications Act's requirement that carriers' agents, acting in the scope of their employment, stand in the place of the carrier, both in terms of rights and liabilities.

217. *Providing Certain Customer PI in Emergency Situations.* In adopting section 222, Congress recognized the important public safety interests in ensuring that carriers can use and share necessary customer information in emergency situations. Section 222(d)(4) specifically allows carriers to provide call location information of commercial mobile service users to: (1) Certain specified emergency services, in response to a user's call for emergency services; (2) a user's legal guardian or immediate family member, in an emergency situation that involves the risk of death or serious physical harm; and (3) to providers of information or database management services solely for the purpose of assisting in the delivery of emergency services in the case of an emergency. We adopt rules mirroring these exceptions, and expand the scope of information that may be disclosed under these circumstances to include customer location information and non-sensitive customer PI.

218. While commercial mobile service users' location may be the information most immediately relevant to emergency services personnel, other forms of customer PI may also be relevant for customers using services other than commercial mobile services, especially if customers are seeking emergency assistance through means other than dialing 9–1–1 on a voice line. Expanding the types of information available in an emergency to include non-sensitive information such as other known contact information for the customer or the customer's family or legal guardian will allow carriers the flexibility necessary to keep emergency services informed with actionable information. However, recognizing the concerns that too broad an exception could lead to increased exposure of sensitive information, we extend the exception only to customer location information and non-sensitive customer PI.

219. We recognize that, as with any provision that allows disclosure of a customer's information, this exception can potentially be abused. Various bad actors may use pretexting techniques, pretending to be a guardian, immediate family member, emergency responder, or other authorized entity to gain access to customer PI. As with all of the other provisions of these rules, we expect carriers to abide by the security standards set forth in Part III.E, below. Under these standards, we expect that carriers will reasonably authenticate third parties to whom they intend to disclose or permit access to customer PI. This need to act reasonably also applies to authenticating emergency services and other entities covered under this exception, as well as authenticating customers themselves.

220. We decline suggestions that we allow carriers only to divulge customer PI in emergency situations to emergency contact numbers specified by the customer in advance. While such a safeguard could prevent a certain amount of pretexting, we believe that such a requirement would be overly restrictive and, in the case of call information, contrary to the statute. If such a requirement were in place, customers who failed to supply or update emergency contact information would be denied the ability for guardians or family members from being contacted. Recognizing the permissible nature of section 222(d), we do not prohibit carriers from using such a safeguard if they so choose.

3. Requirements for Soliciting Customer Opt-Out and Opt-In Approval

221. In this section, we discuss the requirements for soliciting customer approval for the use and sharing of customer PI. First, we require telecommunications carriers to solicit customer approval at the point of sale, and permit further solicitations after the point of sale. Next, we require that carriers actively contact their customers in these subsequent solicitations, to ensure that customers are adequately informed. Finally, we require the solicitations to be clear and conspicuous, to be comprehensible and not misleading, and to contain the information necessary for a customer to make an informed choice regarding her privacy.

222. *Timing of Solicitation.* Based on the record before us, we conclude that BIAS providers and other telecommunications carriers must solicit customers' privacy choices at the point of sale. We agree with the FTC and other commenters that the point of sale remains a logical time for customers

to exercise privacy decisions because it precedes the carriers' uses of customer PI; frequently allows for clarification of terms between customer and carrier; and avoids the need for customers to make privacy decisions when distracted by other considerations, and is the time when customers are making decisions about material terms.

223. We further find that, in addition to soliciting choice at point-of-sale, a carrier seeking customer approval to use customer PI may also solicit that permission at any time after the point after the sale, so long as the solicitation provides customers with adequate information as specified in these rules. This allows carriers to supply customers with relevant information at the most relevant time and in the most relevant context. Moreover, a carrier that makes material changes to its privacy policy must solicit customers' privacy choices before implementing those changes. Material retroactive changes require opt-in customer approval as discussed above in Part III.D.1.a(ii). Consistent with our sensitivity-based framework, prospective material changes require opt-in approval if they entail use or sharing of sensitive customer PI, and opt-out approval if they entail use or sharing of non-sensitive customer PI.

224. *Methods of Solicitation.* We agree with commenters who recommend that we not require particular formats or methods by which a carrier must communicate its solicitation of consent to customers. On this point, we agree with NTCA and USTelecom, which request flexibility in determining the means of solicitation, arguing that carriers are best placed to determine the most effective ways of reaching their customers.

225. The existing voice rules contain specific requirements for solicitations sent as email, such as a requirement that the subject line clearly and accurately identify the subject matter of the email. We decline to include such specific requirements and thereby provide carriers with additional flexibility to develop clear notices that best serve their customers. However, the clarity and accuracy of an email subject line are highly relevant to an overall assessment of whether the solicitation as a whole was clear, conspicuous, comprehensible and not misleading.

226. *Contents of Solicitation.* Carriers' solicitations of opt-in or opt-out consent to use or share customer PI must clearly and conspicuously inform customers of the types of customer PI that the carrier is seeking to use, disclose, or permit access to; how those types of customer PI will be used or shared; and the categories of entities with which that information is shared. The solicitations must also be comprehensible and not misleading, and be translated into a language other than English if the telecommunications carrier transacts business with the customer in that language. As with our notice requirements, we decline to specify a particular format or wording for this solicitation, so long as the solicitation meets the standards described above. The solicitation must provide a means to easily access the carrier's privacy policy as well as a means to easily access to a mechanism, described below in Part III.D.4, by which the customer can easily exercise his choice to permit or deny the use or sharing of his customer PI. Access to the choice mechanism may take a variety of forms, including being built into the solicitation, or provided as a link to the carrier's Web site, an email address that will receive the customer's choice, or a toll-free number that a customer can call to make his choice.

227. As a point of clarification, the distinction between notice and consent solicitation is one of functionality, not necessarily of form. Choice solicitations may be combined with notices of privacy policies or notices of material change in privacy policies, but only to the extent that both the notices and solicitations meet their respective requirements for being clear and conspicuous, comprehensible, and not misleading. For instance, a carrier instituting a new program that uses non-sensitive customer PI prospectively could send an existing customer a notice of material change to the privacy policy that contained the opt-out solicitation (described in this Part) and access to the customer's choice mechanism (described in Part III.D.4, *infra*). This communication would, subject to the ease-of-use requirements, satisfy the rules. We further clarify that we are not requiring carriers to have special ''customer PI'' choice mechanisms that are different and stand alone from other mechanisms that may exist, so long as those mechanisms satisfy the outcomes required by our rules (such as, among other things, that they be clear and conspicuous). Likewise, we are not mandating a ''blanket'' choice mechanism. A carrier is free to give the customer the ability to pick and choose among which marketing channels the customer will opt out of. At the same time, if a carrier wanted to give the customer the ability to opt out of all marketing with a single click, that would be consistent with our rules.

4. Customers' Mechanisms for Exercising Privacy Choices

228. In soliciting a customer's approval for the use or sharing of his or her customer PI, we require carriers to provide customers with access to a choice mechanism that is simple, easy-to-use clear and conspicuous, in language that is comprehensible and not misleading, and made available at no additional cost to the customer. This choice mechanism must be persistently available on or via the carrier's Web site; on the carrier's app, if it provides one for account management purposes; and on any functional equivalents of either. We intend for this requirement to mirror the requirements for a provider's provision of its notice of privacy policies. If a carrier lacks a Web site, it must provide a persistently available mechanism by another means such as a toll-free telephone number. However, we decline to specify any particular form or format for this choice mechanism. Carriers must act upon customers' privacy choices promptly.

229. *Format.* As with our requirements for notices and for solicitations of approval, the actual mechanism provided by the carrier by which customers may inform the carrier of their privacy choices must be clear and conspicuous, and in language that is comprehensible and not misleading. Because users' transaction costs, in terms of time and effort expended, can present a major barrier to customers exercising choices, carriers' choice mechanisms must also be easy to use, ensuring that customers can readily exercise their privacy rights.

230. We encourage but do not require carriers to make available a customer-facing dashboard. While a customer-facing dashboard carries a number of advantages, we are mindful of the fact that it may not be feasible for certain carriers, particularly small businesses, and that improved technologies and user interfaces may lead to better options. Preserving this flexibility benefits both carriers and customers by enabling carriers to adopt a mechanism that suits the customer's abilities and preferences and the carrier's technological capabilities. As noted, we are particularly mindful of the needs of smaller carriers. For example, WTA explains that ''[a] privacy dashboard as envisioned in the NPRM would require providers to aggregate information that is likely housed today on multiple systems and develop both internal and external user interfaces.'' ACA adds that creating a privacy dashboard would be a ''near-impossible task'' for small BIAS providers. Particularly in light of the

concerns expressed by small providers and their representatives, we decline to mandate that BIAS providers make available a customer-facing dashboard.

231. *Timing to Implement Choice.* We require carriers to give effect to a customer's grant, denial, or withdrawal of approval ''promptly.'' Aside from the ordinary time that might be required for processing incoming requests, customers must be confident that their choices are being respected. The flexibility of this standard enables carriers to account for the relative size of the carrier, the type and amount of customer PI being used, and the particular use or sharing of the customer PI. Since the carrier process and technical mechanics of implementing a customer denial of approval for a new use may well differ from implementing a customer's denial of a previously approved practice, we do not expect that the time frames for each will necessarily be the same. The Commission has long held this interpretation to be consistent with the language and design of section 222.

232. *Choice Persistence.* As in our existing rules and as proposed in the *NPRM,* we require a customer's choice to grant or deny approval for use of her customer PI to remain in effect until a customer revokes or limits her choice. We find that customers reasonably expect that their choices will persist and not be changed without their affirmative consent (in the case of sensitive customer PI and previously collected non-sensitive customer PI) or at least the opportunity to object (in the case of yet to be collected non-sensitive customer PI).

233. *Small Carriers.* Some small carriers expressed concern on the record that their Web sites do not allow for customers to manage their accounts, and thus could not offer an in-browser way for customers to immediately exercise their privacy choices on the carriers' Web sites. Since we decline to require a specific format for accepting customer privacy choices, any carriers, including small carriers, that lack choice mechanisms that customers can operate directly from the carrier's Web site or app may be able to accept customer preferences by providing on their Web sites, in their apps, and any functional equivalents, an email address, 24-hour toll-free phone number, or other easily accessible, persistently available means to exercise their privacy choices.

5. Eliminating Periodic Compliance Documentation

234. We eliminate the specific compliance recordkeeping and annual certification requirements in section 64.2009 for voice providers. Eliminating these requirements reduces burdens for all carriers, and particularly small carriers, which often may not need to record approval if they do not use or share customer PI for purposes other than the provision of service. We find that carriers are likely to keep records necessary to allow for any necessary enforcement without the need for specific requirements, and that notifications of data breaches to customers and to enforcement agencies (including the Commission) will ensure compliance with the rules and a workable level of transparency for customers.

E. Reasonable Data Security

235. In this section, we adopt a harmonized approach to data security that protects consumers' confidential information by requiring BIAS providers and other telecommunications carriers to take reasonable measures to secure customer PI. The record reflects broad agreement with our starting proposition that strong data security practices are crucial to protecting the confidentiality of customer PI. There is also widespread agreement among industry members, consumer groups, academics, and government entities about the importance of flexible and forward-looking reasonable data security practices.

236. In the *NPRM* we proposed rules that included an overarching data security expectation and specified particular types of practices that providers would need to implement to comply with that standard, while allowing providers flexibility in implementing the proposed requirements (*e.g.,* taking into account, at a minimum, the nature and scope of the provider's activities and the sensitivity of the customer PI held by the provider). Based on the record in this proceeding, we have modified the overarching data security standard to more directly focus on the reasonableness of the providers' data security practices. Also based on the record, we decline to mandate specific activities that providers must undertake in order to meet the reasonable data security requirement. We do, however, offer guidance on the types of data security practices we recommend providers strongly consider as they seek to comply with our data security requirement—recognizing, of course, that what constitutes ''reasonable'' data security is an evolving concept.

237. The approach we take today underscores the importance of ensuring that providers have robust but flexible data security practices that evolve over time as technology and best practices continue to improve. It is consistent with the FTC's body of work on data security, the NIST Cybersecurity Framework (NIST CSF), the Satellite and Cable Privacy Acts, and the CPBR, and finds broad support in the record. In harmonizing the rules for BIAS providers and other telecommunications carriers we apply this more flexible and future-focused standard to voice providers as well, replacing the more rigid data security procedures codified in the existing rules and thus addressing the potential that these existing procedures are both under- and over-inclusive—with the expectation that strong and flexible, harmonized, forward-looking rules will benefit consumers and industry.

1. BIAS and Other Telecommunications Providers Must Take Reasonable Measures To Secure Customer PI

238. The rule that we adopt today requires that every BIAS provider and other telecommunications carrier take reasonable measures to protect customer PI from unauthorized use, disclosure, or access. To comply with this requirement, a provider must adopt security practices appropriately calibrated to the nature and scope of its activities, the sensitivity of the underlying data, the size of the provider, and technical feasibility.

239. As we observed in the *NPRM,* privacy and security are inextricably linked. Section 222(a) imposes a duty on telecommunications carriers to ''protect the confidentiality of proprietary information of and relating to . . . customers.'' Fulfilling this duty requires a provider to have sound data security practices. A telecommunications provider that fails to secure customer PI cannot protect its customers from identity theft or other serious personal harm, nor can it assure its customers that their choices regarding use and disclosure of their personal information will be honored. As commenters point out, contemporary data security practices are generally oriented toward ''confidentiality, integrity, and availability,'' three dynamic and interrelated principles typically referred to together as the ''CIA'' triad. Confidentiality refers specifically in this context to protecting data from unauthorized access and disclosure; integrity refers to protecting information from unauthorized modification or destruction; and availability refers to providing authorized users with access to the information when needed. Our discussion of ''confidentiality'' as part of the CIA triad of data security

principles is not intended to suggest that the term has the same meaning under section 222 of the Act as it has in the CIA context. We agree with NTCA that confidentiality, integrity and availability are best understood as ''elements of a single duty'' to secure data, and their collective purpose is to ''illustrate the various considerations that must be engaged when the management of confidential information is considered.'' The record confirms that these are core principles that underlie the modern-day practice of data security. Thus, we expect providers to take these principles into account when developing, implementing, and monitoring the effectiveness of adopted measures to meet their data security obligation.

240. By requiring providers to take reasonable data security measures, we make clear that providers will not be held strictly liable for all data breaches. Instead, we give providers significant flexibility and control over their data security practices while holding these practices to a standard of reasonableness that respects context and is able to evolve over time. There is ample precedent and widespread support in the record for this approach. FTC best practices guidance advises companies to ''make reasonable choices'' about data security, and in numerous cases the FTC has taken enforcement action against companies for failure to take ''reasonable and appropriate'' steps to secure customer data. Many states also have laws that require regulated entities to take ''reasonable measures'' to protect the personal data they collect. The CPBR reaffirms this standard, directing companies to ''establish, implement and maintain safeguards reasonably designed to ensure the security of'' personal customer information. Placing the responsibility on companies to develop and manage their own security practices is also a core tenet of the NIST CSF. A diverse range of commenters in this proceeding support adoption of a data security requirement for BIAS providers that is consistent with these principles. Indeed, several providers acknowledge the importance of and need for reasonable data security.

241. By clarifying that our standard is one of ''reasonableness'' rather than strict liability, we address one of the major concerns that providers—including small providers and their associations—raise in this proceeding. WTA, for instance, argues that a strict liability standard ''is particularly inappropriate for small providers that lack the resources to install the expensive and constantly evolving safeguards necessary to comply with a strict liability regime.'' We agree with these parties, and others such as the Federal Trade Commission staff, that our rules should focus on the reasonableness of the providers' practices and not hold providers, including smaller providers, to a standard of strict liability.

242. We also agree with those commenters that argue that the reasonableness of a provider's data security practices will depend significantly on context. The rule therefore identifies four factors that a provider must take into account when implementing data security measures: The nature and scope of its activities; the sensitivity of the data it collects; its size; and technical feasibility. Taken together, these factors give considerable flexibility to all providers. No one factor, taken independently, is determinative.

243. We include ''size'' in part based on the understanding in the record that smaller providers employ more limited data operations in comparison to their larger provider counterparts. While the other contextual factors already account considerably for the varying data collection and usage practices of providers of different sizes, we agree with commenters that size is an independent factor in what practices are reasonable for smaller providers, particularly to the extent that the smaller providers engage in limited data usage practices. For instance, WTA explains that ''its members do not currently, and have no plans to, retain customer Internet browsing histories and related information on an individual subscriber basis because the cost . . . would significantly outweigh any potential monetary benefit derived from data relating to the small subscriber bases of [rural carriers].'' Several small provider commenters also point out that many such providers have few employees and limited resources. Accordingly, certain security measures that may be appropriate for larger providers, such as having a dedicated official to oversee data security implementation, are likely beyond the needs and resources of the smallest providers. Our decision not to adopt minimum required security practices should further allay concerns about the impact of the rule on small providers. Our inclusion of ''size'' as a factor makes clear that small providers are permitted to adopt reasonable security practices that are appropriate for their businesses. At the same time, we emphasize that all providers must adopt practices that take into account all four contextual factors. For instance, a small provider with very expansive data collection and usage practices could not point to its size as a defense for not implementing security measures appropriate for the ''nature and scope'' of its operations.

244. The rule also takes into account the distinction between sensitive and non-sensitive information that underlies our customer approval requirements. Because the protection of both sensitive and non-sensitive customer PI is necessary to give effect to customer choices about the use and disclosure of their information, our data security rule must cover both. The State Privacy and Security Coalition argues that the security rule proposed in the *NPRM* would be too burdensome when applied to non-sensitive information. We believe the modifications we have made to the proposal, including our decision not to adopt minimum required security practices, sufficiently address this concern. At the same time, we decline to require ''the same, strict data security protections'' for all such information. Rather, we direct providers to calibrate their security measures to ''the sensitivity of the underlying data.'' This approach finds broad support in the record and is consistent with FTC guidance and precedent. Where sensitive and non-sensitive customer PI are commingled, a carrier should err on the side of treating the information as sensitive. Similarly, our inclusion of ''technical feasibility'' as a factor makes clear that reasonable data security practices must evolve as technology advances. Because our rule gives providers broad flexibility to consider costs when determining what security measures to implement over time, we do not find it necessary to include ''cost of security measures'' as a separate factor as AT&T and other commenters propose. This means that every provider must adopt security measures that reasonably address the provider's data security risks.

245. In their comments, the National Consumers League recommended that we establish data security threshold requirements that providers could build on, but not fall below. We find that unnecessary in light of the rules we adopt today. We believe that the flexible and forward-looking rule we adopt combined with the discussion that follows regarding exemplary practices makes clear that the rule sets a high and evolving standard of data security. A provider that fails to keep current with industry best practices and other relevant guidance in designing and implementing its data security practices runs the risk of both a preventable data breach and that it will be found out of compliance with our data security rule.

We also observe that we have already acted in multiple instances to enforce carriers' broad statutory obligations to take reasonable precautions to protect sensitive customer information. In the *TerraCom* proceeding, for instance, we took action against a carrier under section 222 of the Act for its failure to employ ''appropriate security measures'' to protect customers' Social Security numbers and other data from exposure on the public Internet. Moreover, in *TerraCom* and other data security enforcement proceedings, parties have agreed to detailed data security obligations on individual carriers as conditions of settlement. For example, as part of one consent decree entered into by AT&T and the Commission's Enforcement Bureau, AT&T agreed to develop and implement a compliance plan aimed at preventing recurrence of a major data security lapse. We have the ability to pursue similar remedial conditions in the context of any enforcement proceeding that may arise under the data security rule we adopt today, based on the facts of the case.

246. In addition, the flexibility we have built into our rule addresses concerns about potential conflict with the NIST Cybersecurity Framework (NIST CSF) and with other initiatives to confront data security as well as broader cyber threats. The Commission values the NIST CSF and has demonstrated its commitment to promoting its adoption across the communications sector, and we have accordingly fashioned a data security rule that closely harmonizes with the NIST CSF's flexible approach to risk management. The rule gives providers ample flexibility to implement the NIST CSF on a self-directed basis, and it imposes on BIAS providers a standard for data security similar to that which governs edge providers and other companies operating under the FTC's general jurisdiction. We also reject any suggestions that our rule will impinge on BIAS providers' efforts to improve Internet security or protect their customers from malware, phishing attacks, and other cyber threats. Indeed, protecting against such attacks and threats will only bolster a company's claims that it has reasonable data security practices. Moreover, as explained above, the rules adopted in this Report and Order do not prohibit or impose any constraint on cyber threat information sharing that is lawfully conducted pursuant to the Cybersecurity Information Sharing Act of 2015 (CISA). Indeed, we believe that information sharing is a vital part of promoting data security across the industry.

247. Finally, we recognize that there is more to data security than the steps each individual provider takes to secure the data it possesses. For instance, effective consumer outreach and education can empower customers to be pro-active in protecting their own data from inadvertent or malicious disclosures. We also encourage providers to continue to engage constructively with the Commission, including through the CSRIC and related efforts, to develop and refine data security best practices. Also, as carriers develop and manage their security practices, we encourage them to be forward-looking. In particular, carriers should make efforts to anticipate future data security threats and proactively work to mitigate future risk drivers.

2. Practices That Are Exemplary of Reasonable Data Security

248. While we do not prescribe specific practices that a provider must undertake to comply with our data security rule, the requirement to engage in reasonable data security practices is set against a backdrop of existing privacy and data security laws, best practices, and public-private initiatives. Each of these is a potential source of guidance on practices that may be implemented to protect the confidentiality of customer PI. For the benefit of small providers, and others, below we discuss in more detail an evolving set of non-exclusive practices that we consider relevant to the question of whether a provider has complied with the requirement to take reasonable data security measures. While certain of these practices were originally proposed as minimum data security requirements, we discuss them here as part of a set of practices that we presently consider exemplary of a reasonable and evolving standard of data security. We agree with commenters that dictating a minimum set of required practices could foster a ''compliance mindset'' that is at odds with the dynamic and innovative nature of data security. Providers with less established data security programs may interpret such requirements as a checklist of what is required to achieve reasonable data security, an attitude we seek to discourage. We also seek to avoid codifying practices as the state of the art continues to rapidly evolve. For example, National Consumers League recommends adoption of multi-factor authentication as a required ''minimum baseline.'' Yet the record includes discussion of a variety of techniques for robust customer authentication, not all of which would necessarily qualify as ''multi-factor'' in all circumstances. Our approach places the responsibility on each provider to develop and implement data security practices that are reasonable for its circumstances and to refine these practices over time as circumstances change. Rather than mandate what these practices must entail, we provide guidance to assist each provider in achieving reasonable data security on its own terms. Taking this approach will also allay concerns that overly prescriptive rules would frustrate rather than improve data security.

249. While providers are not obligated to adopt any of the practices we suggest, we believe that together they provide a solid foundation for data security that providers can modify and build upon as their risks evolve and, as such, the presence and implementation of such practices will be factors we will consider in determining, in a given case, if a provider has complied with the reasonable data security requirement. However, these practices do not constitute a ''safe harbor.'' A key virtue of the flexible data security rule we adopt today is that it permits data security practices to evolve as technology advances and new methods and techniques for data security come to maturity. We are concerned that any fixed set of security practices codified as a safe harbor would fail to keep pace with this evolutionary process. The availability of a safe harbor may also discourage experimentation with more innovative data security practices and techniques. While it may be possible to construct a safe harbor ''with concrete requirements backed by vigorous enforcement'' that also takes the evolution of data security practices into account, we find no guidance in the record on how to do so in a workable fashion. Accordingly, our approach is to evaluate the reasonableness of any provider's data security practices on a case-by-case basis under the totality of the circumstances, taking into account the contextual factors that are part of the rule. This approach is well-grounded in precedent and will provide sufficient guidance to providers. Our approach to data security also mirrors the FTC's, under which the reasonableness of an individual company's data security practices is assessed against a background of evolving industry guidance. The CPBR also takes a similar approach.

250. *Engagement with Industry Best Practices and Risk Management Tools.* We encourage providers to engage with and implement up-to-date and relevant

industry best practices, including available guidance on how to manage security risks responsibly. One powerful tool that can assist providers in this respect is the NIST CSF, which many commenters endorse as a voluntary framework for cyber security and data security risk management. We agree that proper implementation of the NIST CSF, as part of a provider's overall risk management, would contribute significantly to reasonable data security, and that use of the NIST CSF can guide the implementation of specific data security practices that are within the scope of that framework. We encourage providers to consider use of the NIST CSF, as the widespread adoption of this common framework permits the Commission to optimize its engagement with the industry. That said, we clarify that use of the NIST CSF is voluntary, and providers retain the option to use whatever risk management approach best fits their needs. In addition, we encourage providers to look to guidance from the FTC, as well as materials that have been issued to guide the implementation of data security requirements under HIPAA, GLBA, and other relevant statutory frameworks. Finally, we note that a Commission multi-stakeholder advisory body, the Communications Security, Reliability, and Interoperability Council (CSRIC), has produced a rich repository of best practices on various aspects of communications security as well as alerting the Commission of useful activities for which Commission leadership can effectively convene stakeholders to address industry-wide risk factors. In particular, CSRIC has developed voluntary mechanisms by which the communications industry can address cyber risk, based upon the NIST CSF. Many providers and industry associations that have participated in this proceeding are active contributors to the CSRIC's work. We encourage providers to consider implementation of the CSRIC best practices as appropriate.

251. *Strong Accountability and Oversight.* Strong accountability and oversight mechanisms are another factor we consider exemplary of reasonable data security. As an initial matter, we agree with the FTC that the development of a written comprehensive data security program is a practice that is a best practice in promoting reasonable data security. As the FTC explains, putting a data security program in writing can ''permit internal and external auditors to measure the effectiveness of the program and provide for continuity as staff members leave and join the team.'' A written security program can also reinforce the specific practices a provider implements to achieve reasonable data security.

252. A second accountability mechanism that helps a company engage in reasonable data security is the designation of a senior management official or officials with personal responsibility over and accountability for the implementation and maintenance of the provider's data security practices as well as an official responsible for its privacy practices. Companies that take this step are advised to couple designation of corporate privacy and security roles and responsibilities with effective interaction with Boards of Directors (or, for firms without formal Board oversight, such other structure governing the firm's risk management and oversight), to provide a mechanism for including cyber risk reduction expense within overall risk management plans and resource allocations. That said, we do not specify the qualifications or status that such an official would need to possess, and we recognize that for a smaller provider these responsibilities may rest with someone who performs multiple functions or may be outsourced. Another practice that is indicative of reasonable data security is training employees and contractors on the proper handling of customer PI. Employee training is a longstanding component of data security under the Commission's existing rules. We encourage providers to seek out expert guidance and best practices on the design and implementation of efficacious training programs. Finally, accountability and oversight are also relevant in the context of sharing customer PI with third parties. We agree with commenters that providers must take reasonable steps to promote the safe handling of customer PI they share with third parties. Perhaps the most straightforward means of achieving this accountability is to obtain data security commitments from the third party as a condition of the disclosure. We also remind providers that they are directly accountable for the acts and omissions of their agents, including independent contractors, for the entirety of the data lifecycle. This means that the acts and omissions of agents will be taken into account in assessing whether a provider has engaged in reasonable data security practices.

253. *Robust Customer Authentication.* The strength of a provider's customer authentication practices also is probative of reasonable data security. We have recognized that there is no single approach to customer authentication that is appropriate in all cases, and authentication techniques and practices are constantly evolving. That said, the record documents some discernable trends in this area that we would currently expect providers to take into account. For instance, we encourage providers to consider stronger alternatives to relying on rudimentary forms of authentication like customer-generated passwords or static security questions. Providers may also consider the use of heightened authentication procedures for any disclosure that would place a customer at serious risk of harm if the disclosure were improperly made. In addition, we encourage providers to periodically reassess the efficacy of their authentication practices and consider possible improvements. Another practice we encourage providers to consider is to notify customers of account changes and attempted account changes. These notifications provide a valuable tool for customers to monitor their own accounts' security. Providers that implement them should consider the potential for ''notice fatigue'' in determining how often and under what circumstances these notifications are sent.

254. *Other Practices.* The record identifies other practices that we encourage providers to consider when implementing reasonable security measures. For instance, several commenters cite the importance of ''data minimization,'' which involves thinking carefully about what data to collect, how long to retain it, and how to dispose of it securely. The principle of data minimization is also embodied in FTC guidance, in the CPBR, and in the Satellite and Cable Privacy Acts. We encourage providers to look specifically to the FTC's ''Disposal Rule'' for guidance on the safe destruction and disposal of customer PI. We also encourage providers to consider data minimization practices that apply for the entirety of the data lifecycle, from collection to deletion. In addition, several commenters recommend strong data encryption, another practice that the FTC advises companies to consider. We agree with commenters that technologically sound data encryption can significantly improve data security, in part by minimizing the consequences of a breach. Finally, we believe that the lawful exchange of information regarding cyber incidents and threats is relevant to promoting data security, and encourage providers to consider engagement in established information sharing practices.

255. The exemplary practices discussed above are not an exhaustive

list of reasonable data security practices. A provider that implements each of these practices may still fall short of its data security obligation if there remain unreasonable defects in its protection of the confidentiality of customer PI. Conversely, a provider may satisfy the rule without implementing each of the listed practices. The key question is whether a provider has taken reasonable measures to secure customer PI, based on the totality of the circumstances. In taking this approach, we acknowledge that the adoption of more prescriptive, bright-line requirements could offer providers greater certainty as to what reasonable data security requires. Yet virtually all providers that have addressed the issue—including small providers and their associations—oppose such requirements. Rather, these providers prefer the approach we have taken in this Report and Order, *i.e.,* the adoption of a ''reasonableness'' standard that mirrors the FTC's. Also like the FTC, we have provided the industry with guidance on how to achieve reasonable data security in compliance with our rule. We anticipate building upon this guidance over time as data security practices evolve and with them the concept of reasonable data security.

3. Extension of the Data Security Rule To Cover Voice Services

256. In light of the record, we conclude that harmonization of the data security requirements that apply to BIAS and other telecommunications services is the best option for providers and consumers alike. Accordingly, we extend to voice services the data security rule we have adopted for BIAS. This data security rule replaces the more inflexible data security requirements presently codified in Part 64 of the rules.

257. There are many reasons to harmonize the data security requirements that apply to BIAS and voice services. As an initial matter, many providers offer services of both kinds and often sell them together in bundled packages. We agree with commenters that argue that applying different security requirements to the two kinds of services may confuse customers and add unnecessary complexity to providers' data security operations, which may be particularly burdensome for smaller providers. In addition, the evidence suggests that the data security requirements of the existing rules no longer provide the best fit with the present and anticipated communications environment. For instance, expert commentary on the topic of robust customer authentication indicates that this is a complex area where providers need flexibility to adapt their practices to new threats. The highly specific procedures outlined in the existing voice rules are incongruous with this approach to customer authentication.

258. Moreover, retaining the prescriptive data security rules that apply to voice services could impede the development and implementation of more innovative data security measures for BIAS. Providers subject to both sets of rules may determine that the easiest and most cost-effective path to compliance is to adopt for both services the more rigid data security practices that the voice rules require. Such an outcome would contravene our intent to establish a robust and flexible standard for BIAS data security that evolves over time.

259. Accordingly, we find that the best course is to replace the data security rules that currently govern voice services with the more flexible standard we are adopting for BIAS. We find that the rule as written is sufficiently broad to cover BIAS and other telecommunications services. We also clarify that the exemplary practices we discuss above may be implemented differently depending on the services an entity provides. For instance, data security best practices that pertain specifically to broadband networks or services may or may not be relevant in the context of providing voice services.

260. In harmonizing the data security rules for voice services and BIAS, we acknowledge that voice providers have operated for many years under the existing rules and have tailored their data security practices accordingly. We do not expect any provider to revamp its data security practices overnight. On the contrary, as explained below, we are adopting an implementation schedule that affords providers ample time to bring their practices into compliance with the new rules.

F. Data Breach Notification Requirements

261. In this section we adopt rules requiring BIAS providers and other telecommunications carriers to notify affected customers, the Commission, the FBI, and the Secret Service of data breaches unless the provider reasonably determines that no harm to customers is reasonably likely to occur. The data breach notification requirements adopted in this Report and Order extend to breaches involving a carrier's vendors and contractors. For purposes of these rules, we define a breach as any instance in which a person, without authorization or exceeding authorization, has gained access to, used, or disclosed customer proprietary information. The record clearly demonstrates that data breach notification plays a critical role in protecting the confidentiality of customer PI. An obligation to notify customers and law enforcement agencies when customer data is improperly accessed, used, or disclosed incentivizes carriers to adopt strong data security practices. Breach notifications also empower customers to protect themselves against further harms, help the Commission identify and confront systemic network vulnerabilities, and assist law enforcement agencies with criminal investigations. At the same time, unnecessary notification can cause notice fatigue, erosion of consumer confidence in the communications they receive from their provider, and inflated compliance costs. The approach we adopt today finds broad support in the record and will maximize the benefits of breach notification as a consumer protection and public safety measure while avoiding unnecessary burdens on providers and their customers. Furthermore, our approach is consistent with how federal law enforcement agencies, such as the FBI and Secret Service, conduct and coordinate data breach investigations.

262. First, we address the circumstances that will obligate BIAS providers and other telecommunications carriers to notify the Commission, federal law enforcement agencies, and customers of data breaches. We note that these obligations are not mutually exclusive with other data breach notification obligations stemming from other state, local, or federal laws, or contractual obligations. This includes a discussion of two related elements adopted today: The harm-based notification trigger and the updated definition for ''breach.'' We then address the requirements that BIAS providers and other telecommunications carriers must follow for providing notice to the Commission and other federal law enforcement. Next, we describe the specific notification requirements that BIAS providers and other telecommunications carriers must follow in providing data breach notifications to customers, including: The required timing for sending notification; the necessary contents of the notification; and the permissible methods of notification. We then discuss the data breach record retention requirements. Finally, we explain our decision to adopt rules that harmonize data breach requirements for BIAS providers and other telecommunications carriers.

1. Harm-Based Notification Trigger

263. We require breach notification unless a carrier can reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach. We do so to enable customers to receive the data breach notifications that they need to take steps to protect themselves, and to provide the Commission, the FBI, and Secret Service with the information they need to evaluate the efficacy of data security rules as well as detect systemic threats and vulnerabilities. In the *NPRM* we sought comment on what should trigger data breach notification, and based on the record, we conclude that the trigger most suitable for our purposes is one based on the potential for customer harm. Among its many benefits, this harm-based trigger will avoid burdening providers and customers alike with excessive notifications, and it will allow providers the flexibility to focus limited resources on data security and ameliorating customer harms resulting from data breaches rather than on notifications that have minimal benefit to customers. The record reflects various harms inherent in unnecessary notification, including notice fatigue, erosion of consumer confidence in the communications they receive from their provider, and compliance costs. The harm-based notification trigger we adopt addresses these concerns, by limiting the overall volume of notifications sent to customers and eliminating correspondence that provides minimal or no customer benefit.

264. Our harm-based trigger has a strong basis in existing state data breach notification frameworks. The triggers employed in these laws vary from state to state, but in general they permit covered entities to avoid notifying customers of breaches where the entity makes some determination that the breach will not or is unlikely to cause harm. Likewise, the FTC ''supports an approach that requires notice unless a company can establish that there is no reasonable likelihood of economic, physical, or other substantial harm.'' Our rule similarly requires the carrier to reasonably determine that no harm to customers is reasonably likely to occur. As such, we disagree with commenters arguing that standards based on determinations of harm leave consumers more vulnerable to that harm. On the contrary, the record, and the many state laws addressing data breach notifications, demonstrate that providers have ample experience determining a likelihood of harm. Additionally, the reasonableness standard that applies to both the carrier's evaluation and the likelihood of harm adds an objective component to these determinations.

265. Further, the harm-based trigger places the burden on a carrier that detects a breach to reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach. This responds to concerns such as AAJ's that it is ''frequently impossible'' for a carrier to immediately discern the full scope and ramifications of a breach. Our harm-based trigger does not relieve a carrier of its notification obligation simply by virtue of its failure or inability to ascertain the harmful effects of a breach. Rather, carriers must take the investigative steps necessary to reach a reasonable determination that no such harm is reasonably likely. Where a carrier's investigation of a breach leaves it uncertain whether a breach may have resulted in customer harm, the obligation to notify remains. By contrast, requiring customer notification *only when* a provider determines the presence of some risk of harm would create perverse incentives not to carefully investigate breaches.

266. In adopting a harm-based trigger, we clarify that its scope is not limited to ''easily recognized financial harm.'' In the *NPRM,* we acknowledged that ''harm'' is a concept that can be broadly construed to encompass ''financial, physical, and emotional harm.'' We conclude that the same construction of harm is appropriate for our final breach notification rule. This decision is consistent with the fundamental premise of this proceeding that customer privacy is about more than protection from economic harm. The record demonstrates that commenters' privacy concerns stem from more than just avoiding financial harms. As such, we disagree with commenters who assert that financial loss or identity theft should be the primary metrics for determining the level of harm or whether harm exists at all. Some commenters have called ''for the FCC to help determine how organizations can better respond to breaches in which personal, non-financial data is breached.'' We find that within the meaning of section 222(a), threats to the ''confidentiality'' of customer PI include not only identity theft or financial loss but also reputational damage, personal embarrassment, or loss of control over the exposure of intimate personal details.

267. Relatedly, we establish a rebuttable presumption that any breach involving sensitive customer PI presumptively poses a reasonable likelihood of customer harm and would therefore require customer notification. This rebuttable presumption finds a strong basis in the record. Even commenters that favor minimal breach reporting generally concede that customers are entitled to notification when their most sensitive information is misused or disclosed. The presumption also aligns with our decision to base the level of customer approval required for use or disclosure of customer PI on whether the PI is sensitive in nature. As we explain above, this distinction upholds the widespread expectation that customers should be able to maintain particularly close control over their most sensitive personal data. While breaches of sensitive customer PI often present severe risks of concrete economic harm, there is a more fundamental harm that comes from the loss of control over information the customer reasonably expects to be treated as sensitive.

268. We also find that our employing a harm-based trigger will substantially reduce the burdens of smaller providers in reporting breaches of customer PI. We agree with commenters stating that a framework—such as ours—that allows providers to assess the likelihood of harm to their customers will ultimately be less costly and ''will not overburden small providers.'' The record indicates that smaller providers tend to collect and use customer data, including sensitive information, far less extensively than larger providers. More modest collection and usage of customer PI leaves a provider less prone to breaches that would trigger a data breach notification obligation under our rule.

269. Finally, we clarify that our harm-based notification trigger applies to breaches of data in an encrypted form. Whether a breach of encrypted data presents a reasonable likelihood of harm will depend in significant part on the likelihood that unauthorized third parties reasonably would be expected to be able to decrypt the data. It also will depend on, among other things, the scope and magnitude of potential harm if the data were unencrypted. Factors that make decryption more or less likely are therefore relevant in determining whether a reasonable likelihood of customer harm is present in such instances. These factors may include the quality of the encryption and whether third parties can access the encryption key. Ultimately, a provider must notify affected customers if it cannot reasonably determine that a breach poses no reasonable likelihood of harm, regardless of whether the breached data is encrypted.

270. With our adoption of a harm-based trigger, we have removed the need

for a separate trigger based on intent. Thus, for purposes of these rules, we adopt the definition of breach that we proposed in the *NPRM* and define a breach as any instance in which a person, without authorization or exceeding authorization, has gained access to, used, or disclosed customer proprietary information. This definition is broader than the definition in our existing rules, which includes an intent element, and only applies to breaches of CPNI, in recognition that the record indicates that the relevant factor for breach reporting is not intent, but effect on the customer.

271. We agree with other commenters that inadvertent breaches can be just as severe and harmful for consumers as intentional breaches, and consumers are likely to care about serious breaches even when they occur by accident or mistake. Moreover, whether or not a breach was intentional may not always be immediately apparent. By defining breach to include unintentional access, use, or disclosure we ensure that in the event of a breach the provider has an incentive to investigate the cause and effect of the breach, and the opportunity to respond appropriately. Some commenters recommend that the definition of breach include an intent element to avoid equating inadvertent disclosure of customer PI to an employee or contractor of a provider with intentional hacking of customer records. The adoption of a harm-based trigger—in lieu of a trigger based on intent—creates a consistent obligation to report breaches that may harm consumers, regardless of the source or cause of the breach.

272. Commenters also argue that including an intent element in the definition of breach would prevent excessive data breach notifications. Commenters making this argument raise the prospect of a flood of notifications for breaches that have no impact on the consumer, including such good-faith errors as an employee inadvertently accessing the wrong database. We share their general concern about the risk of over-notification—it is costly to providers, without corresponding benefit to consumers, and can lead to notice fatigue and possibly consumer de-sensitization. However, in this context the argument is misplaced. Identifying a data breach is only the first step towards determining whether data breach notification is necessary. The harm-based trigger that we adopt today relieves a provider from notifying its customers and government agencies of breaches that result from minor mistakes that create no risk of harm to the affected customers. Based on this analysis, we find eliminating the word ''intentionally'' from our breach definition equally warranted for all telecommunications carriers.

273. Our adoption of a harm-based trigger also addresses concerns about the breadth of our breach definition. For example our definition includes incidents where a person gains unauthorized access to customer PI but makes no further use of the data. We agree with AAJ that we must account for the difficulties a provider faces in determining when ''access translates to acquisition and when acquisition leads to misuse.'' Our rule appropriately requires providers to issue notifications in cases where a provider is unable to determine the full scope and impact of a breach. However, the definition of breach does not create an obligation to notify customers of an unauthorized gain of access—such as an employee opening the wrong file—once the provider reasonably determines that no harm is reasonably likely to occur. This accords with AT&T, which explains that ''not requiring notification where a provider determines that there is no reasonable likelihood of harm to any customer resulting from the breach'' will ''reduce excessive reporting.''

274. Similarly, our harm-based trigger allays the concern that extending breach notification obligations beyond CPNI to customer PI more broadly would vastly expand the range of scenarios where notification is required. This concern is largely premised on the assumption that we would require customer notification of all breaches of customer PI, regardless of the severity of the breach or the sensitivity of the PI at issue. As explained above, we have instead adopted a more targeted obligation that takes into account the potential for customer harm. In addition, we observe that many, if not all, state data breach notification requirements explicitly include sensitive categories of PII within their scope. Under our rule, breaches involving such information would presumptively meet our harm trigger and thus require notification. We think it is clear that the unauthorized exposure of sensitive PII, such as Social Security numbers or financial records, is reasonably likely to pose a risk of customer harm, and no commenter contends otherwise. We therefore find it appropriate for our breach notification rule to apply broadly to customer PI, including PII.

2. Notification to the Commission and Federal Law Enforcement

275. In this section, we describe rules requiring telecommunications carriers to notify the Commission and federal law enforcement of breaches of customer PI, under the harm-based notification trigger discussed above. We also specify the timeframe and methods by which providers must provide this information.

276. *Scope.* As proposed in the *NPRM,* we require notification to the Commission of all breaches that meet the harm-based trigger and, when the breach affects 5,000 or more customers, the FBI and Secret Service. We expect that this notification data will facilitate dialogue between the Commission and telecommunications carriers, and will prove extremely valuable to the Commission in evaluating the efficacy of its data security rules, as well as in identifying systemic negative trends and vulnerabilities that can be addressed with individual providers or the industry as a whole including to further the goal of collaborative improvement and refinement of data security practices. Still, we retain discretion to take enforcement action to ensure BIAS providers and other telecommunications carriers are fulfilling their statutory duties to protect customer information.

277. We adopt an additional trigger of at least 5,000 affected customers for notification to the Secret Service and FBI, in order to ensure that these agencies are not inundated with notifications that are unlikely to have significant law enforcement implications. This threshold finds support in the comments of the FBI and Secret Service and is also consistent with or similar to provisions in various legislative and administration proposals for a federal data breach law. We recognize that there may be circumstances under which carriers want to share breach information that does not meet the harm trigger we adopt today as part of a broader voluntary cybersecurity and threat detection program, and we encourage providers to continue these voluntary efforts.

278. *Timeframe.* The dictates of public safety and emergency response may require that the Commission and law enforcement agencies be notified of a breach in advance of customers and the general public. Thus, for breaches affecting 5,000 or more customers, we require carriers to notify the Commission, the FBI, and the Secret Service within seven (7) business days of when the carrier reasonably determines that a breach has occurred, and at least three (3) business days before notifying customers. For breaches affecting fewer than 5,000 customers, carriers must notify the Commission without unreasonable delay and no later than thirty (30) calendar days following the carrier's reasonable determination

that a breach has occurred. Both of these thresholds remain subject to the harm-based trigger. We agree with commenters that the timeline for data breach notification should not begin when a provider first identifies suspicious activity. At the same time, we clarify that ''reasonably determining'' a breach has occurred does not mean reaching a conclusion regarding every fact surrounding a data security incident that may constitute a breach. Rather, a carrier will be treated as having ''reasonably determined'' that a breach has occurred when the carrier has information indicating that it is more likely than not that there was a breach. To further clarify, the notification timelines discussed herein run from the carrier's reasonable determination that a breach has occurred, not from the determination that the breach meets the harm-based notification trigger.

279. We agree with the FBI and the Secret Service that advance notification of breaches will enable law enforcement agencies to take steps to avoid the destruction of evidence and to assess the need for further delays in publicizing the details of a breach. We reject arguments that the timeframes for Commission and law enforcement notification that we adopt are too burdensome. Rather, we agree with AT&T and other commenters in the record that allowing carriers seven (7) business days to notify the Commission and law enforcement furnishes those providers with sufficient time to adequately investigate suspected breaches. Further, to address concerns expressed in the record regarding the complexity and costs of data breach notification for smaller providers, we relax the notification timeframe for breaches affecting fewer than 5,000 customers. Carriers must notify the Commission of breaches affecting less than 5,000 customers without unreasonable delay and no later than thirty (30) calendar days following the carrier's reasonable determination that a breach has occurred. We find that a 30-day notification timeframe for breaches affecting fewer than 5,000 customers provides the Commission with the data necessary to monitor trends and gain meaningful insight from breach activity across the country, while at the same time reducing and simplifying the requirements for all carriers, particularly smaller providers, whose limited resources might be better deployed toward remediating and preventing breach activity, particularly in the early days of addressing a relatively small breach.

280. We also recognize that a carrier's understanding of the circumstances and impact of a breach may evolve over time. We expect carriers to supplement their initial breach notifications to the Commission, FBI, and Secret Service, as appropriate. Early notification of breaches will improve the Commission's situational awareness and enable it to coordinate effectively with other agencies, including with the FBI and Secret Service on breaches not reportable directly to these agencies that may nevertheless raise law enforcement concerns. Furthermore, time is of the essence in a criminal investigation. Learning promptly of a significant, large-scale breach gives law enforcement agencies an opportunity ''to coordinate their efforts so that any law enforcement response can maximize the resources available to address and respond to the intrusion.'' Given the vital interests at stake in cases where a data breach merits a law enforcement response, we find that the seven (7) business day reporting deadline for such breaches is necessary as a matter of public safety and national security.

281. To further advance the needs of law enforcement, we permit the FBI or Secret Service to direct a provider to delay notifying customers and the public at large of a breach for as long as necessary to avoid interference with an ongoing criminal or national security investigation. This provision replaces the more prescriptive requirements in the existing rules specifying the timing and methods for law enforcement intervention. Consistent with our overall approach in this proceeding, we adopt rules that incorporate flexibility to account for changing circumstances. Several commenters agree that this provision for law enforcement, which is embodied in the existing rules, remains prudent. We also observe that the laws of several states and the District of Columbia include similar law enforcement delay provisions. We are not persuaded that such a provision unduly interferes with the interests of customers in taking informed action to protect themselves against breaches. As the FBI and Secret Service explain, customer notification delays are not routine but are requested as a matter of practice only in ''exceptional circumstances'' involving a serious threat of harm to individuals or national security. In addition, decisions regarding when to publicly disclose details of a criminal investigation are a matter that lies within the expertise of law enforcement agencies. We therefore find that the best course is to defer to the judgment of the FBI and Secret Service on when the benefits of delaying customer notification outweigh the risks.

282. *Method.* We will create a centralized portal for reporting breaches to the Commission and other federal law enforcement agencies. The Commission will issue a public notice with details on how to access and use this portal once it is in place. The reporting interface will include simple means of indicating whether a breach meets the 5,000-customer threshold for reporting to the FBI and Secret Service. The creation of this reporting facility will streamline the notification process, reducing burdens for providers, particularly small providers. Any material filed in this reporting facility will be presumed confidential and not made routinely available for public inspection.

3. Customer Notification Requirements

283. In order to ensure that telecommunications customers receive timely notification of potentially harmful breaches of their customer PI, we adopt rules specifying how quickly BIAS providers and other telecommunications carriers must notify their customers of a breach, the information that must be included in the breach notification, and the appropriate method of notification.

a. Timeline for Notifying Customers

284. We require BIAS providers and other telecommunications carriers to notify affected customers of reportable breaches of their customer PI without unreasonable delay, and no later than 30 calendar days following the carriers' reasonable determination that a breach has occurred, unless the FBI or Secret Service requests a further delay. This approach balances affected customers' need to be notified of potentially harmful breaches of their confidential information with carriers' need to properly determine the scope and impact of the breach, and to the extent necessary, to most immediately focus resources on preventing further breaches. Also, the specific customer notification timeline we adopt has broad record support.

285. As an initial matter, we agree with commenters that clear and straightforward notification deadlines are necessary to ensure that customers are timely notified of breaches that affect them. We also agree with commenters that providing more time to notify customers than the 10 days we initially proposed will enable carriers to conduct a more thorough and complete investigation of breaches in advance of the notification. This extra time for

investigation will minimize duplicative and incomplete breach notices, avoid customer confusion, allow providers to focus first on stopping further breaches, and minimize burdens on providers. The FBI and Secret Service, which have extensive experience with data breach notification and, more specifically, experience with our existing data breach notification rules, generally support a customer notification timeframe of between 10 and 30 days. FTC staff recommends that breach notifications occur without unreasonable delay, but within an outer limit of between 30–60 days. State data breach laws vary, but most states do not require notification within a specific time frame and the majority of states that do provide 45 days or more to provide notice.

286. Our adoption of a customer notification period longer than that initially proposed also responds to concerns raised by smaller carriers. For example, the Rural Wireless Association argues that ''[s]mall BIAS providers need additional time [beyond ten days] to determine the extent of any breach, as well as to consult with counsel as to the appropriate next steps.'' The American Cable Association similarly argues that compliance with a compressed notification timeline would require small providers ''to divert senior and technical staff solely to data breach response for the duration of the breach response period'' and otherwise incur high compliance costs. We are mindful of the compliance burdens that a 10-day period for customer notification would impose on small carriers in particular, and accordingly adopt a more flexible requirement to notify customers of reportable breaches without unreasonable delay and in any event no longer than 30 calendar days. These commenters and others proposed longer notification periods and, alternatively, an open-ended non-specific timeframe for small providers. While we are sensitive to these concerns, we also note, however, that customer exposure to avoidable or mitigable risk continues to grow in the aftermath of a breach. We therefore emphasize the value of notifying affected customers as soon as possible to allow the customer to undertake time-sensitive mitigation activities and encourage carriers to notify consumers as soon as practicable.

287. Requiring carriers to notify affected customers without unreasonable delay while adopting a 30 calendar day deadline to do so creates a backstop against excessive delays in notifying customers. Of course, if a telecommunications carrier conducts a good faith, reasonable investigation within 30 calendar days but later determines that the scope of affected customers is larger than initially known, we expect that provider to notify those additional customers as soon as possible. However, based on the record, we find that 30 calendar days is ample time to prepare a customer notification that meets our minimum content requirements, as discussed below. Our prior rules did not specify a precise timeline for customer notice—only that it must occur after the carrier completes law enforcement notification—and we find adoption of the timeline above warranted to ensure timely notification to customers. We recognize that a carrier may identify a breach and later learn that the scope of the breach is larger than initially determined. Under such circumstances a carrier has a continuing obligation to notify without unreasonable delay any additional customers it identifies as having been affected by the breach, to the extent the carrier cannot reasonably determine that no harm is reasonably likely to occur to the newly identified affected customers as a result of the breach.

b. Information Provided as Part of Customer Breach Notifications

288. To be a useful tool for consumers, breach notifications should include information that helps the customer understand the scope of the breach, the harm that might result, and whether the customer should take any action in response. In the *NPRM* we proposed that providers include certain types of basic information in their data breach notifications to affected customers, and based on the record, we adopt those same basic requirements, which include the following elements:

- The date, estimated date, or estimated date range of the breach;
- A description of the customer PI that was used, disclosed, or accessed, or reasonably believed to have been used, disclosed, or accessed, by a person without authorization or exceeding authorization as a part of the breach of security;
- Information the customer can use to contact the telecommunications carrier to inquire about the breach of security and the customer PI that the carrier maintains about the customer;
- Information about how to contact the Federal Communications Commission and any state regulatory agencies relevant to the customer and the service; and
- If the breach creates a risk of financial harm, information about national credit-reporting agencies and the steps customers can take to guard against identity theft, including any credit monitoring, credit reporting, or credit freezes the telecommunications carrier is offering customers affected by the breach of security.

289. While data breaches are not ''one-size-fits-all,'' creating a measure of consistency across customer breach notifications will benefit customers and providers, particularly smaller providers, by removing any need to reinvent the wheel in the event of a data breach. Seventeen states and territories currently mandate that specific content be included in breach notifications and the requirements we adopt today are generally consistent with those statutes. Much of the information we require consists of contact information for the Commission, relevant authorities, credit reporting agencies, and the carrier itself. Based on the record, we also require customer breach notifications to contain information about credit freezes and credit monitoring if the breach creates a risk of financial harm. Several states currently require data breach notices to contain information about both credit monitoring and credit freezes. The foregoing elements should be easy for any provider to ascertain and for customers to understand. The remaining two elements simply define the basic elements of a breach notification—when the breach occurred and what information was breached. Additionally, we hold carriers to a reasonable standard of accuracy and precision in providing this information. Rather than having to provide the exact moment a breach occurred, providers are tasked with giving an ''estimated'' date or, alternatively, an estimated date ''range.'' Moreover, while a description of the customer PI involved in the breach should be as detailed, informative, and accurate as possible, the rule allows for a description of the data the telecommunications carrier ''reasonably believes'' was used, disclosed, or accessed.

290. We encourage providers to supplement these minimum elements with additional information that their customers may find useful or informative. For example, FTC Staff recommends that notifications include contact information for the FTC, and a reference to its comprehensive IdentityTheft.gov Web site. In appropriate cases, providing such additional information could further empower customers to take steps to mitigate their own harm and protect themselves against the effects of any future breaches.

c. Notification Methods

291. As proposed in the *NPRM,* we require that customer notifications occur by means of written notification

to the customer's address of record or email address, or by contacting the customer by other electronic means of active communications agreed upon by the customer for contacting that customer for data breach notification purposes. For former customers, we require carriers to issue notification to the customer's last known postal address that can be determined using commonly available sources. These options create flexibility for providers to notify customers in a manner they choose to be contacted by their provider, and they are consistent with methods permitted under other data breach notification frameworks. One of the few commenters to address this issue supports the *NPRM* proposal, while also suggesting that providers post ''substitute breach notifications'' on their Web sites. While some other breach notification frameworks do include such a requirement, we are not persuaded it is necessary for our purposes. Telecommunications carriers have direct relationships with their customers through which they are likely to have ready means of contacting them. We believe the options discussed above for direct notification will generally provide a sufficient array of options for reaching customers affected by a breach, and we thus decline also to require a broader, less targeted public disclosure.

4. Record Retention

292. We adopt a streamlined version of the record retention requirement we proposed in the *NPRM.* We require only that providers keep record of the dates on which they determine that reportable breaches have occurred and the dates when customers are notified, and that they preserve written copies of all customer notifications. These records must be kept for two years from the date a breach was reasonably determined to have occurred. The purpose of this limited requirement is to enable Commission oversight of the customer breach notifications our rule requires. This minor recordkeeping requirement will not impose any significant administrative burden on providers. On the contrary, the information that must be retained must be collected anyway, is of limited quantity, and largely comprises information we would expect carriers to retain as a matter of business practice. Moreover, shortening the retention period would weaken the utility of the requirement as an enforcement tool, while not delivering any substantiated cost savings for providers. As a final point, we clarify that we do not require carriers to retain records of breaches that do not rise to the level of a required Commission notification. A large percentage of breaches are therefore likely to be exempted from this requirement.

5. Harmonization

293. In the *NPRM,* we proposed adoption of a harmonized breach notification rule for BIAS and other telecommunications services that would replace the existing Part 64 rule. Based on the record, we have determined to take this approach. We agree with commenters who argue that creating a harmonized rule will enable providers to streamline their notification processes and will reduce the potential for customer confusion. Moreover, we find that the modifications we have made to the proposed rule, particularly the harm trigger we adopt and timeline for notifying customers, ameliorate concerns that applying the new rule to both BIAS and other telecommunications services will unduly increase burdens for voice providers.

G. Particular Practices That Raise Privacy Concerns

294. In this section we prohibit ''take-it-or-leave-it'' offers in which BIAS providers offer broadband service contingent on customers surrendering their privacy rights as contrary to the requirements of sections 222, 201, and 202 of the Act. We also adopt heightened disclosure and affirmative consent requirements for BIAS providers that offer customers financial incentives, such as lower monthly rates, in exchange for the right to use the customers' confidential information. Congress has tasked the Commission with protecting the public interest, and we conclude that our two-fold approach to these practices will permit innovative and experimental service offerings and encourage and promote customer choice, while prohibiting the most egregious offerings that would harm the public interest.

1. BIAS Providers May Not Offer Service Contingent on Consumers' Surrender of Privacy Rights

295. We agree with those commenters that argue that BIAS providers should not be allowed to condition or effectively condition the provision of broadband on consenting to use or sharing of a customer's PI over which our rules provide the consumer with a right of approval. Consistent with our proposal in the *NPRM,* we therefore prohibit BIAS providers from conditioning the provision of broadband service on a customer surrendering his or her privacy rights. We also prohibit BIAS providers from terminating service or otherwise refusing to provide BIAS due to a customer's refusal to waive any such privacy rights. By design, such ''take-it-or-leave-it'' practices offer no choice to consumers. The record supports our finding that such practices will harm consumers, particularly lower-income customers, and we agree with Atomite that there is a difference between offering consumers ''a carrot (*i.e.,* consideration in exchange for property rights) and [] a stick (*e.g.,* no ISP service unless subscribers relinquish their property rights).'' We therefore conclude that prohibiting such practices will ensure that consumers will not have to trade their privacy for broadband services.

296. As we discussed above, broadband plays a pivotal role in modern life. We find that a ''take-it-or-leave it'' approach to the offering of broadband service contingent upon relinquishing customer privacy rights is inconsistent with the telecommunications carriers' ''duty to protect the confidentiality of proprietary information of, and related to . . . customers.'' Further, we find that a ''take-it-or-leave-it'' customer acceptance is not customer ''approval'' within the meaning of section 222(c)(1), which prohibits telecommunications carriers from using, disclosing, or permitting access to CPNI without customer approval.

297. We also conclude that requiring customers to relinquish all privacy rights to their PI to purchase broadband services is an unjust and unreasonable practice within the meaning of section 201(b). Thus, we disagree with CTIA's assertions that the ''term 'approval' must reflect the common law contract law principle that neither take-it-or-leave-it offers nor financial inducements are unconscionable.'' Congress directed the Commission to ''execute and enforce'' the provisions of the Act, including the prohibition on ''unjust or unreasonable'' practices. Requiring customers to relinquish privacy rights in order to purchase broadband services, or other telecommunications services, would also constitute unjust and unreasonable discrimination in violation of section 202(a). A take-it-or-leave-it offering would discriminate unreasonably by offering the service to potential customers willing and able to relinquish privacy rights that consumers expect and deserve, and/or that are guaranteed to them under sections 222 and 201, and not offering the service to others. Consumers should not have to face such a choice. In the *2015 Open Internet Order,* we explained that with respect to BIAS services, we will evaluate whether a practice is unjust,

unreasonable, or unreasonably discriminatory using the no-unreasonable interference/disadvantage standard (general conduct rule). Under this standard, the Commission can prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing. In evaluating whether a practice satisfies this rule, we consider a totality of the circumstances, looking to a non-exhaustive list of factors. Among these factors are end-user control, free expression, and consumer protection.

2. Heightened Requirements for Financial Incentive Practices

298. Unlike the ''take-it-or-leave-it'' offers for BIAS discussed above, the record concerning financial incentives practices is more mixed. There is strong agreement among BIAS providers, some public interest groups, and other Internet ecosystem participants that there are benefits to consumers and companies of allowing BIAS providers the flexibility to offer innovative financial incentives. The record does, however, reflect concerns that these programs may be coercive or predatory in persuading consumers to give up their privacy rights. We therefore find that that heightened disclosure and affirmative customer consent requirements will help to ensure that customers' decisions to share their proprietary information in exchange for financial incentives are based on informed consent. We limit the heightened disclosure and consent requirements discussed herein to financial incentive practices offered by BIAS providers. The record reveals concerns about these practices specific to BIAS, and as such, we limit our requirements to such services.

299. As we recognized in the *Broadband Privacy NPRM,* it is not unusual for business to give consumers benefits in exchange for their personal information. For example, customer loyalty programs that track consumer purchasing habits online and in the brick-and-mortar world are commonplace. Moreover, the Internet ecosystem continues to innovate in ways to obtain consumer information such as earning additional broadband capacity, voice minutes, text messages, or even frequent flyer airline miles in exchange for personal information. Discount service offerings can benefit consumers. As MMTC explains, for example, such programs ''significantly drive online usage'' as well as ''help financially challenged consumers.''

300. At the same time, the record includes legitimate concerns that financial incentive practices can also be harmful if presented in a coercive manner, mislead consumers into surrendering their privacy rights, or are otherwise abused. This is particularly true, because as CFC has explained, ''consumers have difficulty placing a monetary value on privacy'' and often ''have little knowledge of the details or extent of the personally identifiable data that is collected or shared by their BIAS providers and others.'' Commenters also raise concerns about the potential disproportionate effect on low income individuals. Thirty-eight public interest organizations expressed concern that financial incentives can result in consumers paying up to $800 per year—$62 per month—for plans that protect their privacy.

301. Mindful of the potential benefits and harms associated with financial incentive practices, we adopt heightened disclosure and choice requirements, which will help ensure consumers receive the information they need to fully understand the implications of any such practices and make informed decisions about exchanging their privacy rights for whatever benefits a provider is offering. We therefore require BIAS providers offering financial incentives in exchange for consent to use, disclose, and/or permit access to customer PI to provide a clear and conspicuous notice of the terms of any financial incentive program that is explained in a way that is comprehensible and not misleading. Notices that contain material misrepresentations or omissions will not be considered accurate. That explanation must include information about what customer PI the provider will collect, how it will be used, with what types of entities it will be shared and for what purposes. The notice must be provided both at the time the program is offered and at the time a customer elects to participate in the program. BIAS providers must make financial incentive notices easily accessible and separate from any other privacy notifications and translate such notices into a language other than English if they transact business with customers in that language. When a BIAS provider markets a service plan that involves an exchange of personal information for reduced pricing or other benefits, it must also provide at least as prominent information to customers about the equivalent plan without exchanging personal information.

302. BIAS providers must also comply with all notice requirements in Section 64.2003 of our rules when providing a financial incentive notice. Because of the potential for customer confusion and in keeping with our overarching goal of giving customers control over the use and sharing of their personal information, we further require BIAS providers to obtain customer opt-in consent for participation in any financial incentive program that requires a customer to give consent to use of customer PI. Consistent with the choice framework we adopt today, once customer approval is given, BIAS providers must provide a simple and easy-to-use mechanism that enables customers to change their participation in such programs at any time. This mechanism, which may be the same choice mechanism as the one in Part III.D.4, must be clear and conspicuous and in language that is comprehensible and not misleading. The mechanism must also be persistently available on or through the carrier's Web site; the carrier's application, if it provides one for account management purposes; and any functional equivalent of either. If a carrier does not have a Web site, it must provide its customers with a persistently available mechanism by another means such as a toll-free telephone number. We find that the protections outlined herein will encourage consumer choice in evaluating whether to take advantage of financial incentive programs.

303. We will closely monitor the development of financial incentive practices, particularly if allegations arise that service prices are inflated such that customers are essentially compelled to choose between protecting their personal information and very high prices. We caution that we reserve the right to take action, on a case-by-case basis, under sections 201 and 222 against BIAS providers engaged in financial incentive practices that are unjust, unreasonable, unreasonably discriminatory, or contrary to section 222. The approach we take today enables BIAS providers the flexibility to experiment with innovative financial incentive practices while ensuring that such practices are neither predatory nor coercive.

H. Other Issues

1. Dispute Resolution

304. In the *Broadband Privacy NPRM* we sought comment on whether our current informal complaint resolution process is sufficient to address customer concerns or complaints with respect to our proposed privacy and data security rules. At present, customers who experience violations of any of our rules may file informal complaints through

the Consumer Inquiries and Complaints Division of the Consumer & Governmental Affairs Bureau, and carriers may not require customers to waive, or otherwise restrict their ability to file complaints with or otherwise contact the Commission regarding violations of their privacy rights. The record does not demonstrate a need to modify our complaint process for purpose of the rules we adopt today.

305. On the question of whether BIAS providers should adopt specific dispute resolution processes, we received significant feedback both in support of and in opposition to limitations on mandatory arbitration agreements. Based on that record, we continue to have serious concerns about the impact on consumers from the inclusion of mandatory arbitration requirements as a standard part of many contracts for communications services. The time has come to address this important consumer protection issue in a comprehensive way. Therefore, we will initiate a rulemaking on the use of mandatory arbitration requirements in consumer contracts for broadband and other communications services, acting on a notice of proposed rulemaking in February 2017. We observe that the Consumer Financial Protection Bureau (CFPB)—which has extensive experience with consumer arbitration agreements and dispute resolution mechanisms—issued a report last year on mandatory arbitration clauses and is currently engaged in a rulemaking on the subject in the consumer finance context. We expect that many of the lessons the CFPB learns and the conclusions it draws in its rulemaking will be informative and useful.

2. Privacy and Data Security Exemption for Enterprise Voice Customers

306. Having harmonized the current rules for voice services with the rules we adopt today for BIAS, we revisit and broaden the existing exemption from our Section 222 rules for enterprise voice customers, where certain conditions are met. Specifically, we find that a carrier that contracts with an enterprise customer for telecommunications services other than BIAS need not comply with the other privacy and data security rules under part 64, Subpart U of our rules if the carrier's contract with that customer specifically addresses the issues of transparency, choice, data security, and data breach; and provides a mechanism for the customer to communicate with the carrier about privacy and data security concerns. As with the existing, more limited business customer exemption from our existing authentication rules, carriers will continue to be subject to the statutory requirements of section 222 even where this exemption applies.

307. Our existing voice rules include customer authentication obligations as a required data security practice, but allow business customers to bind themselves to authentication schemes that are different than otherwise provided for by our rules. In adopting an alternative data security option for authenticating business customers, the Commission recognized that the privacy concerns of telecommunications customers are greatest ''when using personal telecommunications service,'' and ''businesses are typically able to negotiate the appropriate protection of CPNI in their service agreements.'' As Level 3 argues in this rulemaking, business customers have the ''knowledge and bargaining power necessary to contract for privacy and data security protections that are tailored to meet their needs.'' Moreover, business customers may have different privacy and security needs and therefore different expectations. For example, Verizon explains that ''many businesses may want their CPNI used in different ways than a typical consumer.'' Allowing sophisticated enterprise customers to negotiate their own privacy and data security protections with their carriers will ''allow businesses to tailor how a telecommunications service provider protects their privacy and data specifically to their individual needs'' and allow carriers ''to compete by offering innovative pro-customer options and contracts that meet business customers' privacy and data security expectations.'' Although the Commission previously limited the enterprise exemption to authentication, for the reasons above we are convinced to broaden the exemption to encompass all privacy and data security rules under section 222 for the provision of telecommunications services other than BIAS to enterprise customers.

308. To ensure that business customers have identifiable protections under section 222, we limit the business customer exemption to circumstances in which the parties' contract addresses the subject matter of the exemption and provides a mechanism for the customer to communicate with the carriers about privacy and data security concerns. The existing exemption applies only if the parties' contract addresses authentication; in light of the broader scope of the exemption we adopt today, we now limit the exemption to circumstances in which the parties' contract addresses transparency, choice, data security, and breach notification. We reject the contention that we should exempt enterprise services from our rules entirely with regard to the two limitations above. The existence of contractual terms between two businesses addressing privacy ensures that the enterprise customer's privacy is in fact protected without the need for our rules. We clarify that the contract at issue need not be a fully negotiated agreement, but can take the shape of standard order forms. In this regard, as XO observes, an enterprise carrier would ''face significant liability if it violated contractual terms governing privacy and data security.'' We do not provide a business exemption for BIAS services purchased by enterprise customers, because BIAS services by definition are ''mass market retail service[s],'' and as such we do not anticipate that it will be typical for purchasers to negotiate the terms of their contracts.

309. Regardless of whether the exemption applies, we observe that carriers remain subject to the statutory requirements of section 222. This exemption in our rules is thus not tantamount to forbearance from the statute. We agree with commenters that section 222 provides a solid legal foundation for carriers and sophisticated business customers to negotiate adequate and effective service terms on matters of privacy and data security.

I. Implementation

310. To provide certainty to customers and carriers alike, in this section we establish a timeline by which carriers must implement the privacy rules we adopt today. Until these rules become effective, section 222 applies to all telecommunications services, including BIAS, and our current implementing rules continue to apply to telecommunications services other than BIAS and to interconnected VoIP. Below, we explain when the rules we adopt will be effective, and address how carriers should treat customer approvals to use and share customer PI received before the new rules are effective. Finally, we establish an extended implementation period for small providers with respect to the transparency and choice requirements we adopt today.

1. Effective Dates and Implementation Schedule for Privacy Rules

311. Swift implementation of the new privacy rules will benefit consumers. Moreover, carriers that have complied with FTC and industry best practices will be well-positioned to achieve

prompt compliance with the privacy rules we adopt today. We recognize, however, that carriers will need some time to update their internal business processes as well as their customer-facing privacy policies and choice mechanisms in order to come into compliance with some of our new rules. Additionally, some of the new rules will require revised information collection approval from the Office of Management and Budget pursuant to the Paperwork Reduction Act (PRA approval), and it is difficult to predict the exact timeline for PRA approval. PRA approval, as defined herein, is not complete until the Commission publishes notice of OMB approval in the **Federal Register**. We therefore adopt a set of effective dates for the new rules that is calibrated to the changes carriers will need to make to come into compliance—providing a minimum timeframe before which the rules could come into effect. In order to provide certainty about effective dates, we also direct the Wireline Competition Bureau (Bureau) to provide advance notice to the public of the precise date after PRA approval when the Commission will begin to enforce compliance with each of the new rules.

312. *Notice and Choice.* The notice and choice rules we adopt today will become effective the later of (1) PRA approval, or (2) twelve months after the Commission publishes a summary of the Order in the **Federal Register**. This implementation schedule also applies to the disclosure and consent requirements for financial incentive practices. We acknowledge that our new notice and choice rules may ''represent a significant shift in the status quo'' for carriers. Carriers will need to analyze the new, harmonized privacy rules as well as coordinate with various business segments and vendors, and update programs and policies. Carriers will also need to engage in consumer outreach and education. These implementation steps will take time and we find, as supported in the record, that twelve months after publication of the Order in the **Federal Register** is an adequate minimum implementation period to implement the new notice and approval rules. In order to provide certainty, we also direct the Bureau to release a public notice after PRA approval of the notice and choice rules, indicating that the rules are effective, and giving carriers a time period to come into compliance with those rules that is the later of (1) eight weeks from the date of the public notice, or (2) twelve months after the Commission publishes a summary of the Order in the **Federal Register**.

313. *Breach Notification Procedures.* The data breach notification rule we adopt today will become effective the later of (1) PRA approval, or (2) six months after the Commission publishes a summary of the Order in the **Federal Register**. We find that six months is an appropriate minimum implementation period for data breach implementation. Although providers of telecommunications services other than BIAS are subject to our current breach notification rule and we are confident that carriers are cognizant of the importance of data breach notification in the appropriate circumstances, we recognize that carriers may have to modify practices and policies to implement our new rule, we find the harm trigger we adopt and timeline for notifying customers lessen the implementation requirements. Moreover, harmonization of our data breach rule for BIAS and voice services enable providers to streamline their notification processes, which should also lessen carriers' need for implementation time. Given these steps to minimize compliance burdens, we find six months is an adequate minimum timeframe. We also direct the Bureau to release a public notice after PRA approval of the data breach rule, indicating that the rule is effective, and giving carriers a time period to come into compliance with the rule that is the later of (1) eight weeks from the date of the public notice, or (2) six months after the Commission publishes a summary of the Order in the **Federal Register**.

314. *Data Security.* The specific data security requirements we adopt today will become effective 90 days after publication of a summary of the Order in the **Federal Register**. We find this to be an appropriate implementation period for the data security requirements because as discussed above, carriers should already be largely in compliance with these requirements because the reasonableness standard adopted in this Order provides carriers flexibility in how to approach data security and resembles the obligation to which they were previously subject pursuant to section 5 of the FTC Act. We therefore do not think the numerous steps outlined by commenters that would have been necessary to comply with the data security proposals in the *NPRM* apply to the data security rule that we adopt. Nevertheless, we encourage providers, particularly small providers, to use the adoption of the Order as an opportunity to revisit their data security practices and therefore provide an additional 90 days subsequent to **Federal Register** publication in which carriers can revisit their practices to ensure that they are reasonable, as provided for in this Order.

315. *Prohibition on Conditioning Broadband Service on Giving up Privacy.* The prohibition on conditioning offers to provide BIAS on a customer's agreement to waive privacy rights will become effective 30 days after publication of a summary of this Order in the **Federal Register**. We find that unlike the other privacy rules, consumers should benefit from this prohibition promptly. As discussed above, we find that these ''take-it-or-leave-it'' offers give consumers no choice and require them to trade their privacy for access to the Internet. As supported in the record, these practices would harm consumers, particularly lower-income customers. We therefore find no basis for any delay in the effective date of this important protection. Further, prompt implementation will not create any burdens for carriers that are committed to providing their customers with privacy choices. All other privacy rules adopted in the Order will be effective 30 days after publication of a summary of the Order in the **Federal Register**.

2. Uniform Timeline for BIAS and Voice Services

316. We adopt a uniform implementation timetable for both BIAS and other telecommunications services. Implementing our rules for all telecommunications services simultaneously will help alleviate potential customer confusion from disparate practices between services or carriers. This approach will support the benefits of harmonization discussed throughout this Order and is strongly supported in the record. We emphasize that until the new privacy rules are effective and implemented with respect to voice services, the existing rules remain in place. Further, we make clear that all carriers, including BIAS providers, remain subject to section 222 during the implementation period that we establish and beyond.

3. Treatment of Customer Consent Obtained Prior to the Effective and Implementation Date of New Rule

317. We recognize that our new customer approval rule requires carriers to modify the way they obtain consent for BIAS and voice services based on our sensitivity-based framework discussed above. We seek to minimize disruption to carriers' business practices and therefore do not require carriers to obtain new consent from all their customers. Rather, for BIAS, we treat as valid or ''grandfather'' any consumer consent that was obtained prior to the

effective date of our rules and that is consistent with our new requirements. For example, if a BIAS provider obtained a customer's opt-in consent to use that individual's location data to provide coupons for nearby restaurants and provided adequate notice regarding his or her privacy rights, then the customer's consent would be treated as valid. The consent would not be invalidated simply because it occurred before the new customer approval rule became effective. However, if the customer consent was not obtained in the manner contemplated by our new rule, a new opportunity for choice is required. We recognize that consumers whose opt-in or opt-out consent is grandfathered may not be aware of our persistent choice requirement, and therefore we direct the Consumer and Governmental Affairs Bureau to work with the industry to engage in a voluntary consumer education campaign.

318. We decline to more broadly grandfather preexisting consents obtained by small BIAS providers. WTA argues that the Commission should permit ''small BIAS providers to grandfather existing opt-out approvals as it has done in the past'' citing the Commission's *2002 CPNI Order,* in which the Commission allowed carriers to use preexisting opt-out approval with the limitation that such approval only be used for marketing of communications-related services by carriers, their affiliates that provide communications-related services, and carriers' agents, joint venture partners and independent contractors. We find that the parameters set forth above create the appropriate balance to limit compliance costs with our new notice and customer approval rules while providing consumers the privacy protections they need. As we explain above, BIAS providers are in a unique position as gateways to the Internet and we need to ensure consumers are aware of their privacy rights and have the ability to choose how their personal information is used and shared.

319. As with BIAS services, customer consent obtained by providers of other telecommunications services subject to the legacy rules remains valid for the time during which it would have remained valid under the legacy rules. As such, opt-out consent obtained before the release date of this order remains valid for two years after it was obtained, after which a carrier must conform to the new rules. Opt-in consent that is valid under the legacy rules remains valid. This approach is consistent with established customer expectations at the time the consent was solicited, and should reduce notice fatigue. Maintaining the validity of customer consent for voice services will also help reduce the up-front cost of compliance of the new rules. We reiterate that a customer's preexisting consent is valid only within its original scope. For instance, if a carrier previously received a customer's opt-in consent to use information about the characteristics of the customer's service to market home alarm services, the carrier could not claim that same consent applies to use of different customer PI (*e.g.,* a Social Security Number) or a different use or form of sharing (*e.g.,* selling to a data aggregator). Similarly, opt-out consent to use and share CPNI to market communications-related services could not be used to support use of different customer PI or different forms of use or sharing (*e.g.,* marketing non-communications-related services).

4. Limited Extension of Implementation Period for Small Carriers

320. In the *NPRM* we sought comment on ways to minimize the burden of our proposed privacy framework on small providers, and throughout this Order we have identified numerous ways to reduce burdens and compliance costs while providing robust privacy protections to their customers. To further address the concerns raised by small providers in the record, we provide small carriers an additional twelve months to implement the notice and customer approval rules we adopt today. CCA asserts that ''any compliance burdens produced by privacy rules will be compounded by many additional regulations including Title II regulation, enhanced transparency rules, and outage reporting requirements.'' Consideration of the effect of separate requirements was taken into account in developing this implementation plan.

321. We find that an additional one-year phase-in will allow small carriers—both broadband providers and voice providers—time to make the necessary investments to implement these rules. The record reflects that small providers have comparatively limited resources and rely extensively on vendors over which they have limited leverage to compel adoption of new requirements. We recognize our notice and choice framework may entail up-front costs for small providers. We also agree with NTCA that small providers will ''be aided by observing and learning from the experience of larger firms who by virtue of their size and scale are better position to absorb the learning curve.'' As such, we find that this limited extension is appropriate.

322. For purposes of this extension, we define small BIAS providers as providers with 100,000 or fewer broadband connections and small voice providers with 100,000 or fewer subscriber lines as reported on their most recent Form 477, aggregated over all the providers' affiliates. In the *NPRM* we sought comment on whether we should exempt carriers that collect data from fewer than 5,000 customers a year provided they do not share customer data with third parties. Commenters objected that the 5,000 threshold was too narrow to accurately identify small providers and that the limitation on information sharing was too restrictive. We therefore find that given the limited scope of relief granted to small carriers, increasing the numeric scope from the 5,000 to 100,000 is suitable because it will benefit additional providers without excess consumer impact. We also decline to count based on the number of customers from whom carriers collect data, as we recognize that some data collection is necessary to the provision of service. Additionally, we decline to impose any requirement that small providers not share their information with third parties to qualify for the exception. Moreover, cabining the scope of this limited extension to providers serving 100,000 or fewer broadband connections or voice subscriber lines is consistent with the *2015 Open Internet Order,* in which we adopted a temporary exemption from the enhancements to the transparency rule for BIAS providers with 100,000 or fewer broadband subscribers. Therefore for these reasons, and the critical importance of privacy protections to consumers, we decline to adopt CCA's recommendation to define small BIAS providers as either companies with up to 1,500 employees or serving 250,000 subscribers or less.

323. We decline to provide any longer or broader extension periods or exemptions to our new privacy rules. We find that our ''reasonableness'' approach to data security mitigates small provider concern about specific requirements, such as annual risk assessments and requiring specific privacy credentials. Moreover, as advocated by small carriers, we adopt a customer choice framework that distinguishes between sensitive and non-sensitive customer information, as well as decline to mandate a customer-facing dashboard to help manage their implementation and compliance costs. Furthermore, we find our data breach notification requirements and ''take-it-or-leave-it'' prohibition do not require

an implementation extension as compliance with these protections should not be costly for small carriers that generally collect less customer information and use customer information for narrower purposes. Also, although smaller in company size and market share, small carriers still retain the ability to see and collect customer personal information and therefore, it is appropriate to extend these important protections to all customers on an equal timeframe.

J. Preemption of State Law

324. In this section, we adopt the proposal in the *NPRM* and announce our intent to preempt state privacy laws, including data security and data breach laws, *only* to the extent that they are inconsistent with any rules adopted by the Commission. State law includes any statute, regulation, order, interpretation, or other state action with the force of law. This limited application of our preemption authority is consistent with our precedent in this area. We have long appreciated and valued the important role states play in upholding the pillars of privacy and protecting customer information. As the Office of the New York Attorney General has explained, the State AGs are ''active participants in ensuring that [their] citizens have robust privacy protections'' and it is critical that they continue that work. As such, we further agree with the New York Attorney General's Office that ''it is imperative that the FCC and the states maintain broad authority for privacy regulation and enforcement.'' We also agree with those providers and other commenters that argue that neither telecommunications carriers nor customers are well-served by providers expending time and effort attempting to comply with conflicting privacy requirements. We therefore codify a very limited preemption rule that is consistent with our past practice with respect to rules implementing section 222. By allowing states to craft and enforce their own laws that are not inconsistent with our rules with respect to BIAS providers' and other telecommunications carriers' collection, use, and sharing of customer information, we recognize and honor the important role the states play in protecting the privacy of their customer information.

325. As the Commission has previously explained, we may preempt state regulation of intrastate telecommunications matters ''where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects.'' We reject ITTA's argument that we lack authority to preempt inconsistent state laws regarding non-CPNI customer PI because its argument is premised on the incorrect assumption that our legal authority under section 222 is limited to CPNI. In this case, we apply our preemption authority to the limited extent necessary to prevent such instances of incompatibility. Where state privacy laws do not create a conflict with federal requirements, providers must comply with federal law and state law.

326. As we have in the past, we will take a fact-specific approach to the question of whether a conflict between our privacy rules and state law exists. The Commission reviews petitions for preemption of CPNI rules on a case-by-case basis. If a provider believes that it is unable to comply simultaneously with the Commission's rules and with the laws of another jurisdiction, the provider should bring the matter to our attention in an appropriate petition. Examining specific conflict issues when they arise will best ensure that consumers receive the privacy protections they deserve, whether from a state source or from our rules.

327. The states have enacted many laws aimed at ensuring that their citizens have robust privacy protections. We agree with the Pennsylvania Attorney General that it is important that we not ''undermine or override state law providing greater privacy protections than federal law,'' or impede the critical privacy protections states continue to implement. Rather, as supported in the record, we encourage the states to continue their important work in the privacy arena, and adopt an approach to preemption that ensures that they are able to do so. In so doing, we reaffirm the Commission's limited exercise of our preemption authority to allow states to adopt consumer privacy protections that are more restrictive than those adopted by the Commission provided that regulated entities are able to comply with both federal and state laws.

328. In taking this approach, we reject ACA's suggestion that we should ''preempt state data breach notification laws entirely.'' As stated above, we continue to provide states the flexibility to craft and enforce their own privacy laws, and therefore we only preempt state laws to the extent that they impose inconsistent requirements. Our privacy rules are designed to promote ''cooperative federalism'' and therefore unless providers are unable to comply with both the applicable state and Commission requirements, we find it inappropriate to categorically preempt these state data breach laws.

329. Commenters have identified data breach notification as one area where conflicts may arise. We agree with commenters that it is generally best for carriers to be able to send out one customer data breach notification that complies with both state and federal laws, and we welcome state agencies to use our data breach notification rules as a model. However, we recognize that states law may require differently timed notice or additional information than our rules, and we do not view such privacy-protective requirements as necessarily inconsistent with the rules we adopt today since carriers are capable of sending two notices at two different times. However, in the interest of efficiency and preventing notice fatigue, we invite carriers that find themselves facing requirements to send separate consumer data breach notices to fulfill their federal and state obligations to come to the Commission with a proposed waiver that will enable them to send a single notice that is consistent with the goals of notifying consumers of their data breach. Additionally, as explained by CTIA, a situation could arise where a state law enforcement agency requests a delay in data breach notice due to an ongoing investigation. We encourage both carriers and state law enforcement officials to come to the Commission in such a situation, as we have authority to waive our rules for good cause and recognize the importance of avoiding interference with a state investigation.

330. We clarify that we apply the same preemption standard to all aspects of our section 222 rules. Although the Commission, in its previous orders, had applied its preemption standard with respect to all of the section 222 rules, the preemption requirement is currently codified at section 64.2011 of our rules, which addresses notification of data breaches. Recognizing that states are enacting privacy laws outside of the breach notification context, and consistent with historical Commission precedent, we conclude that the preemption standard should clearly apply in the context of all of the rules we adopt today implementing section 222. Therefore, as we proposed in the *NPRM,* we remove the preemption provision from that section of our rules, and adopt a new preemption section that will clearly apply to all of our new rules for the privacy of customer proprietary information. In doing so, we enable states to continue their important role in privacy protection.

331. Further, we find that the same preemption standard should apply in both the voice and BIAS contexts to help provide certainty and consistency to the industry. Accordingly, we adopt a harmonized preemption standard across BIAS and other telecommunications services. By applying the same preemption standard to BIAS providers and to other telecommunications carriers, we ensure that states continue to serve a role in tandem with the Commission, regardless of the specific service at issue.

IV. Legal Authority

332. In this Report and Order, we implement Congress's mandate to ensure that telecommunications carriers protect the confidentiality of proprietary information of and relating to customers. As explained in detail below, the privacy and security rules that we adopt are well-grounded in our statutory authority, including but not limited to section 222 of the Act.

A. Section 222 of the Act Provides Authority for the Rules

333. Section 222 of the Act governs telecommunications carriers in their use, disclosure, and protection of proprietary information that they obtain in their provision of telecommunications services. The fundamental duty this section imposes on each carrier, as stated in section 222(a), is to ''protect the confidentiality of proprietary information of, and relating to'' customers, fellow carriers, and equipment manufacturers. Section 222(c) imposes more specific requirements with regard to a subset of customers' proprietary information, namely customer proprietary *network* information. This Report and Order implements section 222 as to customer PI, a category that includes individually identifiable CPNI and other proprietary information that is ''of, and relating to'' customers of telecommunications services. As explained below, the rules we adopt today are faithful to the text, structure, and purpose of section 222.

1. Section 222 Applies to BIAS Providers Along With Other Telecommunications Carriers

334. We begin by reaffirming our conclusion in the *2015 Open Internet Order* that section 222 applies to BIAS providers. In so doing, we reject the view that Section 222 applies only to voice telephony. The *2015 Open Internet Order* reclassified BIAS as a telecommunications service, making BIAS providers ''telecommunications carriers'' insofar as they are providing such service. Section 222(a) imparts a general duty on ''[e]very telecommunications carrier,'' while other subsections specify the duties of ''a telecommunications carrier'' in particular situations. The term ''telecommunications carrier'' has long included providers of services distinct from telephony, including at the time of section 222's enactment. Thus, in construing the term for purposes of Section 222, we see no reason to depart from the definition of ''telecommunications carrier'' in Section 3 of the Act. To the contrary, deviating from this definition without a clear textual basis in section 222 would create uncertainty as to the scope of numerous provisions in the Act, regulatory imbalance between various telecommunications carriers, and a gap in Congress's multi-statute privacy regime. Moreover, commenters cite no evidence that the term ''telecommunications carrier'' is used more restrictively in section 222 than elsewhere in the Act.

335. We similarly reject the claim that in reclassifying BIAS we have improperly exercised our ''definitional authority'' to expand the scope section 222. The relevant term that defines the scope of section 222 is ''telecommunications carrier,'' and we simply are applying the holding of the *2015 Open Internet Order* that this statutory term encompasses BIAS. Nor does the fact that Section 230 of the Act uses the term Internet, while Section 222 does not, compel us to disregard the clear uses of ''telecommunications carrier'' in Section 222.

336. We also reject arguments that ''telephone-specific references'' contained in Section 222 serve to limit the scope of the entire section to voice telephony or related services. This argument misconstrues the structure of Section 222. As explained in more detail below, Section 222(a) imposes a broad general duty to protect proprietary information while other provisions impose more-specific duties. Some of these more-specific duties concerning CPNI are indeed relevant only in the context of voice telephony. But their purpose is to specify duties that apply in that limited context, not to define the outer bounds of Section 222. The definition of CPNI found in section 222(h)(1) illustrates this point. We need not and do not construe BIAS as a ''local exchange service,'' ''telephone exchange service,'' or ''telephone toll service'' in order to bring it within the reach of section 222. Provisions of the statute that apply only to such limited categories, or to carriers that provide services in such categories, are not part of the statutory basis for any rules we adopt in this Report and Order as to BIAS. Rather, the rules we adopt for BIAS are rooted only in those aspects of section 222 that govern ''telecommunications carriers'' and ''telecommunications services'' writ large. While the term is defined in section 222(h)(1)(B) to include ''the information contained in the bills pertaining to telephone exchange service or telephone toll service'' and to exclude ''subscriber list information''—categories that have no relevance for BIAS—pursuant to section 222(h)(1)(A) the term CPNI also includes a broader category of information that carriers obtain by virtue of providing a telecommunications service. This broader category articulated in section 222(h)(1)(A) pertains to ''telecommunications service[s]'' in general, not only to telephony. As we have explained above, BIAS providers collect significant amounts of information that qualifies as CPNI under the broad, functional definition articulated in Section 222(h)(1)(A). Whether BIAS providers also issue telephone bills or publish directories makes no difference. The reference to ''call[s]'' in Section 222(d)(3) is similarly inapposite as to the scope of Section 222 as a whole. The ''call[s]'' at issue in this provision are customer service calls initiated by the customer; a customer of any service, including BIAS, can make such a call.

337. If anything, the placement of references to telephony in section 222 supports our reading of that section as reaching *beyond* telephony. Such terms are used to define narrow provisions or exceptions, but not the outer contours of major components of the statute. Most significantly, the broad term ''telecommunications carrier'' is used in defining the general duty under subsection (a); the obligation to seek customer approval for use, disclosure, or permission of access to individually identifiable CPNI under paragraph (c)(1); the obligation to disclose CPNI upon request under paragraph (c)(2); and the grant of permission to use and disclose ''aggregate customer information'' under paragraph (c)(3).

338. Where a component of section 222 applies only to a subset of telecommunications carriers, Congress used a term to apply such a limit. For instance, section 222(c)(3) permits all telecommunications carriers to use and disclose aggregate customer information, but ''local exchange carrier[s]'' can do so only on the condition that they make the information available to others on reasonable and nondiscriminatory

terms. The inclusion of a pro-competitive condition in Section 222(c)(3) that applies only to local exchange carriers is consistent with other provisions of the 1996 Act directed at opening local telephone markets to competition. But the limited scope of this condition does not serve to limit the applicability of Section 222 as a whole. Indeed, not even section 222(c)(3) *itself* is limited in scope to providers of local exchange service. Rather, its primary purpose is to clarify that telecommunications carriers may use and disclose customer information when it takes the form of ''aggregate customer information.'' BIAS providers commenting in this proceeding have expressed a strong interest in being able to use and disclose such information. As telecommunications carriers, their ability to do so is made clear under section 222(c)(3).

339. Similarly, the limited scope of providers covered by the duty to share ''subscriber list information'' under section 222(e) is commensurate with the scope of the problem being addressed, namely in the publication of telephone directories. In particular, the ''telephone exchange service'' providers subject to unbundling and nondiscrimination requirements by the provision are those that would have the ''subscriber list information'' needed to produce these directories. The fact that section 222 includes provisions to address such telephone-specific concerns does not change its overall character as a privacy protection statute for telecommunications, one that has as much relevance for BIAS as it does for telephone service.

340. We disagree with the view that Congress confirmed section 222 as a telephone-specific statute when it amended subsections 222(d)(4), (f)(1) and (g) as part of the New and Emerging Technologies 911 Improvement Act of 2008 (NET 911 Act). These provisions of section 222 establish rights and obligations regarding carrier disclosure of customer information to assist in the delivery of emergency services. The NET 911 Act brought ''IP-enabled voice service[s]'' within their scope. Amending section 222 in this manner addressed a narrow but critical public safety concern: IP-enabled voice services were emerging as a platform for delivery of 911 service, yet providers of these services were not classified as ''telecommunications carriers'' subject to section 222. The NET 911 Act amendments ensure that all IP-enabled voice services, even to the extent they are *not* telecommunications services, are treated under section 222 much the same as traditional telephony services for purposes related to E911 service. This treatment has nothing to do with the extent to which telecommunications services that are not voice services are subject to section 222. We have exercised our ancillary jurisdiction to apply rules adopted under section 222 to providers of interconnected VoIP services.

341. In addition, we observe that none of the references to telephone-specific services in section 222 that commenters identify are found in section 222(a). As explained below, we construe section 222(a) as a broad privacy protection mandate that extends beyond the specific duties articulated in sections 222(b) and (c). Thus, even if commenters could establish that these more specific parts of section 222 are qualified in ways that limit their scope to voice telephony or related services, or that exclude BIAS from their scope, we would still find that a BIAS provider—like ''[e]very telecommunications carrier''—has customer privacy obligations under section 222(a). And if we accept commenters' view that the role of section 222(a) in the statute is to identify ''which entities'' have duties thereunder, it follows that subsections (b) and (c) apply not only to telephony or voice providers but to ''every telecommunications carrier.''

342. Finally, we dismiss efforts to conflate section 222 with its implementing rules. When we forbore from application of the existing implementing rules to BIAS, we made clear that the statute itself still applies. Commenters do not present any compelling reason to revisit this decision.

2. Section 222(a) Provides Authority for the Rules as to Customer PI

343. We next conclude that section 222(a) provides legal authority for our rules. As explained below, section 222(a) imposes an enforceable duty on telecommunications carriers that is more expansive than the combination of duties set forth subsections (b) and (c). We interpret these subsections as defining the contours of a carrier's general duty under section 222(a) as it applies in particular contexts, but not as coterminous with the broader duty under section 222(a). On the contrary, we construe section 222(a) as imposing a broad duty on carriers to protect customer PI that extends beyond the narrower scope of information specified in section 222(c). We also find that the rules adopted in this Report and Order to ensure the protection of customer PI soundly implement section 222(a).

a. Section 222(a) Imposes on Telecommunications Carriers an Enforceable Duty To ''Protect the Confidentiality'' of ''Proprietary Information''

344. Section 222(a) states that ''[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to'' customers, fellow carriers, and equipment manufacturers. In this Report and Order we adopt the most straightforward interpretation of this text by finding that section 222(a) imposes a ''duty,'' on ''every telecommunications carrier.'' A ''duty'' is commonly understood to mean an enforceable obligation. It is well-established that the Commission may adopt rules to implement and enforce an obligation imposed by the Act, including section 222(a). The substance of the duty is to ''protect the confidentiality of proprietary information''—all ''proprietary information'' that is ''of, and relating to,'' the specified entities, namely ''other telecommunications carriers, equipment manufacturers, and customers.'' This Report and Order implements section 222(a) with respect to ''customers,'' defining the term ''customer PI'' to mean that which is ''proprietary information of, and relating to . . . customers.'' The term is thus firmly rooted in the language of section 222(a).

345. The duty set forth in section 222(a) concerns information ''of, and relating to'' customers and other covered entities. The Supreme Court has held that ''the ordinary meaning of [the phrase 'relat[ing] to'] is a broad one,'' and in certain contexts it has described the phrase as ''deliberately expansive'' and ''conspicuous for its breadth.'' The record contains no evidence that Congress intended the phrase ''relating to'' to be construed more narrowly for purposes of section 222(a) than it would be ordinarily. Thus, the most natural reading of section 222(a) is that it imposes a broad duty on telecommunications carriers to protect proprietary information, one that is informed by but not necessarily limited to the more specific duties laid out in subsections (b) and (c).

346. The treatment of ''equipment manufacturers'' under section 222 provides further evidence for this interpretation. This term is used only once: section 222(a) includes ''equipment manufacturers'' among the classes of entities owed confidentiality protections as part of a carrier's ''general'' duty. While Sections 222(b) and (c) specify in greater detail how this

duty applies with respect to customers and fellow carriers—the other entities protected under section 222(a)—there is no further statutory guidance on what carriers must do to protect the proprietary information of equipment manufacturers. Thus, the duty imposed on carriers under section 222 with regard to equipment manufacturers must have its sole basis in section 222(a). This would not be possible unless section 222(a) were read to confer enforceable obligations that are independent of, and that exceed, the requirements of subsections (b) and (c). We reject any argument that the reference in section 222(a) to equipment manufacturers is nothing more than a cross-reference to obligations contained in Section 273. Such an interpretation would give no independent meaning to section 222(a), and therefore would be inconsistent with established principles of statutory construction. It would also be contrary to the plain meaning of section 222(a), which contains no reference to and is plainly broader than Section 273; nothing in section 273 applies broadly to every telecommunications carrier, as section 222(a) clearly does.

347. Nothing in the statutory text or structure of section 222 contradicts this interpretation. To the contrary, this plain language interpretation is further supported by the structure of section 222 and consistent with approaches used in other parts of the Act. Section 222(a)'s heading ''In General'' suggests a general ''duty,'' to be followed by specifics as to particular situations. Section 222(a) is not given a heading such as ''Purpose'' or ''Preamble'' that would indicate that the ''duty'' it announces is merely precatory or an inert ''statement of purpose.'' Section 251 of the Act is structured similarly in this regard, and there is no argument that the duty announced in Section 251(a) is merely precatory. Also, like in section 222, the ''general duty'' announced in subsection (a) of section 251 is accompanied by more specific duties announced in the subsections that follow. In addition, there is no textual indication that sections 222(b) and (c) define the outer bounds of section 222(a)'s scope. For instance, section 222(a) does not include language such as ''as set forth below'' or ''as set forth in subsections (b) and (c).'' We also dismiss as irrelevant CTIA's observation that some provisions of the 1996 Act ''can be interpreted as general statements of policy, rather than as grants of additional authority.'' That fact alone would have no bearing on how to interpret section 222(a), which employs ''regulatory terminology'' in imparting a general ''duty'' on telecommunications carriers. Finally, our interpretation of subsection (a) does not render subsection (b) or (c) superfluous. The latter subsections directly impose specific requirements on telecommunications carriers to address concerns that were particularly pressing at the time of section 222's enactment. Our reading of section 222(a) preserves the role of each of these provisions within the statute, while also allowing the Commission to adopt broader privacy protections to keep pace with the evolution of telecommunications services.

348. As Public Knowledge argues, the breadth of the duty announced in section 222(a) is consistent with a broad understanding of the purpose of section 222. We agree that this subsection endows the Commission with a continuing responsibility to protect the privacy customer information as telecommunications services evolve. Congress's inclusion in section 222 of more specific provisions to address issues that were ''front-and-center'' at the time of the 1996 Act's enactment in no way detracts from this broader purpose.

349. Our interpretation of section 222(a) is far from novel. Other provisions of the Act set forth a general rule along with specific instructions for applying the rule in particular contexts. CTIA attempts to distinguish other such provisions by arguing that they do not ''define in their subsequent subsections the duties *of different regulated entities* identified in their initial subsections.'' In fact, section 251 does define specific duties of different regulatees in subsections (b) (all local exchange carriers) and (c) (incumbent local exchange carriers), and section 628 does apply specific duties to cable operators, satellite cable programming vendors, and common carriers. In any event, CTIA does not explain what it believes to be the significance of this distinction. We agree with Public Knowledge that, in addition to section 251, another provision that bears a particularly close resemblance to Section 222 in this regard is section 628. Subsection (b) of this provision imposes a general ''prohibition'' on cable operators from interfering with competitors' ability to provide satellite cable or satellite broadcast programming. Subsection (c) in turn directs the Commission to adopt rules to implement this prohibition and specifies their ''minimum contents.'' As a general matter, the ''minimum'' regulations required under section 628(c) are aimed at preventing cable operators from denying their competitors access to programming. In 2009, the D.C. Circuit upheld Commission rules adopted under section 628(b) that prevented cable operators from entering exclusivity agreements with owners of multi-unit buildings, an anti-competitive practice that is only tenuously related to the ''minimum'' regulations implemented under section 628(c). Taking note of section 628(b)'s ''broad and sweeping terms,'' the court ruled that ''nothing in the statute unambiguously limits the Commission to regulating practices'' related to the ''principal evil that Congress had in mind'' when enacting Section 628, as expressed in subsection (c). Rather, it held that the Commission's ''remedial powers'' to enforce subsection (b) reached beyond circumstances that Congress ''specifically foresaw.'' Similarly, we agree with OTI that the ''principal'' focus of section 222 on regulating CPNI to promote competition and consumer protection in emerging telecommunications markets must be read in harmony with the ''broad and sweeping'' mandate of section 222(a). In construing the latter we must give effect to the ''actual words'' of the provision. These words plainly impose a ''duty'' on ''every telecommunications carrier.''

350. Even if there were some ambiguity in the text, commenters that oppose our interpretation of section 222(a) have failed to offer a compelling alternative interpretation. One proposed alternative is that section 222(a) merely confirms Congress's intent that the newly enacted section 222 would apply to ''every telecommunications carrier,'' including not only the legacy carriers subject to then-existing CPNI requirements but also ''the new entrants that the 1996 Act envisioned.'' Verizon argues that both the House bill and the Senate bill originally would have protected a category of customer information broader than the eventual definition of CPNI, but that ''Congress ultimately rejected both approaches.'' There is no evidence that Congress would have, without explanation, adopted an approach that is narrower than either chamber's bill. And, in fact, the Senate bill (which, as Verizon points out, was intended to apply broadly to ''customer-specific proprietary information,'' S. Rep. No. 104–23 at 24), contained in its text language almost identical to what Congress ultimately enacted, creating ''a duty to protect the confidentiality of proprietary information relating to other common carriers, to equipment manufacturers, and to customers.'' Similar arguments in the record are that section 222(a)

''identifies which entities have responsibility to protect information, and informs the reading of subsequent subsections, which articulate how these entities must protect information,'' or that the provision ''merely identifies the categories of information to which section 222 applies.'' These arguments are unconvincing. First, subsections (b) and (c) themselves are written broadly to apply to ''telecommunications carrier[s].'' There is no textual basis for interpreting either provision as applying only to a legacy subset of carriers, such as the Bell Operating Companies, AT&T, and GTE. Subsections (b) and (c) also specify the categories of information to which each applies, without reference to subsection (a). Thus, commenters' proposals for interpreting section 222(a) would render that provision superfluous, contrary to the canon against such interpretations. Moreover, the statute does not expressly link the duty announced in section 222(a) with the subsections that follow. That is, the statute does not direct ''every telecommunications carrier'' to protect proprietary information ''in accordance with subsections (b) and (c)'' or anything similar.

351. Nor does our interpretation of section 222(a) vitiate any other elements of Section 222. On the contrary, we read section 222(a) as imposing a broad duty that can and must be read in harmony with the more specific mandates set forth elsewhere in the statute. Accordingly, we need not and do not construe section 222(a) so broadly as to prohibit any sharing of subscriber information that subsection (e) or (g) would otherwise require. That is, subsection (a)'s duty to protect the confidentiality of customer PI is in no way inconsistent with subsection (e)'s duty to share SLI, which by definition is *published* and therefore is not confidential. Nor is it inconsistent with subsection (g)'s duty to share subscriber information ''solely for purposes of delivering or assisting in the delivery of emergency services.'' Indeed, far from ''render[ing] null'' subsections (e) and (g), our reasoned interpretation of section 222(a) preserves the full effect of both of these provisions. We thus reject the argument that subsection (a)'s absence from the ''notwithstanding'' clauses of subsections (e) and (g) should be taken as evidence that the former provision confers no ''substantive regulatory authority.'' Rather, there was simply no need for Congress to have included subsection (a) in these clauses. Also, the mere omission of section 222(a) from the these clauses would have been an exceedingly oblique and indirect way of settling upon an interpretation of section 222(a) that runs counter to its plain meaning. Relatedly, there is no conflict because our understanding of section 222(a) does not override any of the exceptions to section 222(c) set forth in section 222(d). For example, a carrier need not fear that its disclosure of CPNI ''to initiate, render, bill [or] collect for telecommunications services'' as subsection (d) permits might independently violate section 222(a), because such disclosure is not inconsistent with the carrier's duty to protect the confidentiality of such information. Nor do we construe section 222(a) as negating a carrier's right under section 222(c)(1) to use, disclose or permit access to CPNI for the specific purposes set forth in subclauses (A) and (B).

352. We also disagree with the argument that our construction of Section 222(a) enlists a ''vague or ancillary'' provision of the statute to ''alter [its] fundamental details.'' Section 222(a) appears, of course, at the beginning of Section 222. The first thirteen words of Section 222(a)—and thus, of Section 222—read: ''Every telecommunications carrier has a duty to protect the confidentiality of proprietary information. . . .'' Congress could not have featured this language any more prominently within the statute, nor could the duty it propounds be any more clearly and directly expressed. As discussed above, a statutory structure of establishing a general duty and then addressing subsets of that duty in greater detail is not unique, even within the Communications Act.

353. Finally, we reject the view that our interpretation of section 222(a) locates in ''a long-extant statute an unheralded power to regulate a significant portion of the American economy.'' The Commission has exercised regulatory authority under section 222(c) for approximately two decades and oversaw certain carriers' handling of customer PI for over two decades before that. Even assuming a contrary reading of section 222(a), subsection (c) would still invest the Commission with substantial regulatory authority over personal information that BIAS providers and other telecommunications carriers collect from their customers, and sections 201 and 202 would apply to carriers' practices in handling customers' information. Thus, our interpretation of section 222(a) is a far cry from the ''transformative'' act of statutory interpretation struck down in *Utility Air Regulatory Group* v. *EPA.* There, the agency's broad construction of the term ''air pollutant'' would have completely upended the ''structure and design'' of a permitting scheme established by statute and extended that regime to broad swaths of the economy. By contrast, the net effect of our interpreting Section 222(a) as governing all customer PI is to make clear the Commission's authority over carriers' treatment of customer proprietary information that may not qualify as CPNI, such as Social Security numbers or financial records. This represents a modest but critical recognition of our regulatory purview beyond CPNI to cover additional ''proprietary'' information that section 222(a) plainly reaches. Moreover, BIAS providers' treatment of such information fell squarely within the jurisdiction of the FTC prior to the Commission's reclassification of BIAS. The scope of regulatory authority we are asserting under section 222(a) is thus far from novel or ''unheralded.''

b. The Broad Duty of Section 222(a) Extends to All ''Proprietary Information'' That Is ''Of'' or ''Relating to'' Customers

354. Having determined that section 222(a) imposes on carriers an enforceable duty, we also conclude that this duty extends to all ''proprietary information'' that is ''of, or relating to'' customers, regardless of whether the information qualifies as CPNI. That is, we reject the argument that section 222(c) exhausts the duty set forth in section 222(a) as it applies with respect to customers.

355. Once again, our interpretation follows from the plain language of section 222. While subsection (c) establishes obligations with respect to ''customer proprietary network information,'' subsection (a) omits the word ''network.'' The concept of the ''network'' lies at the heart of CPNI: The information defined as CPNI in section 222(h)(1) is of the sort that carriers obtain by virtue providing service over their networks. However, as we have explained above, this sort of information is not the only ''proprietary information'' that telecommunications carriers can and do obtain from their customers by virtue of the carrier-customer relationship. We therefore find that ''proprietary information of, and relating to . . . customers'' is best read as broader than CPNI. Moreover, we are convinced that the term ''network'' should not be read into section 222(a), contrary to what some commenters appear to argue. We dismiss the idea that the syntax of section 222(a) would have made it awkward to include the term ''network'' as an express limitation

on the general duty as it applies with regard to customer proprietary information. Congress is not bound to any particular formula when drafting legislation. Section 222(a) could easily have been written to include the term ''customer proprietary network information'' in full, had Congress chosen to do so. For instance, the subsection could have read: ''Every telecommunications carrier has a duty to protect the confidentiality of customer proprietary network information, and of proprietary information of, and relating to, other telecommunication carriers and equipment manufacturers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.''

356. Even if there were some ambiguity in the text of the statute, we would conclude that the best interpretation is that section 222(a) applies to customer proprietary information that is not CPNI. Some argue that the legislative history of section 222 precludes this interpretation because of a statement from the Conference Report that attended passage of the 1996 Act, which reads: ''In general, section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI.'' Commenters appear to interpret this statement as evidence that Section 222 was intended to apply *only* to CPNI. But this is clearly not so. Section 222(a) concerns not only customer information but also information ''of, and relating to'' fellow carriers and equipment manufacturers. Section 222(b) in turn is focused exclusively on ''carrier information.'' Furthermore, subsections (e) and (g) impose affirmative obligations on carriers in certain circumstances to share SLI, which by definition is not CPNI. Therefore, section 222 *in general* cannot be concerned solely with CPNI. We are similarly unmoved by evidence that Congress considered but ultimately rejected a more expansive definition of CPNI than that which is codified in section 222(h)(1). Such evidence cannot decide the question whether section 222(a) governs a category of customer information that is *broader than* CPNI. As explained above, our interpretation follows from the plain language of the provision, and the legislative history of Section 222 is not to the contrary. At the very least, any contrary evidence that may be derived from the legislative history is far from sufficient to override our reasoned interpretation of the provision.

357. We acknowledge that prior Commission orders implementing section 222 have focused largely on CPNI rather than customer PI more broadly. Yet we do not believe this precedent should constrain our efforts in this proceeding to develop robust privacy protections for consumers under section 222(a). In fact, the Commission made clear as early as 2007 that section 222(a) requires carriers to ''take every reasonable precaution to protect the confidentiality of proprietary or personal customer information.'' Our express determination in the *TerraCom* proceeding that subsection (a) covers customer proprietary information beyond CPNI merely ''affirm[ed]'' what the Commission had strongly implied seven years earlier. Moreover, earlier orders adopting and revising rules under Section 222 were focused so narrowly on the protection of individually identifiable CPNI that the question whether Section 222(a) covers additional customer information was never squarely addressed. This early focus on CPNI makes sense: Section 222 was adopted against the background of existing Commission regulations concerning CPNI, and the first section 222 proceeding was instituted in response to a petition from industry seeking clarity about the use of CPNI. However, the Commission has never expressly endorsed the view that section 222(a) fails to reach customer information beyond CPNI. We expressly disavow any prior Commission statement that could be read as endorsing such a view. We therefore disagree that interpreting the provision in a contrary manner will have the effect of unsettling ''18 years'' of Commission precedent in this area.

358. Finally, construing section 222(a) as reaching customer information other than CPNI avoids the creation of a regulatory gap that Congress could not reasonably have intended. While the FTC has broad statutory authority to protect against ''unfair or deceptive'' commercial practices, its enabling statute includes a provision that exempts common carriers subject to the Communications Act. This leaves the Federal Communications Commission as the only federal agency with robust authority to regulate BIAS providers and other telecommunications carriers in their treatment of sensitive customer information obtained through the provision of BIAS and other telecommunications services. If that authority failed to reach customer PI other than CPNI, substantial quantities of highly sensitive information that carriers routinely collect and use would fall outside of the purview of either this Commission or the FTC. The facts of *TerraCom* make clear the dangers of this outcome. In that proceeding we enforced Section 222(a) against a carrier that neglected to take even minimal security measures to protect Social Security numbers and other sensitive customer data from exposure on the public Internet. Commenters that advocate a narrow construction of section 222(a) would have us divest ourselves of authority to take action in circumstances such as these. We need not and will not leave consumers without the authority to decide under what circumstances, if any, their BIAS providers are allowed to use and share their Social Security numbers, financial and health information, and other personal information.

c. The Rules We Adopt as to ''Customer PI'' Reasonably Implement the Mandate of Section 222(a) That Carriers ''Protect the Confidentiality'' of Such Information

359. The rules we adopt in this Report and Order apply with respect to customer PI, which we have defined to include three overlapping categories of information: Individually identifiable CPNI; personally identifiable information (PII); and the content of communications. As explained above, the information we define as customer PI is ''proprietary information of, [or] relating to . . . customers'' for purposes of section 222(a). The rules we adopt in this Report and Order faithfully implement this statutory provision. As a general matter, we are adopting a uniform regulatory scheme to govern all customer PI, regardless of whether the information qualifies as CPNI. We have achieved this unity by replicating the basic structure of section 222(c), including the exceptions set forth in section 222(d), under section 222(a). In doing so, we uphold the specific statutory terms that govern CPNI, while adapting these to the broader category of customer PI. This approach is lawful under the statute and well-supported as a matter of policy.

360. As discussed above, we understand section 222(a) to impose a broad duty on carriers to protect customer PI that extends beyond the narrower scope of information specified in section 222(c). Section 222(c) sets forth binding rules regarding application of the general duty to carriers' handling of CPNI. In support of this view, we note the common focus of these subsections on ''confidentiality.'' While subsection (a) directs carriers to ''protect the confidentiality of proprietary information'' in general, subsection (c) concerns the confidentiality of ''individually

identifiable customer proprietary network information'' in particular. Under our interpretation, subsection (c) provides one possible way of implementing the broad duty set forth in subsection (a). That is, subsection (c) settles what it means for a carrier to ''protect the confidentiality of proprietary information'' when the information at issue is individually identifiable CPNI. Given this reading of the two provisions, we find no reason that the basic scheme set forth in section 222(c) to govern individually identifiable CPNI cannot not be replicated under section 222(a) to govern customer PI more broadly. In adopting section 222(c), Congress identified a scheme for ''protecting the confidentiality of proprietary information'' that it deemed valid at least in the context of CPNI. The statute is silent on the implementation of this general duty as it applies to customer PI more broadly. In the absence of clear statutory guidance on the matter, we must exercise our judgment to determine a regulatory scheme that is appropriate for customer PI other than individually identifiable CPNI.

361. We have good reason to adopt a single set of rules for all customer PI under section 222(a) that is based on the scheme set forth for individually identifiable CPNI in sections 222(c) and (d). First, the record indicates that customer expectations about the use and handling of their personal information do not typically depend on whether the information at issue is CPNI or some other kind of proprietary information. Rather, customers are far more likely to recognize distinctions based on the sensitivity of the data. The rules we adopt today uphold this widespread customer expectation. In addition, a common set of rules for all customer PI subject to 222(a) will be easier for customers to understand and for providers to implement than two distinct sets of rules. These considerations go to the very heart of section 222: The ability of customers to make informed decisions and of providers to apply a harmonized regime to all customer data will each contribute to the protection of ''confidentiality'' that the statute requires. Moreover, equalizing treatment of CPNI and other customer PI more closely aligns our rules with the FTC's time-tested privacy approach.

362. We agree with Comcast that ''protect[ing] confidentiality'' of proprietary information involves, among other things, ''preventing [such information] from being exposed without authorization.'' This is among the core purposes of our rules. The requirement to obtain customer approval before using, disclosing, or permitting access to customer PI directly ensures that such information is not ''expose[d]'' without the ''authorization'' of the customer. The notice requirement advances this purpose further by providing customers the information they need to make informed choices regarding such use, disclosure, and access. As for the data security rule we adopt, its essential purpose is to safeguard customer PI from inadvertent or malicious ''expos[ure].'' The data breach notification rule reinforces these other requirements by providing customers, the Commission, and law enforcement agencies with notice of instances in which customer PI was ''exposed without authorization.'' Finally, we uphold customers' ability to make decisions about the ''expos[ure]'' of their data by prohibiting carriers from conditioning service on the surrender of privacy rights.

363. Yet ''protecting the confidentiality'' of customer PI involves more than protecting it from unauthorized exposure. AT&T draws a false distinction in arguing that certain aspects of the rules ''have nothing to do with confidentiality concerns and instead address only the *uses* of information within an ISP's possession.'' On the contrary, upholding customer expectations and choices regarding the use of their proprietary information is an integral part of ''protecting the confidentiality of'' that information for purposes of section 222. In support of this view, we note that restrictions on the use of individually identifiable CPNI are part of the scheme enacted under section 222(c) to address the ''confidentiality of [CPNI],'' and use is the *sole* conduct regulated to address the ''confidentiality of carrier information'' under subsection (b). We thus believe the most natural reading of the term ''confidentiality'' as used in section 222 is that it encompasses the use of information, not only ''disclos[ure]'' and permissions of ''access.'' As a coalition of consumer advocacy groups explain, in creating section 222 ''Congress most explicitly directed the Commission to ensure that users are not merely protected from exposure to third parties, but can actively control how the telecommunications provider itself *uses* the information'' it collects. We agree with Verizon that '' 'protect' and 'use' are different words [that] must have different meanings'' within the statute, but our view is that these meanings differ in terms of breadth. The ''protect[ion] of confidentiality'' is a concept that is broad enough to cover the different kinds of conduct regulated under section 222(c): Use, disclosure, and permission of access. A carrier that uses, discloses, or permits access to individually identifiable CPNI without customer approval violates its duty under section 222(c) to protect the ''confidentiality'' of that CPNI. The same analysis applies under section 222(a) with regard to customer PI more broadly. Accordingly, we find section 222(a)'s duty to ''protect the confidentiality'' of proprietary information supports our rules in full.

3. Section 222(c) Provides Authority for the Rules as to CPNI

364. In addition to our section 222(a) authority discussed above, we have authority under section 222(c) to adopt the rules articulated in this Order as to individually identifiable CPNI. Subsection (c) obligates carriers to obtain customer approval for any use or disclosure of individually identifiable CPNI, except to provide the underlying telecommunications service or related services. Our rules implement this mandate.

365. First, our rules establish three methods for obtaining the customer approval required under section 222(c): Inferred consent, opt-in and opt-out. There exists longstanding Commission precedent for requiring the use of these methods, and commenters generally support some combination of the three. Under the rules we adopt in this Order, whether a carrier must seek an affirmative ''opt-in'' depends primarily on whether the information at issue is sensitive. This distinction is permissible under section 222(c), which requires customer approval in general for most uses and disclosures of individually identifiable CPNI but does not specify the form this approval must take in any particular circumstance. Second, we require carriers to provide their customers with notice of their privacy policies, both at the point of sale and through posting on their Web sites and in mobile apps. This is an essential part of customer approval, as only informed customers can make meaningful decisions about whether and how extensively to permit use or disclosure of their information. The need for this notice to be given at the point of sale is particularly acute in circumstances where approval may take the form of an ''opt-out.'' In such cases, the notice itself is integral to the ''approval'': customers are presumed to approve of the use or disclosure unless and until they affirmatively ''opt out'' of such activity. We also prohibit carriers from

conditioning the provision of service on consent to the use or disclosure of information protected under section 222. We believe that this prohibition is necessary to give effect to the customer approval that subsection (c) requires.

366. We next require carriers to take reasonable measures to secure the individually identifiable CPNI they collect, possess, use and share. Such a requirement is necessary to uphold customer decisions regarding use and disclosure of their information and to give effect to the terms of carriers' privacy policies. These other privacy protections would be vitiated if customers lacked any assurance that their information would be secured against unauthorized or inadvertent disclosures, cyber incidents, or other threats to the confidentiality of the information. Finally, we require carriers to report data breaches to their customers, the Commission, and law enforcement, except when a carrier reasonably determines that there is no reasonable likelihood of harm to customers. The Commission has long required such reporting as part of a carrier's duty to protect the confidentiality of its customers' information. Among other purposes, data breach notifications can meaningfully inform customer decisions regarding whether to give, withhold, or retract their approval to use or disclose their information.

367. In adopting these rules, we are respectful of other parts of the statute that limit or condition the scope of section 222(c). For instance, our rules preserve the statutory distinction between individually identifiable ''CPNI'' and ''aggregate customer information.'' As explained above, we have not modified the definition of either of these terms in a way that would impermissibly narrow the scope of section 222(c)(3). In addition, our rules include provisions that implement the exceptions to Section 222(c) that are set forth in section 222(d). Finally, our rules are consistent with and pose no obstacle to compliance with the requirements of sections 222(e) and (g) that subscriber information be disclosed in certain defined circumstances.

B. Sections 201(b) and 202(a) Provide Additional Authority To Protect Against Privacy Practices That Are ''Unjust or Unreasonable'' or ''Unjustly or Unreasonably Discriminatory''

368. While section 222 provides sufficient authority for the entirety of the rules we adopt in this Order, we conclude that sections 201(b) and 202(a) also independently support the rules, because they authorize the Commission to prescribe rules to implement carriers' statutory duties not to engage in conduct that is ''unjust or unreasonable'' or ''unjustly or unreasonably discriminatory.'' Our enforcement of sections 201(b) and 202(a) in the context of BIAS finds expression in the ''no unreasonable interference/disadvantage'' standard adopted in the *2015 Open Internet Order.* As we explained in the *2015 Open Internet Order,* ''practices that fail to protect the confidentiality of end users' proprietary information'' are among the potential carrier practices that are ''unlawful if they unreasonably interfere with or disadvantage end-user consumers' ability to select, access, or use broadband services, applications, or content.'' Above, we noted that financial incentives to surrender privacy rights in connection with BIAS are one sort of practice that could potentially run afoul of this standard, and we will accordingly monitor such practices closely. Yet, aside from prohibiting ''take-it-or-leave-it'' offerings, we do not engage in any *ex ante* prohibition of such practices.

369. In addition, sections 201(b) and 202(a) provide backstop authority to ensure that no gaps are formed in Congress's multi-statute regulatory framework governing commercial privacy and data security practices. As explained above, the FTC's enabling statute grants the agency broad authority with respect to such practices, but denies it authority over common carrier activities of common carriers. That leaves this Commission as the sole federal agency with authority to regulate telecommunications carriers' treatment of personal and proprietary customer data obtained in the provision of BIAS and other telecommunications services. While we believe section 222 endows the Commission with ample authority for the rules we adopt today to protect such data, both as to CPNI and other customer PI, sections 201(b) and 202(a) provide an independent legal basis for the rules. Indeed, both this Commission and the FTC have long recognized that similar conduct would tend to run afoul of section 201(b) and of Section 5 of the FTC Act, the statutory linchpin of the FTC's privacy and data security enforcement work. Thus, asserting sections 201(b) and 202(a) as a basis for our rules merely preserves consistent treatment of companies that collect sensitive customer information—including Social Security numbers and financial records—regardless of whether the company operates under the FCC's or FTC's authority.

370. Accordingly, for these reasons and others discussed throughout this Report and Order, we find that Sections 201(b) and 202(a) by their own terms, consistent the *2015 Open Internet Order's* interpretation of those provisions in the context of BIAS, provide authority for the adoption of these rules. Also, while we recognize that telecommunications services other than BIAS are beyond the reach of the open Internet rules, providers of such services remain subject to enforcement directly under sections 201(b) and 202(a), and those provisions authorize adoption of these rules.

C. Title III of the Communications Act Provides Independent Authority

371. With respect to mobile BIAS and other mobile telecommunications services, the rules we adopt in this Order are also independently supported by our authority under Title III of the Act to protect the public interest through spectrum licensing. Section 303(b) directs the Commission, consistent with the public interest, to ''[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class.'' These rules do so. They lay down rules about ''the nature of the service to be rendered'' by licensed entities providing mobile telecommunications service; making clear that this service may not be offered in ways that harm the interests of consumers is protecting the confidentiality of their personal information. Today's rules specify the form this service must take for those who offer it pursuant to license. In providing such licensed service, carriers must adhere to the rules we adopt today. Section 303(r) also supplements the Commission's authority to carry out its mandates through rulemaking, and section 316 authorizes the Commission to adopt new conditions on existing licenses if it determines that such action ''will promote the public interest, convenience, and necessity.'' Throughout this Order, we determine that the rules adopted here will promote the public interest.

D. The Rules Are Also Consistent With the Purposes of Section 706 of the 1996 Act

372. We also believe that our rules are consistent with section 706 of the 1996 Act and will help advance its objective of promoting ''the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'' We agree with commenters that strong broadband privacy and data security practices tend to promote consumer trust and confidence, which can increase demand for broadband and

ultimately spur additional facilities deployment. Moreover, we have adopted a flexible set of rules that are largely consistent with the FTC's approach to privacy regulation, creating a measure of consistency across the telecommunications ecosystem. We thus reject any argument that the rules will impose novel costs or burdens on BIAS providers and other telecommunications carriers that would discourage further deployment of advanced services.

E. We Have Authority To Apply the Rules to Interconnected VoIP Services

373. In 2007, the Commission exercised ancillary jurisdiction to extend its Part 64 CPNI rules to interconnected VoIP services. Since then, interconnected VoIP providers have operated under these rules. Today, we exercise the same authority to apply to interconnected VoIP services the harmonized set of rules we are adopting for BIAS and other telecommunications services. We make no decisions in this Order on the regulatory classification of interconnected VoIP services. Interconnected VoIP services remain within the Commission's subject matter jurisdiction, and we continue to find that the application of customer privacy requirements to these services is ''reasonably ancillary to the effective performance'' of our statutory responsibilities. We conclude that our jurisdiction to apply the rules in this Order to interconnected VoIP providers is just as strong as it was in 2007. In addition to the analysis in the *2007 CPNI Order,* we observe that applying these obligations to interconnected VoIP providers is necessary to protect the privacy of customers of BIAS providers and other telecommunications services. Given the growth in interconnected VoIP and the extent to which it increasingly is viewed as a substitute for traditional telephone service, telecommunications carriers could be disadvantaged if they were subject to these requirements but other interconnected VoIP providers were not. Consumers' privacy interests could benefit to the extent that providers of competitive services are subject to the same obligations. Furthermore, in light of Congress's amendment of the Act, including section 222, to apply E–911 obligations to interconnected VoIP, the 911 system could be disrupted to the extent that our harmonized section 222 regime were no longer to apply to interconnected VoIP. As the Commission explained in 2007, ''American consumers [can reasonably] expect that their telephone calls are private irrespective of whether the call is made using the service of a wireline carrier, a wireless carrier, or an interconnected VoIP provider.'' Furthermore, ''extending section 222's protections to interconnected VoIP service customers is necessary to protect the privacy of wireline or wireless customers that place calls to or receive calls from interconnected VoIP providers.'' These rationales hold equally true today. In addition, in 2008, Congress ratified the Commission's decision to apply section 222's requirements to interconnected VoIP by adding language to section 222 that expressly covers ''IP-enabled voice service,'' defined expressly to incorporate the Commission's definition of ''interconnected VoIP service.''

374. We believe that the rules we adopt today are no less suitable for interconnected VoIP service, and are in fact better tailored to that service, than the rules adopted in 2007. As explained above, we have adopted a harmonized set of rules for voice services and BIAS. There is considerable flexibility built into these rules to permit providers of different services and with different business models to adopt privacy practices appropriate for their businesses. Moreover, while the Order expands on existing obligations in some respects, it also streamlines or removes several of the more prescriptive requirements codified in the existing rules. We have also broadened the enterprise customer exemption and taken measures to address the potential for disproportionate impacts on smaller providers, including those that provide interconnected VoIP service. We therefore are not persuaded that our rules will overburden interconnected VoIP providers in particular with ''expand[ed] privacy obligations'' that would ''forestall competition.''

F. Constitutional Considerations

1. Our Sensitivity-Based Choice Framework Is Supported by the Constitution

375. In adopting section 222, Congress identified a substantial government interest in protecting the privacy of customers of telecommunications services. In adopting and revising rules pursuant to section 222 we have recognized and honored that same substantial interest. Nonetheless, because our rules require carries to provide their customers with tools to grant or deny the carriers approval to use customer information for marketing and other purposes, they can be said to restrict certain types of commercial speech by telecommunications carriers, and therefore must be narrowly tailored to further that substantial government interest. In the *Central Hudson* case, the Supreme Court found that in order to meet the requirement that rules implicating commercial speech are narrowly tailored to meet a substantial government interest, the government must conduct a threshold inquiry regarding whether the commercial speech concerns lawful activity and is not misleading. If this threshold requirement is met, as it is here, the government may restrict the speech only if (1) the government interest advanced by the regulation is substantial; (2) the regulation directly and materially advances that interest; and (3) the regulation is not more extensive than necessary to serve the interest. By adopting a sensitivity-based framework for giving customers tools to make decisions about their telecommunications carriers' use and sharing of their information, the rules we adopt today meet that three part test.

a. Substantial Government Interest

376. We agree with the D.C. Circuit that section 222 seeks to promote a substantial public interest in protecting consumer privacy. The record indicates broad agreement on this point, which is further reinforced by the wealth of case law reiterating the substantial state interest in protecting privacy. Section 222 is designed to protect the interest of telecommunications consumers in limiting unexpected and unwanted use and disclosure of their personal information by carriers that must collect such information in order to provide the telecommunications service, and the record further indicates that customers' ability to know and control the information gathered by virtue of their relationships with their telecommunications providers also comprises a substantial government interest.

377. The failure to adequately protect customer PI can have myriad negative consequences for customers and society at large. Revelations of private facts have been recognized as harms since at least the time of Justices Warren and Brandeis. Failure to protect the privacy of consumer information can, of course create a risk of financial harm, identity theft and physical threat. The Commission has also found that emotional and dignitary harms are privacy harms, in other contexts. In implementing the Truth in Caller ID Act, the Commission found that ''harm'' was a broad concept encompassing financial, physical, and emotional harm. The FTC similarly recognized that harms beyond the economic, physical, and intrusive are nonetheless real and cognizable, and the Administration's

CPBR defines ''privacy risk'' to include the potential to cause ''emotional distress, or physical, financial, professional, or other harm to an individual.''

378. Some commenters argue that the Commission can only demonstrate an interest in addressing the *disclosure* of customer PI and not in how carriers' *use* customer PI. We disagree. The Supreme Court has recognized that an important part of privacy is the right to know and have an effective voice in how one's information is being used, holding that ''both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person.'' The D.C. Circuit has similarly held that ''it is widely accepted that privacy deals with determining for oneself when, how, and to whom personal information will be disclosed to others.'' This conception of privacy is embedded within the history of the Fair Information Practice Principles (which form the broadly-supported basis for our privacy rules), and within the long history of communications privacy as well. From their inception, FIPPs have recognized privacy as an individual's right to control *uses* of information about him—not merely to control their disclosures. The Federal Radio Act of 1927, and the original language of the Communications Act of 1934, prohibited carriers not only from publishing or divulging information relevant to communications, but also from making uses of the information solely to benefit themselves. Scholarly literature on privacy also finds that misuse by the collecting entity can harm individuals' privacy, even apart from disclosure.

379. Direct surveys confirm consumers' recognition of these harms. According to the 2016 Consumer Privacy Index by TRUSTe and the National Cybersecurity Alliance, 68 percent of consumers were more concerned about not knowing how personal information was collected online than losing their principal income. The Consumer Privacy Index also indicated that large numbers of consumers want control over who has access to personal information (45 percent), how that information is used (42 percent), and the type of information collected (41 percent). Consumers also object to their data being used, and not only disclosed, in the service of targeted advertising. These studies demonstrate empirically that consumers find loss of control over their information harmful, even apart from potential monetary loss.

380. The risk of privacy harms directly affects behavior and activity by eroding trust in and use of communications networks. As the Commission has found, if ''consumers have concerns about the privacy of their personal information, such concerns may restrain them from making full use of broadband Internet access services and the Internet, thereby lowering the likelihood of broadband adoption and decreasing consumer demand.'' There is evidence that unexpected uses of private customer information can increase fear, uncertainty, powerlessness, and vulnerability. This is not a purely academic concern; the National Telecommunications and Information Administration (NTIA) recently found that fear of privacy violations chills online activity, to the point where privacy concerns prevented 45 percent of online households from conducting financial transactions, buying goods or services, or posting on social networks. The Consumer Privacy Index found that 74 percent of respondents limited their activity in the past year due to privacy concerns, including 36 percent who stopped using certain Web sites and 29 percent stopped using an app. In contrast, when companies protect consumers' privacy, consumers' adoption of their products, services, and technologies increases.

381. We therefore conclude that the government's interest in protecting customer privacy is a substantial one—a fact recognized widely by consumers, the courts, and the Communications Act.

b. Direct and Material Advancement

382. The choice framework that we adopt directly and materially advances the substantial government interests discussed above. We find that requiring customer approval for use and disclosure of customer PI prevents information uniquely collected and collated by telecommunications carriers from being used or disclosed against a customer's wishes, consistent with customer expectations, and as such directly and materially advances the government's substantial government interest in protecting customers' privacy. While we recognize that adopting these rules cannot protect customers from privacy violations that originate from entities that are not telecommunications providers, the fact that the rules do not create universal privacy protection does not mean that customers' privacy interests are not advanced. Customers have an important interest in ensuring that their personal information is not used by their BIAS providers or other telecommunications carrier without their prior approval in a way that the customers do not or cannot reasonably expect.

383. In addition, requiring telecommunications carriers to obtain opt-in approval for the use and sharing of sensitive customer PI materially advances the government's interest in protecting telecommunications customers' privacy and in enabling customer to avoid unwanted and unexpected use and disclosure of sensitive customer PI. The opt-in requirements we adopt today provide telecommunications customers control over how their sensitive customer PI can be used for purposes besides those essential to the delivery of service. Likewise, we conclude that opt-out directly and materially advances the government's interest that a customer be given an opportunity to approve (or disapprove) uses of his non-sensitive customer PI by mandating that carriers provide prior notice to customers along with an opportunity to decline the carriers' requested use.

c. The Rules Are No More Burdensome Than Necessary To Advance the Government's Substantial Interest

384. *Central Hudson* requires that regulations on commercial speech be no more extensive than necessary to advance the substantial interest. This does not mean that a regulation must be as narrow as possible, however. The Supreme Court has held that ''[t]he government is not required to employ the least restrictive means conceivable . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'' As explained below, our framework satisfies this test.

385. *Non-Sensitive Customer PI.* In most cases involving what we categorize as non-sensitive customer PI, we find opt-in approval unnecessary to ensure adequate customer choice. We therefore find that the opt-out framework for use and sharing of non-sensitive customer PI is a narrowly tailored means to directly and materially advance the government's interest in protecting consumers from unapproved use of non-sensitive customer PI by telecommunications carriers. The record reflects that non-sensitive information naturally generates fewer privacy concerns for customers, and as such does not require the same level of customer approval as for sensitive customer PI. Further, the record reflects that customers expect their providers to use their non-sensitive information to market improved services, lower-priced service offerings, promotional discounts for new services, and other offers of

value from telecommunications carriers and their affiliates. The record also demonstrates that customers can reap significant benefits in the form of more personalized service offerings and possible cost saving from their carriers providing services based on the non-sensitive customer PI that carriers collect. The Commission has previously found, in the context of its voice CPNI rules, that ''telecommunications consumers expect to receive targeted notices from their carriers about innovative telecommunications offerings that may bundle desired telecommunications services and/or products, save the consumer money, and provide other consumer benefits.'' Requiring carriers to obtain opt-out consent from customers to use and share their non-sensitive information grants carriers flexibility to make improvements and innovations based on customer PI, while still ensuring that customers can control the use and sharing of their non-sensitive customer PI.

386. *Sensitive Customer PI.* We require opt-in approval only for the most important information to customers—sensitive customer PI. We find that requiring opt-in approval for the use and sharing of sensitive customer PI is a narrowly-tailored means of advancing the Commission's interests in protecting the privacy of sensitive customer PI, and in enabling customers meaningful choice on the use and sharing of such sensitive customer PI. As discussed above in detail, the record reflects that customers reasonably expect that their sensitive information will not be shared without their affirmative consent. Furthermore, it has been our experience implementing section 222 that sensitive information, being more likely to lead to more serious customer harm, requires additional protection, and the record here supports that view . Commenters nearly unanimously argue that use and sharing of sensitive customer information be subject to customer opt-in approval. Although we recognize that opt-in imposes additional costs, we find that opt-in is warranted to maximize opportunities for informed choice about sensitive information.

387. In contrast, we find that opt-out consent would be insufficient to protect the privacy of sensitive customer PI. As a functional matter, while opt-out consent has been described as the least restrictive form of obtaining customer approval, it is only ''marginally less intrusive than opt-in for First Amendment purposes.'' As we explain above, research has shown that default choices can be ''sticky,'' meaning that consumers will remain in the default position, even if they would not have actively chosen it. From this, we conclude that an opt-out regime for use and sharing of sensitive customer PI would not materially and directly advance the government's interest in protecting customer privacy because it would not adequately address customers' expectations that their sensitive customer PI is not used without their affirmative consent.

2. Other First Amendment Arguments

388. *Strict Scrutiny Under* Sorrell. The customer choice rules we adopt today do not impermissibly target particular speech or speakers, and thus a strict scrutiny analysis under *Sorrell* v. *IMS Health Inc.* is unwarranted. In *Sorrell,* the state of Vermont specifically targeted ''drug detailers'' and their marketing speech, which the state disfavored, in a framework that otherwise permitted communications about medical prescriptions. By contrast, the rules adopted here do not disfavor any particular activity. While a large number of commenters are particularly concerned with the limitations that the rules may place upon marketing, customers' privacy interests reach far beyond targeted marketing, to include for instance risk of identity theft or other fraud, stalking, and revelations of private communications, as well as the harms inherent in lacking control over the uses of their proprietary information.

389. The fact that section 222 and our rules thereunder apply to certain types of information and certain providers is a function of their tailoring, not indications that they are content-based. As explained above, our rules are tailored to address unique characteristics of telecommunications services and of the relationship between telecommunications carriers and their customers. Were we to interpret *Sorrell* to hold sector-specific privacy laws such as section 222 and our rules to be content-based simply because they do not apply to all entities equally, it would stand to invalidate nearly every federal privacy law, considering the sectoral nature of our federal privacy statutes. Indeed, if laws impacting expression were considered content-based for not being universal, nearly every privacy and intellectual property law would need to pass strict scrutiny. However, *Sorrell* stands for no such thing, itself citing HIPAA—limited to covering certain specific entities and types of information—as an example of a constitutionally sound privacy protection. Similarly, use-based exceptions to section 222 and our rules do not render the statute or rules content-based any more than purpose-based exceptions in HIPAA.

390. *Compelled Speech.* Some commenters argue that the notice requirements unconstitutionally compel speech from carriers. We disagree. Requirements to include purely factual and uncontroversial information in commercial speech are constitutional so long as they are reasonably related to the government's substantial interest in protecting consumers. The notice requirements we adopt here, just like the notice requirements in the CPNI rules before them and like numerous notice and labeling requirements before, require only that companies provide factual and uncontroversial information to consumers.

391. *Constitutional Avoidance.* Some commenters raise arguments citing the canon of constitutional avoidance. We do not believe this is applicable. Constitutional avoidance is a canon of statutory interpretation that states that a court should not resolve a case ''by deciding a constitutional question if it can be resolved in some other fashion.'' As the Supreme Court has held, ''[t]he so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.'' The Court further found ''no precedent for applying it to limit the scope of authorized executive action.'' The canon of constitutional avoidance therefore does not apply to this proceeding, does not require that we adopt an opt-out framework, and does not mandate that we avoid regulating in this space.

392. Finally, to the extent that parties argue that today's rules deny carriers a First Amendment right of editorial control or impose prior restraints that implicate the First Amendment, we note that it is well established that common carriers transmitting speech through communications networks are not speakers for First Amendment purposes.

G. Severability

393. In this Report and Order, we adopt a unified scheme of privacy protections for customers of BIAS and other telecommunications services. While the unity and comprehensiveness of this scheme maximizes its utility, we clarify that its constituent elements each operate independently to protect consumers. Were any element of this scheme stayed or invalidated by a reviewing court, the elements that remained in effect would continue to provide vital consumer protections. For instance, telecommunications customers have long benefitted from Commission

rules governing the treatment CPNI. The rules we adopt today would continue to ensure that such information is protected even if they did not extend to all of the information we define as customer PI. Similarly, the different forms of conduct regulated under section 222—use, disclosure, and permission of access—each pose distinct threats to the confidentiality of customer PI. Finally, the benefit of the rules for customers of any particular telecommunications service does not hinge on the same rules applying to other telecommunications services. Accordingly, we consider each of the rules adopted in this Report and Order to be severable, both internally and from the remaining rules. In the event of a stay or invalidation of any part of any rule, or of any rule as it applies as to certain services, providers, forms of conduct, or categories of information, the Commission's intent is to otherwise preserve the rule to the fullest possible extent.

V. Procedural Matters

A. Regulatory Flexibility Analysis

394. As required by the Regulatory Flexibility Act of 1980 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Broadband Privacy NPRM.* The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals address in the *2016 Broadband Privacy NPRM,* including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is set forth in Appendix B.

B. Paperwork Reduction Act

395. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It 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 information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

396. In this present document, we require telecommunications carriers to: (1) Disclose their privacy practices to customers; (2) provide customers a mechanism for opting in or out of the use or sharing of their customer PI; (3) notify customers of any unauthorized disclosure or use of their customer PI; and (4) provide customers clear and conspicuous notice regarding any financial incentive programs related to the use or disclosure of their customer PI. We have assessed the effects of these changes and find that the burdens on small businesses will be addressed through the implementation plan adopted in this Order, as well as accommodations made in response to small carriers concerns on the record. The privacy policy notice rules, for example, afford carriers significant flexibility on how to comply with the notice requirement. They mandate neither a specific format nor specific content to be contained in the notice. We have also directed the Commission's Consumer Advisory Committee to develop a standardized notice format that will serve as a safe harbor once adopted. Similarly, the choice rules do not prescribe a specific format for accepting a customer's privacy choices. The choice rules are also significantly harmonized with existing rules, with which most small providers currently comply. Additionally, the heightened requirements for financial incentive programs allow all providers considerable latitude to develop their programs within the parameters of the rule. Finally, the data breach notification rules incorporate both a harm trigger and notification timeline that significantly lessen the implementation requirements for small providers.

C. Congressional Review Act

397. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), see 5 U.S.C. 801(a)(1)(A).

D. Accessible Formats

398. 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).

VI. Final Regulatory Flexibility Analysis

399. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Broadband Privacy NPRM* for this proceeding. The Commission sought written public comment on the proposals in the *Broadband Privacy NPRM,* including comment on the IRFA. The Commission received comments on the IRFA, which are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Rules

400. In the Order, we adopt privacy requirements for providers of broadband Internet access service (BIAS) and other telecommunications services. In doing so, we build upon the Commission's long history of protecting customer privacy in the telecommunications sector. Section 222 of the Communications Act provides statutory protections to the privacy of the data that all telecommunications carriers collect from their customers. Section 222(a) imposes a duty on all telecommunications carriers to protect the confidentiality of their customers' ''proprietary information,'' or PI. Section 222(c) imposes restrictions on telecommunications carriers' use and sharing of customer proprietary network information (CPNI) without customer approval, subject to certain exceptions, including as necessary to provide the telecommunications service (or services necessary to or used in providing that telecommunications service), and as required by law.

401. Over the last two decades, the Commission has promulgated, revised, and enforced privacy rules for telecommunications carriers that are focused on implementing the CPNI requirements of section 222. As practices have changed, the Commission has refined its section 222 rules. The current section 222 rules focus on transparency, choice, data security, and data breach notification.

402. Prior to 2015, BIAS was classified as an information service, which excluded such services from the ambit of Title II of the Act, including section 222, and the Commission's CPNI rules. Instead, broadband providers were subject to the FTC's unfair and deceptive acts and practices authority. In the *2015 Open Internet Order,* we reclassified BIAS as a telecommunications service subject to Title II of the Act, an action upheld by the D.C. Circuit in *United States Telecom Ass'n* v. *FCC.* While we granted BIAS forbearance from many Title II provisions, we concluded that application and enforcement of the privacy protections in section 222 to BIAS is in the public interest and necessary for the protection of consumers. However, we questioned ''whether the Commission's current rules implementing section 222 necessarily would be well suited to

broadband Internet access service,'' and forbore from the application of these rules to broadband service, ''pending the adoption of rules to govern broadband Internet access service in a separate rulemaking proceeding.''

403. In March 2016, we adopted the *Broadband Privacy NPRM,* which proposed a framework for applying the longstanding privacy requirements of the Act to BIAS. In the *NPRM,* we proposed rules protecting customer privacy using the three foundations of privacy—transparency, choice, and security—and also sought comment on, among other things, whether we should update rules that govern the application of section 222 to traditional telephone service and interconnected VoIP service in order to harmonize them with the results of this proceeding.

404. Based on the record gathered in this proceeding, today we adopt a harmonized set of rules applicable to BIAS providers and other telecommunications carriers. The privacy framework we adopt focuses on transparency, choice, and data security, and provides heighted protection for sensitive customer information, consistent with customer expectations. Our need to extend such privacy requirements to BIAS providers is based, in part, on their particular role as network providers and the context of the consumer/BIAS provider relationship. Based on our review of the record, we reaffirm our earlier finding that a broadband provider ''sits at a privileged place in the network, the bottleneck between the customer and the rest of the Internet''—a position that we have referred to as a gatekeeper. As such, BIAS providers can collect ''an unprecedented breadth'' of electronic personal information.

405. In adopting these rules we honor customers' privacy rights and implement the statutory requirement that carriers protect the confidentiality of customer proprietary information. These rules do not prohibit carriers from using or sharing customer information, but rather are designed to protect consumer choice while giving carriers the flexibility they need to continue to innovate. By bolstering customer confidence in carriers' treatment of confidential customer information, we also promote the virtuous cycle of innovation in which new uses of the network lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses, business growth and innovation.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

406. In response to the *Broadband Privacy NPRM,* five entities filed comments, reply comments, and/or *ex parte* letters that specifically addressed the IRFA to some degree: Alaska Telephone Association, Competitive Carriers Association, NTCA, Rural Wireless Association, and Wireless Internet Service Providers Association (WISPA). Some of these, as well as other entities, filed comments, reply comments, and/or *ex parte* letters that more generally considered the small business impact of our proposals.

407. Some commenters recommend that the Commission adopt specific exemptions or provisions to alleviate burdens on small carriers. In particular, commenters recommend that the Commission (1) exempt small carriers from some or all of the rules based on their size and/or practices; (2) give small carriers additional time to comply with the rules; (3) harmonize notice and choice requirements with the preexisting voice CPNI rules; (4) exempt small carriers from any privacy dashboard requirements and otherwise give them flexibility in the structure of their privacy notices; (5) grandfather existing customer approvals for use and disclosure of customer information; (6) exempt small carriers from any opt-in approval requirements; (6) not impose specific data security requirements on small providers; (7) not impose specific data breach reporting deadlines on small providers, and instead allow them to report breaches as soon as practicable; and (8) not hold small carriers liable for misuse of customer PI by third parties with whom they share the information. We considered these proposals and concerns when composing the Order and the accompanying rules.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

408. 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.

409. The SBA filed comments in response to the IRFA encouraging the Commission to examine measures, exemptions, and alternatives that would ease compliance by small telecommunications carriers with our rules. SBA observed that compliance costs to small providers may include ''consulting fees, attorney's fees, hiring or training in-house privacy personnel, customer notification costs, and opportunity costs.'' In particular, SBA recommends giving small providers more time to comply with the rules and it supports granting small providers an exemption from the rules ''wherever practicable.''

410. As explained in detail below, we have taken numerous measures in this Order to alleviate burdens for small providers, consistent with the comments of the SBA. In particular, we have adopted SBA's proposal that we give small providers additional time to comply. Also, while we do not exempt small providers from any of our rules, we have taken alternative measures to address several of the concerns with specific rule proposals that the SBA identifies. For instance, the data security rule we adopt focuses on the ''reasonableness'' of a carrier's security practices and does not prescribe any minimum required practices a provider must undertake to achieve compliance. The rule also specifically recognizes that the size of the provider is one of the factors to be considered in determining whether a provider has engaged in reasonable data security practices. By formulating the rule in this way, we have addressed small provider concerns regarding the costs of implementing prescriptive requirements. We also note that among other accommodations directly responsive to small provider concerns, we decline to require a consumer-facing dashboard.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

411. 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. 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.

412. For the purposes of these rules, we define small providers as providers with 100,000 or fewer broadband connections as reported on their most recent Form 477, aggregated over all the

providers' affiliates. We decline to count based on the number of customers from whom carriers collect data, as we recognize that some data collection is necessary to the provisions of service. Cabining the scope of small providers to those serving 100,000 or fewer subscribers is consistent with the *2015 Open Internet Order.*

413. The rules apply to all telecommunications carriers, including providers of BIAS. Below, we describe the types of small entities that might provide these services.

1. Total Small Entities

414. Our rules may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards. First, as of 2013, the SBA estimates there are an estimated 28.8 million small businesses nationwide—comprising some 99.9% of all businesses. In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' Census Bureau data for 2011 indicate that there were 90,056 local governmental jurisdictions in the United States. We estimate that, of this total, as many as 89,327 entities may qualify as ''small governmental jurisdictions.'' Thus, we estimate that most governmental jurisdictions are small.

2. Broadband Internet Access Service Providers

415. The Economic Census places BIAS providers, whose services might include Voice over Internet Protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (*e.g.,* cable and DSL ISPs), or over client-supplied telecommunications connections (*e.g.,* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. These are also labeled ''broadband.'' The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $32.5 million or less. These are labeled non-broadband. According to Census Bureau data for 2012, there were 3,117 firms in the first category, total, that operated for the entire year. Of this total, 3,083 firms had employment of 999 or fewer employees. For the second category, the data show that 1,442 firms operated for the entire year. Of those, 1,400 had annual receipts below $25 million per year. Consequently, we estimate that the majority of broadband Internet access service provider firms are small entities.

416. The broadband Internet access service provider industry has changed since this definition was introduced in 2007. The data cited above may therefore include entities that no longer provide broadband Internet access service, and may exclude entities that now provide such service. To ensure that this FRFA describes the universe of small entities that our action affects, we discuss in turn several different types of entities that might be providing broadband Internet access service, which also overlap with entities providing other telecommunications services. We note that, although we have no specific information on the number of small entities that provide broadband Internet access service over unlicensed spectrum, we include these entities in our Final Regulatory Flexibility Analysis.

3. Wireline Providers

417. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

418. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in this FRFA. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

419. *Incumbent Local Exchange Carriers* (*Incumbent LECs*). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. Three hundred and seven (307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees.

420. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on this data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they

were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

421. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

422. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in this FRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules adopted.

423. *Operator Service Providers* (*OSPs*). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by these rules.

424. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business definition specifically for prepaid calling card providers. The most appropriate NAICS code-based category for defining prepaid calling card providers is Telecommunications Resellers. This industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual networks operators (MVNOs) are included in this industry. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards. All 193 carriers have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by the rules adopted.

425. *Local Resellers.* Neither the Commission nor the SBA has developed a small business size standard specifically for Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services. Of this total, an estimated 211 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the rules adopted.

426. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers, and the SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

427. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined in paragraph 6 of this FRFA. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities.

4. Wireless Providers—Fixed and Mobile

428. The telecommunications services category covered by these rules may cover multiple wireless firms and categories of regulated wireless services. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

429. *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 appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services. Of this total, an estimated 261 have 1,500 or fewer employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

430. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions.

431. *1670–1675 MHz Services.* This service can be used for fixed and mobile uses, except aeronautical mobile. An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

432. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

433. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a ''small business'' for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For F-Block licenses, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks. On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22. Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

434. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses. On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71. Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses. On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78. Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.

435. *Specialized Mobile Radio Licenses.* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

436. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800

MHz SMR band and qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

437. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard. We assume, for purposes of this analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

438. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. 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. A ''very small business'' is defined as 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. Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—''entrepreneur''—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses. On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

439. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order.* An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included, 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block. Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years) won 49 licenses. Thirty three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) won 325 licenses.

440. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order,* the Commission revised its rules regarding Upper 700 MHz licenses. On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block. The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

441. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is 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. SBA approval of these definitions is not required. An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

442. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. These definitions were approved by the SBA. In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

443. *AWS Services (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)).* For the AWS–1 bands, the Commission has 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. For AWS–2 and AWS–3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS–1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS–2 or AWS–3 bands but proposes to treat both AWS–2 and AWS–3 similarly to broadband PCS service and AWS–1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.

444. *3650–3700 MHz band.* In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.,* 3650–3700 MHz). As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

445. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 135 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

446. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

447. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

448. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year. Of this total, 948 firms had annual receipts of under $10 million, and 48 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

5. Satellite Service Providers

449. *Satellite Telecommunications Providers.* Two economic census

categories address the satellite industry. The first category has a small business size standard of $30 million or less in average annual receipts, under SBA rules. The second has a size standard of $30 million or less in annual receipts.

450. The category of Satellite Telecommunications ''comprises establishments 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.'' For this category, Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of under $25 million. Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

451. The second category of Other Telecommunications comprises, *inter alia,* ''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.'' For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million. Thus, a majority of ''All Other Telecommunications'' firms potentially affected by the rules adopted can be considered small.

6. Cable Service Providers

452. *Cable and Other Program Distributors.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2007, there were a total of 2,048 firms in this category that operated for the entire year. Of this total, 1,393 firms had annual receipts of under $10 million, and 655 firms had receipts of $10 million or more. Thus, the majority of these firms can be considered small.

453. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide. Industry data shows that there were 1,141 cable companies at the end of June 2012. Of this total, all but ten cable operators nationwide are small under this size standard. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,945 cable systems nationwide. Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

454. *Cable System Operators.* The Communications Act also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' There are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. All Other Telecommunications

455. ''All Other Telecommunications'' is defined as follows: This U.S. industry is comprised of establishments that are 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. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million. Thus, a majority of ''All Other Telecommunications'' firms potentially affected by the rules adopted can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

456. The Order adopts requirements concerning (1) the provision of meaningful notice of privacy policies; (2) customer approval for the use and disclosure of customer PI; (3) reasonable data security; (4) data breach notification; and (5) particular practices that raise privacy concerns. The rules we adopt in the Order will apply to all telecommunications carriers, including BIAS and voice service providers.

457. *Providing Meaningful Notice of Privacy Policies.* We adopt privacy policy notice requirements for all telecommunications carriers, including small providers. We require telecommunications carriers to provide notices of privacy policies at the point of sale prior to the purchase of service, and also to make notices clearly, conspicuously, and persistently available on carriers' Web sites and via

carriers' apps that are used to manage service, if any. These notices must clearly inform customers about what customer proprietary information the providers collect, how they use it, and under what circumstances they share it. We also require that providers inform their customers about customers' rights to opt in to or out (as the case may be) of the use or sharing of their proprietary information. We require that privacy notices be clear, conspicuous, comprehensible, and not misleading; and written in the language with which the carrier transacts business with the customer; but we do not require that they be formatted in any specific manner. Finally, we require providers to give their customers advance notice of material changes to their privacy policies. We have declined to require periodic notice on an annual or bi-annual basis, similar to what the preexisting CPNI rules require.

458. *Customer Approval Requirements for the Use and Disclosure of Customer PI.* We require carriers to obtain express, informed customer consent (*i.e.,* opt-in approval) for the use and sharing of sensitive customer PI. With respect to non-sensitive customer PI, carriers must, at a minimum, provide their customers the ability to opt out of the carrier's use or sharing of that non-sensitive customer information. Carriers must also provide customers with easy access to a choice mechanism that is simple, easy-to-use, clearly and conspicuously disclosed, persistently available, and made available at no additional cost to the customer. We require telecommunications carriers to solicit customer approval at the point of sale, and permit further solicitations after the point of sale. We also require that carriers actively contact their customers in these subsequent solicitations, to ensure that customers are adequately informed. Finally, we require the solicitations to be clear and conspicuous, comprehensible, not misleading, and to contain the information necessary for a customer to make an informed choice. This means the solicitations must inform customers of the types of customer proprietary information that the carrier is seeking to use, disclose, or permit access to, how those types of information will be used or shared, and the categories of entities with which that information is shared. In order to maintain flexibility, we do not require particular formats or methods by which a carrier must communicate its solicitation of consent to customers.

459. Our rules allow providers to use and disclose customer data without approval if the data is properly de-identified. This option gives providers carriers, including small providers, a way to use customer information that avoids both the risks associated with identifiable information and any compliance costs associated with obtaining customer approval.

460. *Reasonable Data Security.* We require telecommunications carriers to take reasonable measures to secure customer PI. We decline to mandate specific activities that providers must undertake in order to meet this reasonableness requirement. We do, however, offer guidance on the types of data security practices we recommend carriers strongly consider as they seek to comply with our data security requirement, while recognizing that what constitutes ''reasonable'' data security is an evolving concept. When considering whether a carrier's data security practices are reasonable, we will weigh the nature and scope of the carrier's activities, the sensitivity of the underlying data, the size of the carrier, and technical feasibility. We recognize that the resources and data practices of small carriers are likely to be different from large carriers, and therefore what constitutes ''reasonable'' data security for a small carrier and a large carrier may differ. The totality of the circumstances, and not any individual factor, is determinative of whether a carrier's practices are reasonable. By requiring providers to take reasonable data security measures, we make clear that providers will not be held strictly liable for all data breaches.

461. *Data Breach Notification Requirements.* We require BIAS providers and other telecommunications carriers to notify affected customers, the Commission—and, when a breach affects 5,000 or more customers, the FBI and Secret Service—of data breaches that meet a harm-based trigger. In particular, a carrier must report the breach unless it reasonably determines that no harm to customers is reasonably likely to occur. Customer breach notifications must include the date, estimated date, or estimated date range of the breach; a description of the customer PI that was breached; contact information for the carrier; contact information for the FCC and any relevant state agencies; and information about credit-reporting agencies and steps customers can take to avoid identity theft. We also require providers to keep records, for two years, of the dates of breaches and the dates when customers are notified.

462. When a reportable breach affects 5,000 or more customers, a provider must notify the Commission and the FBI and Secret Service within seven (7) business days of when the carrier reasonably determines that such a breach has occurred, and at least three (3) business days before notifying customers. The Commission will create a centralized portal for reporting breaches to the Commission and other federal law enforcement agencies. Carriers must notify affected customers without unreasonable delay, and no later than 30 calendar days following the carriers' reasonable determination that a breach has occurred, unless the FBI or Secret Service requests a further delay. When a reportable breach does not meet the 5,000-customer threshold for reporting to the FBI and Secret Service, the Commission may be notified of the breach within the same no-more-than-30-days timeframe as affected customers.

463. *Particular Practices That Raise Privacy Concerns.* The Order prohibits BIAS providers from conditioning the provision of service on a customer's consenting to use or sharing of the customer's proprietary information over which our rules provide the consumer with a right of approval. However, the Order does not prohibit BIAS providers from offering financial incentives to permit the use or disclosure of such information. The Order requires BIAS providers offering such incentives to provide clear notice explaining the terms of any financial incentive program and to obtain opt-in consent. The notice must be clear and conspicuous and explained in a way that is comprehensible and not misleading. The explanation must include information about what customer PI the provider will collect, how it will be used, with what types of entities it will be shared, and for what purposes. BIAS providers must make financial incentive notices easily accessible and separate from any other privacy notifications. When a BIAS provider markets a service plan that involves an exchange of personal information for reduced pricing or other benefits, it must also provide at least as prominent information to customers about an equivalent plan that does not include such an exchange. BIAS providers must also comply with all notice requirements of our rules when providing a financial incentive notice.

F. Steps Take To Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Considered

464. 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.''

465. The Commission considered the economic impact on small providers, as identified in comments filed in response to the *NPRM* and IRFA, in reaching its final conclusions and taking action in this proceeding. Moreover, in formulating these rules, we have sought to provide flexibility for small providers whenever possible, including by avoiding prescription of the specific practices carriers must follow to achieve compliance. Additionally, harmonizing our rules across all telecommunications services will reduce and streamline compliance costs for small carriers. We have also adopted a phased-in implementation schedule, under which small providers are given an extra twelve months to come into compliance with the notice and approval requirements we adopt today. As discussed below, we have designed the rules we adopt today with the goal of minimizing burdens on all carriers, and particularly on small carriers.

466. *Providing Meaningful Notice of Privacy Policies.* Recognizing the importance of flexibility in finding successful ways to communicate privacy policies to consumers, we decline to adopt any specific form or format for privacy notices. We adopt rules that require providers to disclose their privacy practices, but decline to be prescriptive about either the format or specific content of privacy policy notices in order to provide flexibility to providers and to minimize the burden of compliance levied by this requirement. In the interest of further minimizing the burden of transparency, particularly for small providers, we also direct the Consumer Advisory Committee to develop a model privacy policy notice that will serve as a safe harbor for our notice requirements. We also decline to adopt specific notice requirements in mobile formats and we decline to require periodic notices of privacy practices.

467. *Customer Approval Requirements for the Use and Disclosure of Customer PI.* In formulating customer approval requirements we have taken specific actions to reduce burdens on small carriers. First, as requested by small carriers and other commenters, we harmonize the voice and BIAS customer approval regimes into one set of rules. Second, we do not require carriers to provide a ''privacy dashboard'' for customer approvals; carriers may use any choice mechanism that is easy to use, persistently available, and clearly and conspicuously provided. This reduces the need for small carriers to develop specific customer service architecture. Third, we decline to require a specific format for accepting customer privacy choices and therefore allow carriers, particularly small carriers, that lack sophisticated Web sites or apps to accept customer choices through other means, such as by email or phone, so long as these means are persistently available. Fourth, we eliminate the periodic compliance documentation and reporting requirements that create recordkeeping burdens in our pre-existing CPNI rules. To further reduce compliance burdens, we have clarified that choice solicitations may be combined a carrier's other privacy policy notices.

468. *Reasonable Data Security.* In the *NPRM* we proposed rules that included an overarching data security expectation and specified particular types of practices that carriers would need to implement to comply with that standard, while allowing carriers flexibility in implementing the proposed requirements. Based on the record in this proceeding, we have modified the overarching data security standard to more directly focus on reasonableness of the carriers' data security practices based on the particulars of the carrier's situation. Also based on the record, we decline to mandate specific activities that carriers must undertake in order to meet the reasonable data security requirement. We do, however, offer guidance on the types of data security practices we recommend carriers strongly consider as they seek to comply with our data security requirement—recognizing, of course, that what constitutes ''reasonable'' data security is an evolving concept. This guidance should be of particular benefit to smaller providers that may have less established data security programs. Also, our rule directs all providers—including small providers—to adopt contextually appropriate security practices. Contextual factors specified in the rule include the size of the provider and nature and scope of its activities. In including such factors, we take into account small providers' concerns that certain security measures that may be appropriate for larger carriers, such as having a dedicated official to oversee data security implementation, are likely beyond the needs and resources of the smallest carriers.

469. *Data Breach Notification Requirements.* In formulating our data breach rules, we specifically considered their impact on small carriers and crafted rules designed to balance the burdens on small carriers with the privacy and information security needs of those carriers' customers. First, our adoption of a harm-based trigger substantially reduces compliance burdens on small carriers by not requiring excessive notifications and by granting carriers the flexibility to focus their limited resources on preventing and ameliorating breaches, rather than issuing notifications for inconsequential events. The record shows that because small carriers tend to collect and use customer data far less extensively than larger carriers, they are less likely to have breaches that would trigger the notification requirements of our rules. Second, our customer notification timeline also provides small carriers with greater flexibility; allowing up to 30 days to notify customers of a breach allows small carriers with fewer resources more time to investigate than the 10 days originally proposed. Third, we are creating a centralized portal for reporting data breaches to the Commission and law enforcement. This will streamline the notification process, which particularly reduces burdens on small carriers with fewer staff dedicated to breach mitigation. Finally, for breaches affecting fewer than 5,000 customers, we extend the Commission notification deadline from seven (7) business days to thirty (30) calendar days. This provision will significantly reduce compliance burdens for small carriers, many of whom have fewer than 5,000 customers.

470. *Implementation.* To provide certainty to customers and carriers alike, we establish a timeline by which carriers must implement the privacy rules we adopt today. Carriers that have complied with FTC and industry best practices will be well-positioned to achieve prompt compliance with our privacy rules. We recognize, however, that carriers, especially small carriers, will need some time to update their internal business processes as well as their customer-facing privacy policies and choice mechanisms in order to come into compliance with some of our rules.

471. The notice and choice rules we adopt today will become effective the later of (1) eight weeks after

announcement PRA approval, or (12) twelve months after the Commission publishes a summary of the Order in the **Federal Register**. Carriers will need to analyze the new, harmonized privacy rules as well as coordinate with various business segments and vendors, and update programs and policies. Carriers will also need to engage in consumer outreach and education. These implementation steps will take time and we find, as supported in the record, that twelve months after publication of the Order in the **Federal Register** is an adequate minimum implementation period to implement the new notice and approval rules. In order to minimize disruption to carriers' business practices, we do not require carriers to obtain new consent from all their customers. Rather, we treat as valid or ''grandfather'' any customer consent that was obtained prior to the effective date of our rules and thus is consistent with our new requirements. We decline to more broadly grandfather preexisting consents obtained by small carriers because we find that the parameters set forth in our rules create the appropriate balance to limit compliance costs while providing customers the privacy protections they need.

472. The data breach rule we adopt today will become effective the later of (1) eight weeks after announcement PRA approval, or (2) six months after the Commission publishes a summary of the Order in the **Federal Register**. Although we recognize that carriers may have to modify practices and policies to implement our new rule, we find the harm trigger we adopt and timeline for notifying customers lessen the implementation requirements. Moreover, harmonization of our data breach rule for BIAS and voice services enable providers to streamline their notification processes, which should also lessen carriers' need for implementation time. Given these steps to minimize compliance burdens, we find six months is an adequate minimum timeframe.

473. The data security requirements we adopt today will become effective 90 days after publication of a summary of the Order in the **Federal Register**. We find this to be an appropriate implementation period for the data security requirements because carriers should already be largely in compliance with these requirements because the reasonableness standard adopted in this Order provides carriers flexibility in how to approach data security and resembles the obligation to which they were previously subject pursuant to section 5 of the FTC Act. We therefore do not think the numerous steps outlined by commenters that would have been necessary to comply with the data security proposals in the *NPRM* apply to the data security rules we adopt.

474. The prohibition on conditioning offers to provider BIAS on a customer's agreement to waive privacy rights will become effective 30 days after publication of a summary of the Order in the **Federal Register**. We find that unlike other privacy rules, consumers should benefit from this prohibition promptly. We find no basis for any delay in the effective date of this important protection. All other privacy rules adopted in the Order will be effective 30 days after publication of a summary of the Order in the **Federal Register**. We also adopt a uniform implementation timetable for both BIAS and other telecommunications services.

475. To provide additional flexibility to small carriers, we give small carriers an additional twelve months to implement the notice and customer approval rules we adopt today. We find that an additional one-year phase-in will allow small providers time to make the necessary investments to implement these rules. The record reflects that small providers have comparatively limited resources and rely extensively on vendors over which they have limited leverage to compel adoption of new requirements. We recognize our notice and choice framework may entail upfront costs for small carriers. As such, we find that this limited extension is appropriate.

476. We have considered, but opt against, providing small providers with even longer or broader extension periods, or with exemptions from the rules, as some commenters suggest. In part, this is because the measures we have taken to reduce burdens for small providers have in many cases mitigated commenters' specific concerns. For instance, we find that we have addressed small provider concerns about the adoption of specific security requirements, such as annual risk assessments, by adopting a data security rule that does not prescribe any such requirements. Moreover, as advocated by small providers, we adopt a customer choice framework that distinguishes between sensitive and non-sensitive customer information, as well as decline to mandate a customer-facing dashboard to help manage their implementation and compliance costs. Furthermore, we find that our data breach notification requirements and ''take-it-or-leave-it'' prohibition do not require implementation extension for small providers as compliance with these protections should not be costly for small carriers that generally collect less customer information and use customer information for narrower purposes.

Report to Congress: The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

VII. Ordering Clauses

477. Accordingly, *it is ordered that,* pursuant to sections 1, 2, 4(i)–(j), 201, 202, 222, 303(b), 303(r), 316, 338(i), 631, and 705 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 201, 202, 222, 303(b), 303(r), 316, 338(i), 551, 605, 1302, this Report and Order *is adopted.*

478. *It is further ordered* that part 64 of the Commission's rules IS AMENDED as set forth in Appendix A.

479. *It is further ordered* that the data security requirements set forth in new 47 CFR 64.2005 *shall be* effective 90 days after publication in the **Federal Register**.

480. *It is further ordered* that, except as set forth in the prior paragraph, this Report and Order *shall be* effective 30 days after date of publication of a summary in the **Federal Register**, except that the amendments to 47 CFR 64.2003, 64.2004, 64.2006, and 64.2011(b), which contain new or modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, *will become effective* after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date. It is our intention in adopting the foregoing Report and Order that, if any provision of the Report and Order or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Report and Order and the rules not deemed unlawful, and the application of such Report and Order and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

481. *It is further ordered* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

482. *It is further ordered* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Claims, Communications common carriers, Computer technology, Credit, Foreign relations, Individuals with disabilities, Political candidates, Radio, Reporting and recordkeeping requirements, Telecommunications, Telegraph, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 254(k), 403, Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 202, 218, 222, 225, 226, 227, 228, 254(k), 301, 303, 332, 338, 551, 616, 620, 705, 1302, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, unless otherwise noted.

■ 2. In part 64, revise subpart U to read as follows:

Subpart U—Protecting Customer Information

Sec.
64.2001 Basis and purpose.
64.2002 Definitions.
64.2003 Notice requirements for telecommunications carriers.
64.2004 Customer approval.
64.2005 Data security.
64.2006 Data breach notification.
64.2010 Business customer exemption for provision of telecommunications services other than BIAS.
64.2011 BIAS offers conditioned on waiver of privacy rights.
64.2012 Effect on State law.

Subpart U—Protecting Customer Information

§ 64.2001 Basis and purpose.

(a) *Basis.* The rules in this subpart are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose.* The purpose of the rules in this subpart is to implement section 222 of the Communications Act of 1934, as amended, 47 U.S.C. 222.

§ 64.2002 Definitions.

The following definitions apply to this subpart.

(a) *Broadband Internet access service (BIAS).* The term ''broadband Internet access service'' or ''BIAS'' has the same meaning given to such term in section 8.2(a) of this chapter.

(b) *Broadband Internet Access service provider.* The term ''broadband Internet access service provider'' or ''BIAS provider'' means a person engaged in the provision of BIAS.

(c) *Breach of security.* The terms ''breach of security,'' ''breach,'' or ''data breach,'' mean any instance in which a person, without authorization or exceeding authorization, has gained access to, used, or disclosed customer proprietary information.

(d) *Call detail information.* Any information that pertains to the transmission of specific telephone calls, including, for outbound calls, the number called, and the time, location, or duration of any call and, for inbound calls, the number from which the call was placed, and the time, location, or duration of any call.

(e) *Customer.* A customer of a telecommunications carrier is:

(1) A current or former subscriber to a telecommunications service; or

(2) An applicant for a telecommunications service.

(f) *Customer proprietary information.* The term ''customer proprietary information'' or ''customer PI'' means any of the following a carrier acquires in connection with its provision of telecommunications service:

(1) Individually identifiable customer proprietary network information (CPNI);

(2) Personally identifiable information (PII); and

(3) Content of communications.

(g) *Customer proprietary network information (CPNI).* The term ''customer proprietary network information'' or ''CPNI'' has the same meaning given to such term in section 222(h)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 222(h)(1).

(h) *Interconnected Voice over Internet Protocol (VoIP) Service.* The term ''interconnected VoIP service'' has the same meaning given to such term in § 9.3 of this chapter.

(i) *Material change.* The term ''material change'' means any change that a customer, acting reasonably under the circumstances, would consider important to his or her decisions regarding his or her privacy, including any change to information required by the privacy notice described in § 64.2003.

(j) *Opt-in approval.* A method for obtaining customer consent to use, disclose, or permit access to the customer's proprietary information. This approval method requires that the carrier obtain from the customer affirmative, express consent allowing the requested usage, disclosure, or access to the customer proprietary information after the customer is provided appropriate notification of the carrier's request consistent with the requirements set forth in this subpart.

(k) *Opt-out approval.* A method for obtaining customer consent to use, disclose, or permit access to the customer's proprietary information. Under this approval method, a customer is deemed to have consented to the use, disclosure, or access to the customer's proprietary information if the customer has failed to object thereto after the customer is provided appropriate notification of the carrier's request for consent consistent with the requirements set forth in this subpart.

(l) *Person.* The term ''person'' has the same meaning given such term in section 3 of the Communications Act of 1934, as amended, 47 U.S.C. 153.

(m) *Personally identifiable information (PII).* The term ''personally identifiable information'' or ''PII'' means any information that is linked or reasonably linkable to an individual or device.

(n) *Sensitive customer proprietary information.* The terms ''sensitive customer proprietary information'' or ''sensitive customer PI'' include:

(1) Financial information;

(2) Health information;

(3) Information pertaining to children;

(4) Social Security numbers;

(5) Precise geo-location information;

(6) Content of communications;

(7) Call detail information; and

(8) Web browsing history, application usage history, and the functional equivalents of either.

(o) *Telecommunications carrier or carrier.* The terms ''telecommunications carrier'' or ''carrier'' shall have the same meaning as set forth in section 3 of the Communications Act of 1934, as amended, 47 U.S.C. 153. For the purposes of this subpart, the term ''telecommunications carrier'' or ''carrier'' shall include a person engaged in the provision of interconnected VoIP service, as that term is defined in paragraph (h) of this section.

(p) *Telecommunications service.* The term ''telecommunications service'' has the same meaning given to such term in section 3 of the Communications Act of 1934, as amended, 47 U.S.C. 153. For the purposes of this subpart, the term ''telecommunications service'' shall include interconnected VoIP service, as

that term is defined in paragraph (h) of this section.

§ 64.2003 Notice requirements for telecommunications carriers.

(a) A telecommunications carrier must notify its customers of its privacy policies. Such notice must be clear and conspicuous, and in language that is comprehensible and not misleading.

(b) *Contents.* A telecommunications carrier's notice of its privacy policies under paragraph (a) must:

(1) Specify and describe the types of customer proprietary information that the telecommunications carrier collects by virtue of its provision of telecommunications service and how it uses that information;

(2) Specify and describe under what circumstances the telecommunications carrier discloses or permits access to each type of customer proprietary information that it collects;

(3) Specify and describe the categories of entities to which the carrier discloses or permits access to customer proprietary information and the purposes for which the customer proprietary information will be used by each category of entities;

(4) Specify and describe customers' opt-in approval and/or opt-out approval rights with respect to their customer proprietary information, including:

(i) That a customer's denial or withdrawal of approval to use, disclose, or permit access to customer proprietary information will not affect the provision of any telecommunications services of which he or she is a customer; and

(ii) That any grant, denial, or withdrawal of approval for the use, disclosure, or permission of access to the customer proprietary information is valid until the customer affirmatively revokes such grant, denial, or withdrawal, and inform the customer of his or her right to deny or withdraw access to such proprietary information at any time.

(5) Provide access to a mechanism for customers to grant, deny, or withdraw approval for the telecommunications carrier to use, disclose, or provide access to customer proprietary information as required by § 64.2004;

(6) Be completely translated into a language other than English if the telecommunications carrier transacts business with the customer in that language.

(c) *Timing.* Notice required under paragraph (a) of this section must:

(1) Be made available to prospective customers at the point of sale, prior to the purchase of service, whether such point of sale is in person, online, over the telephone, or via another means; and

(2) Be made persistently available through: A clear and conspicuous link on the telecommunications carrier's homepage; the carrier's application (app), if it provides one for account management purposes; and any functional equivalent to the carrier's homepage or app. If a carrier does not have a Web site, it must provide notice to customers in paper form or another format agreed upon by the customer.

(d) *Material changes to a telecommunications carrier's privacy policies.* A telecommunications carrier must provide existing customers with advance notice of one or more material changes to the carrier's privacy policies. Such notice must be clear and conspicuous, and in language that is comprehensible and not misleading, and must:

(1) Be provided through email or another means of active communication agreed upon by the customer;

(2) Specify and describe:

(i) The changes made to the telecommunications carrier's privacy policies, including any changes to what customer proprietary information the carrier collects, and how it uses, discloses, or permits access to such information, the categories of entities to which it discloses or permits access to customer proprietary information, and which, if any, changes are retroactive; and

(ii) Customers' opt-in approval and/or opt-out approval rights with respect to their customer proprietary information, including the material specified in paragraph (b)(4) of this section;

(3) Provide access to a mechanism for customers to grant, deny, or withdraw approval for the telecommunications carrier to use, disclose, or permit access to customer proprietary information as required by § 64.2004; and

(4) Be completely translated into a language other than English if the telecommunications carrier transacts business with the customer in that language.

§ 64.2004 Customer approval.

Except as described in paragraph (a) of this section, a telecommunications carrier may not use, disclose, or permit access to customer proprietary information except with the opt-out or opt-in approval of a customer as described in this section.

(a) *Limitations and exceptions.* A telecommunications carrier may use, disclose, or permit access to customer proprietary information without customer approval for the following purposes:

(1) In its provision of the telecommunications service from which such information is derived, or in its provision of services necessary to, or used in, the provision of such service.

(2) To initiate, render, bill, and collect for telecommunications service.

(3) To protect the rights or property of the telecommunications carrier, or to protect users of the telecommunications service and other providers from fraudulent, abusive, or unlawful use of the service.

(4) To provide any inbound marketing, referral, or administrative services to the customer for the duration of a real-time interaction, if such interaction was initiated by the customer.

(5) To provide location information and/or non-sensitive customer proprietary information to:

(i) A public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's request for emergency services;

(ii) Inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

(iii) Providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

(6) As otherwise required or authorized by law.

(b) *Opt-out approval required.* Except as otherwise provided in this section, a telecommunications carrier must obtain opt-out approval from a customer to use, disclose, or permit access to any of the customer's non-sensitive customer proprietary information. If it so chooses, a telecommunications carrier may instead obtain opt-in approval from a customer to use, disclose, or permit access to any of the customer's non-sensitive customer proprietary information.

(c) *Opt-in approval required.* Except as otherwise provided in this section, a telecommunications carrier must obtain opt-in approval from a customer to:

(1) Use, disclose, or permit access to any of the customer's sensitive customer proprietary information; or

(2) Make any material retroactive change—*i.e.,* a material change that would result in a use, disclosure, or permission of access to any of the customer's proprietary information previously collected by the carrier for which the customer did not previously grant approval, either through opt-in or opt-out consent, as required by paragraphs (b) and (c) of this section.

(d) *Notice and solicitation required.* (1) Except as described in paragraph (a) of this section, a telecommunications carrier must at a minimum solicit customer approval pursuant to paragraph (b) and/or (c), as applicable, at the point of sale and when making one or more material changes to privacy policies. Such solicitation may be part of, or the same communication as, a notice required by § 64.2003.

(2) A telecommunications carrier's solicitation of customer approval must be clear and conspicuous, and in language that is comprehensible and not misleading. Such solicitation must disclose:

(i) The types of customer proprietary information for which the carrier is seeking customer approval to use, disclose, or permit access to;

(ii) The purposes for which such customer proprietary information will be used;

(iii) The categories of entities to which the carrier intends to disclose or permit access to such customer proprietary information; and

(iv) A means to easily access the notice required by § 64.2003(a) and a means to access the mechanism required by paragraph (e) of this section.

(3) A telecommunications carrier's solicitation of customer approval must be completely translated into a language other than English if the telecommunications carrier transacts business with the customer in that language.

(e) *Mechanism for exercising customer approval.* A telecommunications carrier must make available a simple, easy-to-use mechanism for customers to grant, deny, or withdraw opt-in approval and/or opt-out approval at any time. Such mechanism must be clear and conspicuous, in language that is comprehensible and not misleading, and made available at no additional cost to the customer. Such mechanism must be persistently available on or through the carrier's Web site; the carrier's application (app), if it provides one for account management purposes; and any functional equivalent to the carrier's homepage or app. If a carrier does not have a Web site, it must provide a persistently available mechanism by another means such as a toll-free telephone number. The customer's grant, denial, or withdrawal of approval must be given effect promptly and remain in effect until the customer revokes or limits such grant, denial, or withdrawal of approval.

§ 64.2005 Data security.

(a) A telecommunications carrier must take reasonable measures to protect customer PI from unauthorized use, disclosure, or access.

(b) The security measures taken by a telecommunications carrier to implement the requirement set forth in this section must appropriately take into account each of the following factors:

(1) The nature and scope of the telecommunications carrier's activities;

(2) The sensitivity of the data it collects;

(3) The size of the telecommunications carrier; and

(4) Technical feasibility.

(c) A telecommunications carrier may employ any lawful security measures that allow it to implement the requirement set forth in this section.

§ 64.2006 Data breach notification.

(a) *Customer notification.* A telecommunications carrier shall notify affected customers of any breach without unreasonable delay and in any event no later than 30 calendar days after the carrier reasonably determines that a breach has occurred, subject to law enforcement needs, unless the telecommunications carrier can reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach.

(1) A telecommunications carrier required to provide notification to a customer under this paragraph must provide such notice by one or more of the following methods:

(i) Written notification sent to either the customer's email address or the postal address on record of the customer, or, for former customers, to the last postal address ascertainable after reasonable investigation using commonly available sources; or

(ii) Other electronic means of active communications agreed upon by the customer for contacting that customer for data breach notification purposes.

(2) The customer notification required to be provided under this paragraph must include:

(i) The date, estimated date, or estimated date range of the breach of security;

(ii) A description of the customer PI that was breached or reasonably believed to have been breached;

(iii) Information the customer can use to contact the telecommunications carrier to inquire about the breach of security and the customer PI that the telecommunications carrier maintains about that customer;

(iv) Information about how to contact the Federal Communications Commission and any state regulatory agencies relevant to the customer and the service; and

(v) If the breach creates a risk of financial harm, information about the national credit-reporting agencies and the steps customers can take to guard against identity theft, including any credit monitoring, credit reporting, credit freezes, or other consumer protections the telecommunications carrier is offering customers affected by the breach of security.

(b) *Commission notification.* A telecommunications carrier must notify the Commission of any breach affecting 5,000 or more customers no later than seven business days after the carrier reasonably determines that a breach has occurred and at least three business days before notification to the affected customers, unless the telecommunications carrier can reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach. A telecommunications carrier must notify the Commission of any breach affecting fewer than 5,000 customers without unreasonable delay and no later than thirty (30) calendar days after the carrier reasonably determines that a breach has occurred, unless the telecommunications carrier can reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach. Such notification shall be made through a central reporting system made available by the Commission.

(c) *Federal law enforcement notification.* A telecommunications carrier must notify the Federal Bureau of Investigation (FBI) and the U.S. Secret Service (Secret Service) of a breach that affects 5,000 or more customers no later than seven business days after the carrier reasonably determines that such a breach has occurred and at least three business days before notification to the affected customers, unless the telecommunications carrier can reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach. Such notification shall be made through a central reporting system made available by the Commission.

(d) *Recordkeeping.* A telecommunications carrier shall maintain a record, electronically or in some other manner, of any breaches and notifications made to customers, unless the telecommunications carrier can reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach. The record must include the dates on which the carrier determines that a reportable

breach has occurred and the dates of customer notification. The record must include a written copy of all customer notifications. Carriers shall retain the record for a minimum of two years from the date on which the carrier determines that a reportable breach has occurred.

§ 64.2010 Business customer exemption for provision of telecommunications services other than BIAS.

Telecommunications carriers may bind themselves contractually to privacy and data security regimes other than those described in this subpart for the provision of telecommunications services other than BIAS to enterprise customers if the carrier's contract with that customer specifically addresses the issues of transparency, choice, data security, and data breach and provides a mechanism for the customer to communicate with the carriers about privacy and data security concerns.

§ 64.2011 BIAS offers conditioned on waiver of privacy rights.

(a) A BIAS provider must not condition, or effectively condition, provision of BIAS on a customer's agreement to waive privacy rights guaranteed by law or regulation, including this subpart. A BIAS provider must not terminate service or otherwise refuse to provide BIAS as a direct or indirect consequence of a customer's refusal to waive any such privacy rights.

(b) A BIAS provider that offers a financial incentive, such as lower monthly rates, in exchange for a customer's approval to use, disclose, and/or permit access to the customer's proprietary information must do all of the following:

(1) Provide notice explaining the terms of any financial incentive program that is clear and conspicuous, and in language that is comprehensible and not misleading. Such notice must be provided both at the time the program is offered and at the time a customer elects to participate in the program. Such notice must:

(i) Explain that the program requires opt-in approval to use, disclose, and/or permit access to customer PI;

(ii) Include information about what customer PI the provider will collect, how it will be used, and with what categories of entities it will be shared and for what purposes;

(iii) Be easily accessible and separate from any other privacy notifications, including but not limited to any privacy notifications required by this subpart;

(iv) Be completely translated into a language other than English if the BIAS provider transacts business with the customer in that language; and

(v) Provide at least as prominent information to customers about the equivalent service plan that does not necessitate the use, disclosure, or access to customer PI beyond that required or permitted by law or regulation, including under this subpart.

(2) Obtain customer opt-in approval in accordance with § 64.2004(c) for participation in any financial incentive program.

(3) If customer opt-in approval is given, the BIAS provider must make available a simple, easy-to-use mechanism for customers to withdraw approval for participation in such financial incentive program at any time. Such mechanism must be clear and conspicuous, in language that is comprehensible and not misleading, and must be persistently available on or through the carrier's Web site; the carrier's application (app), if it provides one for account management purposes; and any functional equivalent to the carrier's homepage or app. If a carrier does not have a Web site, it must provide a persistently available mechanism by another means such as a toll-free telephone number.

§ 64.2012 Effect on State law.

The rules set forth in this subpart shall preempt any State law only to the extent that such law is inconsistent with the rules set forth herein and only if the Commission has affirmatively determined that the State law is preempted on a case-by-case basis. The Commission shall not presume that more restrictive State laws are inconsistent with the rules set forth herein.

[FR Doc. 2016–28006 Filed 12–1–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL REGISTER

Vol. 81 Friday,

No. 232 December 2, 2016

Part V

Department of Justice

28 CFR Part 36

Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 36

[CRT Docket No. 126; AG Order No. 3779–2016]

RIN 1190–AA63

Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Justice (Department) regulation implementing title III of the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against persons with disabilities by public accommodations and commercial facilities, including movie theaters. The rule adds specific requirements addressing the obligations of public accommodations that own, lease, or operate movie theaters to provide effective communication to patrons who are deaf or hard of hearing, or blind or have low vision. The rule requires that movie theater auditoriums provide closed movie captioning and audio description when showing a digital movie distributed with such features unless doing so would result in an undue burden or a fundamental alteration. The rule requires movie theaters to have a specified number of captioning devices and audio description devices based on the number of auditoriums in the movie theater that show digital movies. The rule does not impose any specific requirements for movie theater auditoriums that exhibit analog movies exclusively.

DATES: This rule is effective January 17, 2017. Public accommodations with movie theater auditoriums showing digital movies on December 2, 2016 must comply with the rule's requirement to provide closed movie captioning and audio description in such auditoriums by June 2, 2018. If a public accommodation converts a movie theater auditorium from an analog projection system to a system that it allows it show digital movies after December 2, 2016, the public accommodation must comply with the rule's requirement to provide closed movie captioning and audio description in such auditoriums by December 2, 2018, or within 6 months of that auditorium's complete installation of a digital projection system, whichever is later.

FOR FURTHER INFORMATION CONTACT: Rebecca Bond, Section Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

You may obtain copies of the rule in alternative formats by calling the ADA Information Line at (800) 514–0301 (voice) and (800) 514–0383 (TTY). This rule is also available on the Department's Web site at *http://www.ada.gov.*

SUPPLEMENTARY INFORMATION:

Relationship to Other Laws

Section 36.103 of the Department's regulation implementing title III of the ADA states that except as otherwise provided in part 36, that part shall not be construed to allow a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies under that title. In addition, the title III regulation specifies that part 36 does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and any implementing regulations issued by Federal agencies. Finally, part 36 does not invalidate or limit the remedies, rights, and procedures provided under any Federal, State, or local law (including State common law) that affords greater or equal protection to individuals with disabilities or individuals associated with them. These provisions remain unchanged. Compliance with the Department's ADA regulations does not ensure compliance with other Federal statutes.

I. Executive Summary

A. Purpose of the Rule

The Department of Justice is issuing this final rule in order to amend its regulation implementing title III of the ADA (42 U.S.C. 12181 *et seq.*), which covers public accommodations and commercial facilities—including movie theaters. Public accommodations that own, lease, or operate movie theaters have an existing obligation to provide effective communication to persons with disabilities through the use of auxiliary aids and services, and this rule provides greater specificity as to what those obligations are when showing digital movies. The rule explicitly requires public accommodations that own, lease, or operate movie theaters to provide closed movie captioning [1] and audio description to patrons with hearing and vision disabilities whenever such entities exhibit digital movies that are distributed with such features, as well as to have available a specific number of fully operational captioning and audio description devices.

Title III of the ADA prohibits public accommodations from discriminating against individuals with disabilities. 42 U.S.C. 12182(a). It expressly requires owners, operators, or lessees of public accommodations to take ''such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services'' unless doing so would result in an undue burden or a fundamental alteration. 42 U.S.C. 12182(b)(2)(A)(iii). The Department's existing regulation implementing the obligation of covered entities to ensure effective communication with individuals with disabilities (28 CFR 36.303(a)–(c)) specifies that ''open and closed captioning,'' and ''audio recordings'' are examples of auxiliary aids and services. 28 CFR 36.303(b).

Despite the longstanding obligation to provide effective communication, neither closed movie captioning nor audio description is universally available at movie theaters across the United States. Data provided to the Department by the movie theater industry in mid-2015 indicates that at that time, approximately 70 percent of all movie theater auditoriums were already equipped to provide closed movie captioning and audio description; however, advocates and individuals with hearing and vision disabilities have reported that the availability of these services continues to vary significantly depending on a movie theater's location and ownership. In addition, it is the Department's view that the availability of closed movie captioning, and to a lesser extent audio description, is largely due to successful litigation brought by State attorneys general or private plaintiffs representing individuals with disabilities. As a result, although individuals with hearing and vision disabilities are an ever-increasing segment of the aging population, in many cases they continue to be unable to enjoy movies with family or friends, participate in conversations about recent movie

[1] In this rule, the Department uses the term ''closed movie captioning'' to refer to the provision of captions to movie theater patrons at their seats through the use of individual captioning devices.

releases, or otherwise take part in any meaningful way in this important aspect of American culture. Because the ADA's effective communication requirements apply to all public accommodations (including movie theaters) and protect the rights of persons with disabilities in every jurisdiction in the United States, all movie theaters must ensure that they meet those requirements by providing closed movie captioning and audio description upon request to all patrons who are deaf or hard of hearing, or blind or have low vision, unless doing so results in an undue burden or a fundamental alteration.

The requirements of this rule are in addition to a movie theater's current obligation to provide assistive listening systems and receivers pursuant to sections 219 and 706 of the 2010 ADA Standards for Accessible Design (2010 Standards).[2] Assistive listening receivers are effective for persons who are hard of hearing and who only require sound amplification. They do not, however, provide effective communication for individuals who are deaf or for individuals who are hard of hearing and for whom sound amplification is insufficient. Consequently, in order to achieve the goals and guarantees of the ADA and provide effective communication for such individuals, the Department is convinced that this rule is essential.

B. Major Provisions

The major provisions of this rule can be summarized as follows.

First, the requirements of this rule apply only to public accommodations that own, lease, or operate movie theaters with auditoriums that show movies produced in digital cinema format (digital movies). The Department is deferring to a later date the decision whether to engage in rulemaking addressing the application of the specific requirements of this rule for closed movie captioning and audio description to movie theater auditoriums that show movies exclusively in analog film format (analog movies).

Second, the rule requires that within 18 months of the date of publication of the final rule in the **Federal Register**, public accommodations that own, lease, or operate movie theaters must ensure that their movie theater auditoriums that exhibit digital movies produced or distributed with closed movie captions and audio description provide such features to patrons with hearing and vision disabilities at all showings. The rule does not require movie theaters to add captions or audio description for movies that are not produced or distributed with these features. Nor does the rule prohibit movie theaters from showing digital movies that are not produced with captioning or audio description or from choosing to show the analog version of a particular movie, even if that movie is also produced in digital format with captioning and audio description. The rule also specifies that movie theaters that convert from analog projection systems to digital cinema projection systems after the publication date of the rule in the **Federal Register** must comply with the requirements of the rule either 6 months from the date of conversion or 24 months from the publication date, whichever is later.

Third, the rule requires movie theaters to have a minimum number of fully operational captioning devices[3] and to provide them to patrons upon request. This requirement is based on the number of auditoriums at each movie theater that exhibit digital movies and is designed to ensure the availability of a sufficient number of devices for use at peak attendance times by individuals who are deaf or hard of hearing.

Fourth, the rule requires movie theaters to have a minimum number of fully operational audio description devices[4] and to provide them to patrons upon request. The rule permits movie theaters to use the assistive listening receivers that they are already required to provide to patrons pursuant to sections 219 and 706 of the 2010 Standards in lieu of dedicated audio description devices if those assistive listening receivers have a second channel available to deliver audio description.

Fifth, the rule permits public accommodations to meet their obligation to provide captioning and audio description in their movie theaters to persons with hearing and vision disabilities through the use of alternative technologies, including open movie captioning, so long as that technology provides communication as effective as that provided to movie patrons without disabilities.

Sixth, the rule requires movie theaters that exhibit digital movies to provide the public with notice as to the availability of captioning and audio description. This provision is necessary so that movie patrons who are deaf or hard of hearing, or blind or have low vision, can find out which movies are accessible to them.

Finally, the rule requires movie theaters that exhibit digital movies to have staff available who are able to operate and respond to problems with all equipment necessary to deliver captioning and audio description and to show patrons how to use the individual devices whenever digital movies with such features are shown.

As with other effective communication obligations under the ADA, public accommodations do not have to comply with these requirements to the extent that they constitute an undue burden or a fundamental alteration.

C. Costs and Benefits

In accordance with OMB Circular A–4, the Department has prepared a Final Regulatory Assessment (Final RA), which assesses the likely costs and benefits of the rule for all movie theaters subject to the rulemaking over the projected life of the rule (15 years). The Final RA captures the total costs of this rulemaking using a baseline, which represents the Department's best assessment of the current state of the movie exhibition industry, including the availability of closed movie captioning and audio description, if the rule were not implemented. The Department's Final RA projects that the total costs, benefits, or transfer payments[5] of this rule will not reach $100 million in any single year, and thus, the rule is not economically significant under Executive Order 12866.

For movie theaters with auditoriums exhibiting digital movies, total costs are composed of the following components:

- Acquisition costs for captioning hardware;
- Acquisition costs for audio description hardware;
- Acquisition costs for captioning devices;
- Acquisition costs for audio description devices;

[2] 28 CFR 36.104 (title III) (defining the ''2010 Standards'' as the requirements set forth in appendices B and D to 36 CFR part 1191 and in subpart D of 28 CFR part 36). The 2010 Standards are available at *http://www.ada.gov/2010ADAstandards_index.htm.*

[3] Section 36.303(g)(1)(iv) of this rule defines ''captioning device'' as ''the individual device that a patron may use at any seat to view closed movie captioning.''

[4] Section 36.303(g)(1)(iii) of this rule defines ''audio description device'' as ''the individual device that a patron may use at any seat to hear audio description.''

[5] Transfer payments are the distributional effects of a regulatory action that may arise through the transfer of resources from one group to another but do not impact the total value of resources available to society. *See* Office of Management and Budget, Circular No. A–4, *Regulatory Analysis* (Sept. 17, 2003), *available at http://www.whitehouse.gov/omb/circulars_a004_a-4/* (last visited Sept. 12, 2016).

- Installation costs for captioning and audio description equipment;
- Replacement costs for captioning and audio description equipment;
- Staff training costs for the provision of captioning and audio description equipment; and
- Maintenance and administrative costs.

Based on the Department's calculations, total costs to the movie exhibition industry to provide closed movie captioning and audio description in accordance with this final rule are estimated to be $88.5 million over 15 years when discounted by 7 percent, and $113.4 million over 15 years when discounted by 3 percent. This total costs estimate was calculated in the primary analysis of the Department's Final RA. The primary analysis analyzes the cost impact of the final rule by making assumptions about the available data, such as the current availability of closed movie captioning and audio description in movie theaters. The primary analysis represents the Department's best estimate of the total costs that movie theaters will incur as a result of this rulemaking given the available data. Unless otherwise stated, the Department refers to cost estimates developed in the primary analysis of the Final RA throughout this rule. See chapters 2 and 3 of the Final RA for a more detailed explanation of the primary analysis and the data and assumptions relied upon to develop the total costs estimate.

TOTAL COSTS BY COST CATEGORY IN PRIMARY ANALYSIS OVER 15 YEARS

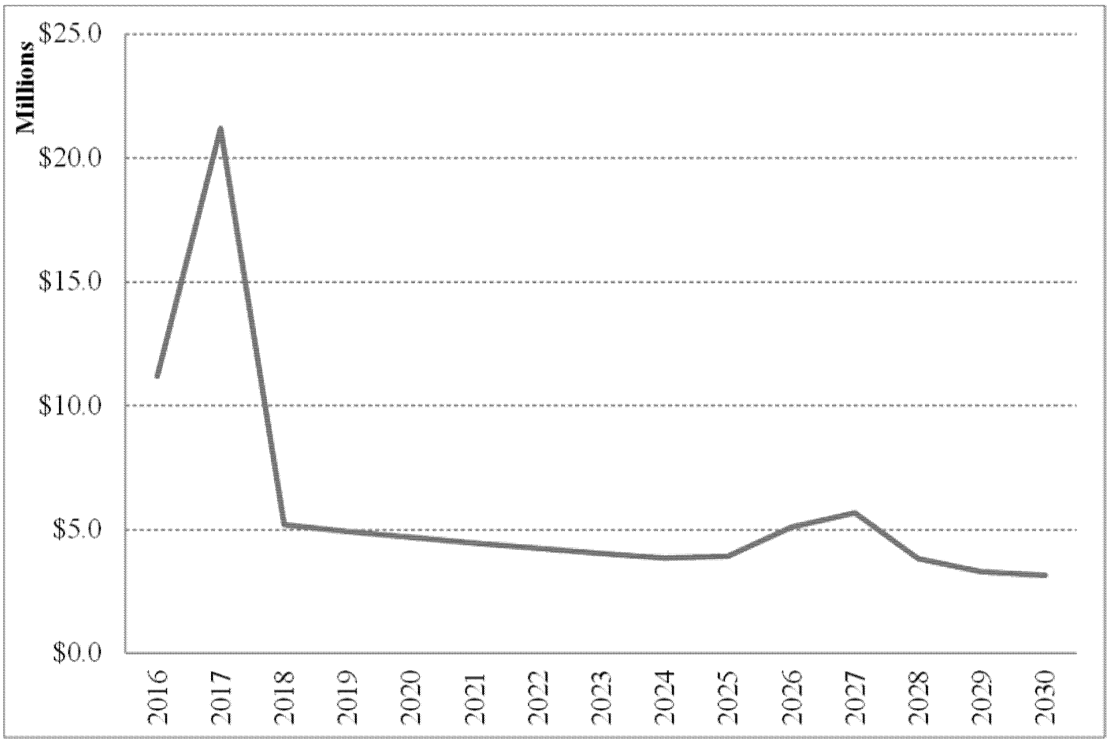
[$ millions]

Cost category	Primary analysis 7% discounted	Primary analysis 3% discounted
Captioning Hardware Acquisition Costs	$14.6	$17.2
Audio Hardware Acquisition Costs	0.5	0.5
Captioning Device Acquisition Costs	15.7	17.6
Audio Device Acquisition Costs	2.4	2.8
Installation Costs	1.0	1.1
Replacement Costs	36.1	49.9
Training Costs	9.9	13.1
Maintenance and Administrative Costs	8.2	11.1
Total Costs	88.5	113.4

*Totals may differ due to rounding.

The highest costs occur in the first 2 years of the analysis when movie theaters incur upfront costs for acquiring and installing the captioning and audio description equipment in accordance with the 18-month compliance date. The table below presents the annual costs to the movie exhibition industry over the 15-year analysis, and it should be noted that these annual costs are well below the $100 million mark that signifies an economically significant regulation under Executive Order 12866.

Annual Costs in Primary Analysis, Discounted at 7 percent ($ millions)



Movie theaters vary greatly by number of auditoriums, which significantly impacts overall costs per facility. Thus, the analysis breaks the movie exhibition industry into four venue types based on size: Megaplex movie theaters (16+ auditoriums), multiplex movie theaters (8–15 auditoriums), miniplex movie theaters (2–7 auditoriums), and single-auditorium movie theaters. The upfront costs per theater are calculated for the average movie theater within each venue type and presented in the table below. The largest cost per year for any single movie theater with auditoriums subject to the rulemaking would occur in the second year due to the upfront costs to acquire and install the necessary equipment by the 18-month compliance date. The average upfront costs for a megaplex movie theater are estimated to total $27,358, while the average upfront costs for a single-auditorium movie theater are estimated to total $3,562.

AVERAGE PER MOVIE THEATER UPFRONT COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, UNDISCOUNTED

[$]

Venue type	Captioning hardware acquisition	Audio description hardware acquisition	Captioning device acquisition	Audio description device acquisition	Installation costs	Total upfront costs
Megaplex	$16,158	$205	$8,728	$1,470	$797	$27,358
Multiplex	10,772	205	5,819	980	533	18,309
Miniplex	4,488	205	4,364	490	286	9,834
Single-Auditorium	1,097	308	1,864	190	104	3,562

* Totals may differ due to rounding.

The Final RA also estimates the annualized costs of the rule by venue type, as presented in the table below. With a 7-percent discount rate, the annualized costs of the $88.5 million in total costs over the 15-year period of analysis are $9.7 million. With a 3-percent discount rate, the annualized costs of the $113.4 million in total costs are $9.5 million.

ANNUALIZED COSTS BY VENUE TYPE IN PRIMARY ANALYSIS

[$ millions]

Venue type	Annualized costs 7% discounted	Annualized costs 3% discounted
Megaplex (16+ auditoriums)	$3.2	$3.1
Multiplex (8–15 auditoriums)	5.0	5.0
Miniplex (2–7 auditoriums)	1.0	0.9
Single-Auditorium	0.6	0.5
Total	9.7	9.5

* Totals may differ due rounding.

As part of this regulatory analysis and in accordance with the Regulatory Flexibility Act (5 U.S.C. 604), the Department has conducted a Final Regulatory Flexibility Analysis (FRFA) on the economic impact of this rule on small entities. The FRFA has been used by the Department to help determine whether small entities would be disproportionately burdened. In addition, the Department has used the FRFA to examine other ways, if possible, to accomplish the Department's goals while imposing fewer burdens on small entities. Based on its analysis, the Department has determined that this rule will have a significant economic impact on a substantial number of small entities in the movie exhibition industry. However, as described in further detail in section VI, *infra,* the Department has taken appropriate steps to reduce the economic impact of this rule while still meeting the Department's rulemaking objectives under the ADA.

The table below presents the average upfront costs as a percentage of annual revenue for firms categorized as small businesses according to the Small Business Association (SBA) size standard for the movie exhibition industry, which is $38.5 million in annual revenue. For all firms with revenue greater than $100,000,[6] the average upfront costs are less than 1.5 percent of average annual revenue. For all firms with revenues of $2,500,000 or greater, the average upfront costs are less than 1 percent of annual revenues.

[6] Although the FRFA calculates the upfront costs as a percent of annual revenue for the category of firms with less than $100,000 in annual revenue for transparency, most of these firms likely operate single-auditorium movie theaters that exhibit analog movies exclusively and are therefore not subject to the requirements of this rule. *See infra* section VI.D for further detail.

AVERAGE UPFRONT COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED

[2015 $]

Revenue category	Establishments per firm	Average upfront costs per establishment	Average upfront costs per firm	Average revenue per firm	Upfront costs as a percentage of revenue (%)
Less than $100,000	1.01	$3,562	$3,591	$54,508	6.6
$100,000 to $499,999	1.02	3,562	3,631	256,537	1.4
$500,000 to $999,999	1.06	9,834	10,456	714,762	1.5
$1,000,000 to $2,499,999	1.15	14,071	16,223	1,542,318	1.1
$2,500,000 to $4,999,999	1.51	20,987	31,732	3,394,864	0.9
$5,000,000 to $7,499,999	1.89	20,987	39,575	5,497,029	0.7
$7,500,000 to $9,999,999	2.58	20,987	54,124	7,697,211	0.7
$10,000,000 to $14,999,999	4.12	20,987	86,368	12,013,115	0.7
$15,000,000 to $19,999,999	4.56	20,987	95,606	14,200,444	0.7
$20,000,000 to $24,999,999	6.00	20,987	125,920	14,314,600	0.9
$25,000,000 to $29,999,999	11.00	20,987	230,853	22,734,000	1.0
$30,000,000 to $34,999,999	16.50	20,987	346,280	* n/a	* n/a
$35,000,000 to $39,999,999	8.00	20,987	167,893	27,514,000	0.6

* Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

The final rule, consistent with the ADA's mandate, explicitly addresses equity and fairness considerations. The Department believes that this regulation will benefit millions of Americans, including those with and without disabilities. Although these benefits are difficult to quantify, they are nonetheless significant. Foremost among the expected benefits from the regulation is the opportunity for a greater number of individuals who are deaf or hard of hearing, or blind or have low vision, to better understand what is being said and shown in digital movies exhibited at movie theaters so that they may fully and equally participate in the movie-going experience to the same extent as persons without these disabilities. In addition to the benefits to individuals with disabilities, individuals without disabilities—who will now be able to attend, enjoy, and discuss movies with their family and friends that have disabilities—will also benefit from this rule. For example, because of this rule, a parent without a disability can now attend the movies with a child who has a hearing or vision disability. The parent will now be able to share the movie-going experience with her child and discuss the film and experience with the child. Similarly, individuals without disabilities who are learning English as an additional language or may be working to improve their literacy skills may also benefit from the availability of closed movie captioning.

While many movie theaters do provide captioning and audio description to their patrons, many still do not provide these auxiliary aids and services at all or they do not provide them regularly, creating barriers for persons with disabilities to take part in the social and cultural movie-going experience. As a result, the Department is confident that the qualitative benefits of this rulemaking justify the associated costs.

II. The Movie Industry: Digital Movies and the Availability of Captioning and Audio Description

A. Transformation From Analog Films to Digital Movies

Digital technology has revolutionized the way movies are produced, delivered, and exhibited. For nearly 100 years, movie studios produced films exclusively in analog film format (analog movies), meaning that they were typically shot with 35 mm film, cut and spliced for editing, shipped to individual movie theaters on several large, heavy reels, and exhibited with a conventional reel-to-reel movie projector. All that changed at the beginning of the twenty-first century with the development of digital cinema technology and the commercial production of movies in digital cinema format (digital movies).[7]

Digital cinema captures images, data, and sound as a digital cinema ''package'' (DCP) that is stored on a hard drive or a flash drive. Digital movies are physically delivered on high resolution DVDs or removable or external hard drives, or can be transmitted to movie theaters' servers via Internet, fiber-optic, or satellite networks. Digital production, distribution, and exhibition have many advantages over analog film, including better and longer lasting image quality, availability of higher resolution images, significantly lower production and distribution costs, ease of distribution, availability of enhanced effects such as 3D, ease of exhibition of live events or performances, greater flexibility in arranging or increasing show times to accommodate unanticipated audience demand, and remote monitoring of projection. *See* Rajesh K, *Digital Cinema—Advantages and Limitations, excITingIP.com* (Oct. 2, 2009), *available at http://www.excitingip.com/611/advantages-limitations-digital-cinema/* (last visited Sept. 12, 2016).

The shift to digital cinema has led to a precipitous decline in the filming, distribution, and exhibition of analog movies, resulting in enormous uncertainty about the future of the analog film market. *See* Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many Movies,* New Republic (Sep. 12, 2014), *available at http://www.newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film* (last visited Sept. 12, 2016); *see also* John Belton, *If Film is Dead, What is Cinema?,* 55 Screen 460, 461–63 (2014), *available at http://english.rutgers.edu/docman/documents/104-screen-2014-belton-460-70-2/file.html* (last visited Sept. 12, 2016). In 2013, Fujifilm, one of the two major producers of movie film stock, announced it was ceasing production of movie film stock. In 2014, Kodak, the other major producer of movie film stock, after first announcing it would cease production of film stock,

[7] *Star Wars: Episode II—Attack of the Clones,* released in 2002, was the first major motion picture to be shot entirely on digital video. *See* Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many Movies,* New Republic (Sept. 12, 2014), *available at http://newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film* (last visited Sept. 12, 2016).

committed to produce only 449 million linear feet (as compared to the 12.4 billion linear feet it produced in 2006). *See* Michael Idato, *Quentin Tarantino, JJ Abrams Help Save Old-Fashioned Film Stock,* Sydney Morning Herald (July 31, 2014), *available at http://www.smh.com.au/entertainment/movies/quentin-tarantino-jj-abrams-help-save-oldfashioned-film-stock-20140731-zytlw.html* (last visited Sept. 12, 2016).

Some movie studios have also begun to release first-run movies exclusively in digital cinema format. For example, both Paramount Pictures and Twentieth Century Fox have completely stopped releasing movies in analog format. *See* Richard Verrier, *End of Film: Paramount First Studio to Stop Distributing Film Prints,* L.A. Times (Jan. 17, 2014), *available at http://articles.latimes.com/2014/jan/17/entertainment/la-et-ct-paramount-digital-20140117* (last visited Sept. 12, 2016); Matt Alderton, *Films Without Film,* Profile Magazine (2014), *available at http://profilemagazine.com/2014/twentieth-century-fox* (last visited Sept. 12, 2016). In its comment on the Department's 2014 Notice of Proposed Rulemaking, the National Association of Theater Owners (NATO) reported that several other movie studios plan to stop producing analog movies, and NATO expects independent production companies to follow suit.[8]

B. Digital Conversion of Movie Theater Auditoriums

To accommodate the motion picture industry's shift to the distribution of movies in digital format, movie theaters across the nation have rapidly transformed and have now nearly completed conversion of their auditoriums to digital projection systems. These systems consist primarily of a digital server and a digital projector and typically cost around $60,000 to $150,000 per auditorium. *See* Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many Movies,* New Republic (Sep. 12, 2014), *available at http://www.newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film* (last visited Sept. 12, 2016). This transition to digital projection systems has accelerated exponentially since 2008 when the Department first sought public comment about whether it should engage in rulemaking. At that time, the information provided to the Department through public comment indicated that only 5,000 of the 38,794 auditoriums[9] (13 percent) had been converted to digital. *See* Advance Notice of Proposed Rulemaking, Nondiscrimination of the Basis of Disability; Movie Captioning and Video Description, 75 FR 43467, 43473 (July 26, 2010). Based on data from July 2015 that NATO provided to the Department, the Department estimates that more than 98 percent of indoor movie auditoriums (or 38,688 auditoriums) in the United States have been converted to digital, leaving only approximately 650 indoor analog projection systems.[10]

As digital technology has advanced, the number of small movie theaters and those showing analog movies has also declined. From 2010 to 2014, single-auditorium movie theaters and those with up to seven auditoriums declined by approximately 25 percent while the number of movie theaters with eight or more auditoriums increased. *See* Motion Picture Association of America (MPAA), *Theatrical Market Statistics 2014,* at 25 (2014), *available at http://www.mpaa.org/wp-content/uploads/2015/03/MPAA-Theatrical-Market-Statistics-2014.pdf* (last visited Sept. 12, 2016). Moreover, the number of analog auditoriums declined by more than 92% during that same time period. *See id.* While small, independent movie theaters have been the slowest to convert to digital technology, the Department, consistent with industry projections, anticipates that the vast majority of the remaining analog movie theaters will either convert to digital projection systems, or be forced to close because of antiquated equipment and the decline in the availability of first-run movies in analog format. *See* Lyndsey Hewitt, *Local Theaters Face Tough Times as 35 mm Faces Extinction,* Williamsport Sun Gazette (July 11, 2013), *available at http://www.sungazette.com/page/content.detail/id/594504/Local-Theaters-Face-Tough-Times-as-35-mm-faces-extinction.html?nav=5016* (last visited Sept. 12, 2016); *see also* Colin Covert, *Final Reel Plays Amid Digital Conversion,* Star Tribune (Aug. 27, 2012), *available at http://www.startribune.com/final-reel-plays-amid-digital-conversion/167253335/* (last visited Sept. 12, 2016); Krista Langlois, *As Analog Film Grows Obsolete, Western Towns Struggle to Keep Theaters Afloat,* High Country News (Jan. 10, 2014), *available at http://www.hcn.org/blogs/goat/as-film-grows-obsolete-western-towns-struggle-to-keep-their-theaters-open* (last visited Sept. 12, 2016).

C. Availability of Captioning and Audio Description

Captioning makes movies accessible to individuals who are deaf or hard of hearing and who are unable to benefit from the sound amplification provided by movie theaters' assistive listening receivers. Currently, captioning is delivered to patrons in one of two formats: ''open'' and ''closed.'' ''Open'' movie captioning shows the movie dialogue and non-speech information in written form on or near the screen with the information visible to all patrons regardless of whether they need to view the captions. ''Closed'' movie captioning displays the movie's dialogue and non-speech information in written form on a captioning device, which is requested by the individual patron who wishes to view the captions.

The motion picture industry and the courts have consistently used the term ''closed captioning'' to refer to the provision of captions displayed on captioning devices at the patron's seat. In the television context, however, the term ''closed captioning'' has typically referred to captions that, when activated, are visible on the TV screen to all viewers. In this rule, in order to avoid confusion with the term used for captions provided in the television context (as well as in other contexts), the Department has chosen to use the terms ''closed movie captioning'' and ''open movie captioning'' to specifically refer to the captioning provided by movie theaters, except where quoting the legislative history of the ADA or specific court decisions.

Closed movie captioning first became available for analog movies in 1997 but was never available at many movie theaters.[11] The advent of digital cinema

[8] *See* National Association of Theater Owners, Statement of Position on RIN 1190–AA63, CRT Docket No. 126, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description 4, *available at http://www.regulations.gov/contentStreamer?documentId=DOJ-CRT-2014-0004-0401&attachmentNumber=4&disposition=attachment&contentType=pdf* (last visited Sept. 12, 2016). NATO is the largest association of motion picture theater owners in the world, and its members include the nation's ten largest movie theater companies as well as hundreds of smaller entities. Together, its member movie theaters operate 32,000 of the 40,000 movie theater auditoriums in the United States.

[9] Although the movie industry refers to ''auditoriums'' as ''screens'' throughout its commentary, the Department believes that ''auditoriums'' is more accurate. Therefore, the Department refers to ''auditoriums'' throughout this rule.

[10] The remaining venues showing movies using analog projection systems are found at drive-in movie theaters, which are not subject to the requirements of the final rule.

[11] There still is only one technology that provides closed movie captioning for analog movies. That technology, known as Rear Window Captioning,

Continued

spurred the development of voluntary standards to ensure that products that provide captioning would be compatible with the various digital cinema systems available for purchase and used by movie theaters. As a result, closed movie captioning became more widely available. *See* Michael Karagosian, *Update on Digital Cinema Support for Those with Disabilities: April 2013, available at http://www.mkpe.com/publications/d-cinema/misc/disabilities_update.php* (last visited Sept. 12, 2016).

There are currently two types of individual devices that are produced to deliver closed movie captioning for digital movies to patrons. These devices receive a transmission from a server via an infrared transmitter or Wi-Fi technology. One type of device utilizes a small, wireless screen attached to a flexible goose neck that can be placed in the cup holder at any movie theater seat and adjusted to display captions near or in a patron's line of vision when looking at the movie screen. Alternatively, special eyeglasses are available that a patron can wear that will exhibit the captions directly in front of the wearer's eyes while watching a movie.

Open movie captioning has sometimes been referred to as ''burned-in'' or ''hardcoded'' captions because in the early days of captioning they were burned in or incorporated into the analog film. Later advancements, however, enabled studios to superimpose the captions on the screen without making a burned-in copy or having to deliver a special version of the movie. Today, open movie captioning is available as a digital file that comes with the DCP. No additional equipment is required in order for a movie theater to display the open movie captions for a digital movie. The Department is aware that some movie theaters currently provide open movie captioning at certain limited showings but knows of no movie theater that routinely utilizes open movie captioning for all screenings.

Audio description, which also became available in 1997, enables individuals who are blind or have low vision to hear a spoken narration of a movie's key visual elements, including, but not limited to, the action, settings, facial expressions, costumes, and scene changes. It requires specially trained writers to create a separate script that is then recorded and synchronized with the movie, included on the audio channels in the DCP, and delivered from a server via infrared, FM, or Wi-Fi systems to wireless headsets that patrons wear at their seats.

Movie studios and distributors determine whether a motion picture is produced and distributed with captioning and audio description. In 1997, movie studios began to substantially increase the number of movies produced with captioning in response to the Federal Communications Commission's publication of regulations requiring programming shown on television (including movies) to be captioned. *See* 47 CFR 79.1. Additionally, the motion picture industry's transformation to digital cinema has made the delivery of captioning and audio description to movie theater patrons easier and less costly to provide. As early as 2010, the movie industry indicated its commitment to provide closed movie captioning and audio description for almost all movies released in digital format.[12] Although the Department does not have data on the exact percentage of digital movies currently produced with captioning and audio description, the Department's research indicates that movie studios and distributors regularly include these accessibility features in the DCP at no extra charge to movie theaters. Despite this availability, however, captioning and audio description are still not consistently made available at all movie theaters, or at all showings, to patrons who are deaf or hard of hearing, or blind or have low vision.

III. Movie Theaters' Legal Obligation To Provide Captioning and Audio Description

A. The ADA and Its Legislative History

The ADA, enacted in July 1990, is a comprehensive civil rights law that broadly prohibits discrimination on the basis of disability and seeks to guarantee that individuals with disabilities are provided the same rights, privileges, and opportunities as other members of the public. The ADA's mandate covers three broad, distinct areas: Employment (title I), public services (title II), and places of public accommodation (title III).

Title III prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. 12182(a). It specifically categorizes a movie theater (''motion picture house'') as a place of public accommodation. 42 U.S.C. 12181(7)(C). Under title III, public accommodations such as movie theaters are barred from affording an unequal or lesser service to individuals or classes of persons with disabilities than is offered to other persons. 42 U.S.C. 12182(b)(1)(A)(ii). Public accommodations must also ''take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services'' unless doing so ''would fundamentally alter the nature'' of the service, or ''result in an undue burden.'' 42 U.S.C. 12182(b)(2)(A)(iii). The statute specifies that auxiliary aids and services include effective methods of making aurally or visually delivered materials available to individuals with hearing disabilities or vision disabilities, respectively, and expressly covers ''taped texts.'' 42 U.S.C. 12103(1)(A)–(B).

While the ADA's text does not refer to movie captioning, the legislative history does. The congressional House and Senate committee reports accompanying the legislation noted that ''[o]pen captioning * * * of feature films playing in movie theaters * * * is not required'' by the ADA. H.R. Rep. No. 101–485, pt. 2, at 108 (1990); S. Rep. No. 101–116, at 64 (1989). At that time, the only way to create open movie captioning was to make a separate print of the movie and then laser-etch, or ''burn,'' the captions onto that separate print.[13] The House and Senate committees nonetheless endorsed open captioning as a means to provide individuals who are deaf or hard of hearing equal access to the movies, stating that ''[f]ilmmakers are, however, encouraged to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some preannounced screenings of a captioned version of feature films.'' S. Rep. No. 101–116, at 64; *see also* H.R. Rep. No. 101–485, pt. 2, at 108.

The House committee report also emphasized that the types of accommodations and services provided to individuals with disabilities ''should keep pace with the rapidly changing

does not require a separate copy of the film, and works using a movie theater's digital sound system. Captions are sent to a light-emitting display at the rear of an auditorium that then reflects and superimposes the captions onto a panel mounted at or near a patron's seat so that the captions appear close to the movie image.

[12] The MPAA announced in its comment on the 2010 Advance Notice of Proposed Rulemaking that almost all new movies released in digital format will include closed movie captioning and audio description. See 2014 NPRM, 79 FR 44976, 44989 (Aug. 1, 2014), for a more detailed discussion of the MPAA's comments on the 2010 ANPRM.

[13] Limited copies of the open-captioned version were made and given to only some movie theaters and then only after the uncaptioned version had already been distributed.

technology of the times.'' H.R. Rep. No. 101–485, pt. 2, at 108. It explained that ''technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities'' and ''[s]uch advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required.'' *Id.*

Neither closed movie captioning nor audio description existed when the ADA was enacted. Both, however, fall within the type of auxiliary aid contemplated by the statute. Given the current availability of digital movies with closed movie captioning and audio description, as well as the individual devices to provide those accessibility features to movie patrons who are deaf or hard of hearing, or blind or have low vision, the Department believes that a rule requiring movie theaters to offer closed movie captioning and audio description for digital movies fits comfortably within the meaning of the ADA's mandate.

B. Title III's Implementing Regulation

Title III's implementing regulation reiterates the statute's requirements and spells out in detail a public accommodation's obligation to furnish auxiliary aids and services to individuals with disabilities. 28 CFR 36.303(c)(1). The regulation's list of examples of ''auxiliary aids and services'' that public accommodations should provide includes ''open and closed captioning'' as examples of effective methods of making aurally delivered information available to individuals with hearing disabilities and ''audio recordings'' as an example of an effective method of making visually delivered materials available to individuals with vision disabilities. 28 CFR 36.303(b)(1)–(2). The Department updated this list in 2010 to reflect changes in technology and the auxiliary aids and services commonly used by individuals who are deaf or hard of hearing, or blind or have low vision. 75 FR 56236, 56253–54 (Sept. 15, 2010).

The title III regulation states that a public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that providing such aids and services would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden. 28 CFR 36.303(a). The overarching obligation imposed by the auxiliary aids and services requirement is that a public accommodation must furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. 28 CFR 36.303(c)(1). The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. 28 CFR 36.303(c)(1)(ii). Moreover, in order to be effective, auxiliary aids and services must be provided in accessible formats and in a timely manner. *Id.* For individuals who are deaf or hard of hearing and who are unable to effectively use the assistive listening receivers currently provided in movie theaters to amplify sound, the only auxiliary aid presently available that would effectively communicate the dialogue and sounds in a movie is captioning. Likewise, for individuals who are blind or who have low vision, the only auxiliary aid presently available that would effectively communicate the visual components of a movie is audio description.

As stated above, a public accommodation is relieved of its obligation to provide a particular auxiliary aid if to do so would result in an undue burden or a fundamental alteration. To that end, the Department's title III regulation specifically defines undue burden as ''significant difficulty or expense'' and, emphasizing the flexible and individualized nature of any such determination, lists five factors that must be considered when determining whether an action would result in an undue burden. 28 CFR 36.104.[14] The undue burden determination entails a fact-specific examination of the cost of a specific action and the specific circumstances of a particular public accommodation. This compliance limitation is intended to ensure that the needs of small businesses, as well as large businesses, are addressed and protected. The Department defines a fundamental alteration as a ''modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.'' U.S. Department of Justice, *Americans with Disabilities Act ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* III–4.3600 (1993), *available at http://www.ada.gov/taman3.html.*

The current section 36.303(g) (renumbered as 36.303(h) in this final rule) provides that if the provision of a particular auxiliary aid or service by a public accommodation would result in an undue burden or a fundamental alteration, the public accommodation is not relieved of its obligation to provide auxiliary aids and services. The public accommodation is still required to provide an alternative auxiliary aid or service, if one exists, that would not result in such a burden or alteration but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods and services offered by the public accommodation.

It has been, and continues to be, the Department's position that it would not be a fundamental alteration of the business of showing movies in theaters to exhibit movies already distributed with closed movie captioning and audio description in order to ensure effective communication for individuals who are deaf or hard of hearing, or blind or have low vision. The service that movie theaters provide is the screening or exhibiting of movies. The use of captioning and audio description to make that service available to those who are deaf or hard of hearing, or blind or have low vision, does not change that service. Rather, the provision of such auxiliary aids is the means by which these individuals gain access to movie theaters' services and thereby achieve the ''full and equal enjoyment,'' 42 U.S.C. 12182(a), of the screening of movies. *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 15–17, *Arizona ex rel. Goddard* v. *Harkins Amusement Enters., Inc.,* 603 F.3d 666 (9th Cir. 2010) (No. 08–16075); *see also* 2014 NPRM, 79 FR 44976, 44982–83 (Aug. 1, 2014).[15]

[14] These factors include: (1) The nature and cost of the action; (2) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question, to any parent corporation or entity; (4) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; and the number, type, and location of its facilities; and (5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

[15] The Department received no public comments challenging that position.

C. Federal Appellate Case Law

The Ninth Circuit is the only Federal court of appeals to address the question whether the ADA requires movie theaters to provide captioning and audio description to patrons who are deaf or hard of hearing, or blind or have low vision. *See Arizona ex rel. Goddard* v. *Harkins Amusement Enters., Inc.,* 603 F.3d 666 (9th Cir. 2010). In *Harkins,* the Ninth Circuit reversed a district court decision dismissing a complaint for failure to state a claim and held that ''closed captioning'' and audio description are ''auxiliary aids and services'' that the ADA may require movie theaters to provide. *Id.* at 668, 675. Evaluating the statute's language, implementing regulation, and case law, the *Harkins* court reasoned that because a public accommodation has a duty to provide auxiliary aids and services, including ''closed captioning'' and audio description, a movie theater unlawfully discriminates when it fails to offer ''closed captioning'' and audio description to persons who have difficulty hearing or seeing, absent proof that those features would fundamentally alter the nature of the theater's services or constitute an undue burden. *Id.* at 675.

IV. Rulemaking History Regarding Captioning and Audio Description

A. Prior to 2010

On September 30, 2004, the Department published an Advance Notice of Proposed Rulemaking announcing its intention to update the 1991 title II and title III ADA regulations and to adopt revised ADA Accessibility Standards. 69 FR 58768 (Sept. 30, 2004) (2004 ANPRM). While the 2004 ANPRM did not mention movie captioning or audio description, several commenters suggested that the Department issue a rule regulating these features. Subsequently, when the Department issued a Notice of Proposed Rulemaking in June 2008, 73 FR 34508 (June 17, 2008) (2008 NPRM), proposing comprehensive updates to the title III regulation relating to nondiscrimination on the basis of disability by public accommodations and commercial facilities, the Department announced that it was considering rulemaking that would require movie theaters to provide captioning and audio description for patrons who are deaf or hard of hearing, or who are blind or have low vision. 73 FR at 34530–31.

The 2008 NPRM did not propose any specific regulatory language addressing captioning and audio description. Rather, the Department emphasized that movie theaters should be left with the discretion to select the appropriate technology should captioning and audio description be required for patrons with hearing and vision disabilities. Nonetheless, the Department inquired whether it should require movie theaters to exhibit all new movies with captioning and audio description at every showing or offer those features on a limited basis.

Most of the commenters on the 2008 NPRM who addressed the issue of captioning and audio description recommended that the Department issue regulations requiring movie theaters to provide both features at all showings unless doing so would result in an undue burden or a fundamental alteration. These commenters urged the Department to act promptly and not await completion of movie theaters' ongoing conversion to digital cinema because the technology for captioning and audio description had been available for approximately ten years and few movie theaters provided either feature to their patrons. Commenters affiliated with the movie industry opposed the Department requiring movie theaters to offer captioning or audio description and claimed that the cost of the necessary equipment would constitute an undue burden. They also maintained that if the Department decided to issue a rule, the effective date should be delayed until movie theaters completed their conversion to digital cinema. See Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 FR 43467 (July 26, 2010), for a more detailed discussion of comments on the 2008 NPRM.

B. The 2010 Advance Notice of Proposed Rulemaking on Captioning and Video Description

In 2010, uncertain about the status of digital conversion, the availability of captioning and audio description technology, and financial setbacks to many public accommodations due to the downturn in the economy over the ensuing 2 years, the Department published the Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 FR 43467 (July 26, 2010) (2010 ANPRM), specifically addressing ''closed [movie] captioning'' and ''video description.'' [16] The Department sought comments in response to 26 questions falling into six categories: Coverage of any proposed rule; transition to digital cinema; equipment and technology for both analog and digital movies; notice; training; and cost and benefits of captioning and audio description. While the Department did not propose specific regulatory language, it noted that it was considering a rule that would require 50 percent of movie theater screens (auditoriums) [17] to offer captioning and audio description over a 5-year period and specifically sought comment on that approach. 75 FR at 43474.

The Department received over 1150 comments on the 2010 ANPRM. Almost all commenters favored a rule that required movie theaters to provide captioning and audio description, and the vast majority recommended that these features be required at all movie showings. Although industry commenters recommended that compliance be phased in over a 5-year schedule with 20 percent compliance each year, most commenters recommended that the requirement be implemented immediately.

C. The 2014 Notice of Proposed Rulemaking on Movie Captioning and Audio Description

After considering all of the comments on the 2010 ANPRM and the rapid rate at which movie theaters were converting from analog to digital projection systems, the Department published a Notice of Proposed Rulemaking on August 1, 2014, entitled Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description, 79 FR 44976 (Aug. 1, 2014) (2014 NPRM). In the 2014 NPRM, the Department proposed that movie theaters be required to provide captioning and audio description at all scheduled showings of any movie that is produced or otherwise distributed with such features. 79 FR at 44977. The Department also proposed that each movie theater have available a certain number of captioning devices based on the number of seats in the movie theater and have available a certain number of audio description devices based on the number of screens (auditoriums) in the theater. 79 FR 44976. The Department further proposed that movie theaters

[16] The 2010 ANPRM used the term ''video description'' to refer to the provision of descriptive information about a movie to persons who are blind or have low vision. As discussed in this rule, the Department is now using the term ''audio description.''

[17] In the 2010 ANPRM, the Department used the term ''screens'' to describe the movie theater facilities that needed to be capable of providing captioning and audio description, but the Department has replaced the term ''screens'' with the term ''auditoriums'' in the final rule. Although the terms are synonymous in the movie theater context, the Department believes that ''auditoriums'' is more accurate.

provide notice of the availability of captioning and audio description as well as ensure that knowledgeable staff are available to operate the equipment and assist patrons in the use of the captioning and audio description devices. 79 FR 44976–77. The Department sought public comment in response to 21 multi-part questions addressing a variety of areas, including the state of the movie industry; the proposed definitions and the nomenclature to be adopted; the compliance date; the basis for determining the number of devices required at each theater; the alternatives for analog as well as small theaters; and the Department's methodology for estimating the costs and benefits of the rule.

The Department received 436 comments from a range of stakeholders, including individuals, both with and without disabilities, advocacy groups representing individuals with disabilities, State and Federal entities, movie industry representatives, private companies, and other organizations. The Department received a joint comment submitted by the National Association of Theater Owners in conjunction with the Alexander Graham Bell Association for the Deaf and Hard of Hearing, the Association of Late Deafened Adults, the Hearing Loss Association of America, and the National Association of the Deaf (Joint Comment), which included a variety of specific recommendations.[18] In addition, the Department participated in a roundtable sponsored by the Office of Advocacy of the Small Business Administration at which organizations representing small movie theaters as well as individual owners expressed their views.

Overall, the commenters supported the Department's stated purpose for proposing the rule. Individuals and industry representatives alike recognized that captioning and audio description in movie theaters is necessary in order to provide equal access to individuals with hearing and vision disabilities. Nearly all commenters disagreed, however, with the Department's basis for determining the number of devices required at each movie theater, including the number of captioning devices required. Most commenters also objected to the Department's proposed 6-month compliance date.

[18] The specific recommendations proposed in the Joint Comment and all other comments are addressed in the Section-by-Section Analysis.

D. Need for Regulatory Action

1. Movies in American Culture

Going to the movies is a quintessential American experience. ''Movie theaters continue to draw more people than all theme parks and major U.S. sports combined.'' MPAA, *Theatrical Market Statistics 2014,* at 10 (Mar. 2015), *available at http://www.mpaa.org/wp-content/uploads/2015/03/MPAA-Theatrical-Market-Statistics-2014.pdf* (last visited Sept. 12, 2016). In addition, going to the movies is an important part of the American family experience. Long holiday weekends offer the movie industry some of its biggest box office sales as families gather for the holidays and attend the movies together.

It has long been recognized that movies are undoubtedly a part of our shared cultural experience and the subject of ''water cooler'' talk and lunch-time conversations. More than half a century ago, the Supreme Court observed that motion pictures ''are a significant medium for the communication of ideas,'' and their ''importance * * * as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.'' *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501 (1952). The Court emphasized that motion pictures ''may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.'' *Id.* When individuals who are deaf or hard of hearing, or blind or have low vision, have the opportunity to attend and actually understand movies with the aid of captioning or audio description, they are exposed to new ideas and gain knowledge that not only contributes to their development, communication, and literacy, but more fundamentally, integrates them into society.

In response to the 2014 NPRM, commenters with hearing and vision disabilities consistently reported that they were unable to take part in the movie-going experience because of the unavailability of captioning or audio description at their local movie theaters. Many individuals stated that the lack of these accessibility features not only affected their ability to socialize and fully take part in group or family outings, but also deprived them of the opportunity to meaningfully engage in the discourse relating to current movie releases.

2. Movie Patrons With Hearing and Vision Disabilities

Individuals with hearing and vision disabilities represent a significant portion of the American population. According to the 2010 Census, 7.6 million Americans ages 15 and older reported that they experience a hearing difficulty (defined as experiencing deafness or having difficulty hearing a normal conversation, even when wearing a hearing aid). Of those individuals, 1.1 million reported having a severe difficulty hearing. Census data also reflects that 8.1 million Americans ages 15 and older reported having some difficulty seeing (defined as experiencing blindness or having difficulty seeing words or letters in ordinary newsprint even when normally wearing glasses or contact lenses). Of those individuals, 2.0 million reported that they were blind or unable to see. *See* U.S. Census Bureau, U.S. Department of Commerce, P70–131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), *available at http://www.census.gov/prod/2012pubs/p70-131.pdf* (last visited Sept. 12, 2016).

Hearing and vision loss are highly correlated with aging. Census data indicates that for people aged 65 or older, 4.2 million have difficulty hearing and 3.8 million reported having difficulty seeing. *Id.* As the nation's population ages, the number of individuals with hearing or vision loss will increase significantly.[19] Research indicates that the number of Americans with hearing loss has doubled during the past 30 years. *See* American Speech-Language-Hearing Association, *The Prevalence and Incidence of Hearing Loss in Adults, available at http://www.asha.org/public/hearing/disorders/prevalence_adults.htm* (last visited Sept. 12, 2016). Similarly, experts predict that by 2030 rates of severe vision loss will double in correspondence with the country's aging population. *See* American Foundation for the Blind, *Aging and Vision Loss Fact Sheet, available at http://www.afb.org/section.aspx?FolderID=3&SectionID=44&TopicID=252&DocumentID=3374* (last visited Sept. 12, 2016). These increases

[19] The percentage of Americans approaching middle age or older is increasing. The 2010 Census reported that from 2000 to 2010, the percentage of adults aged 45 to 64 years increased by 31.5 percent while the population aged 65 and over grew at a rate of 15.1 percent. By contrast, the population of adults between 18 and 44 grew by only 0.6 percent. U.S. Census Bureau, U.S. Department of Commerce, C2010BR–03, *Age and Sex Composition: 2010,* at 2 (2011), *available at www.census.gov/prod/cen2010/briefs/c2010br-03.pdf* (last visited Sept. 12, 2016).

will likely lead to corresponding increases in the number of people who will need captioning or audio description. While not all of these individuals will necessarily take advantage of the captioning and audio description that will be provided under this rule, a significant portion of the population could directly benefit from their availability (*see infra* section V.A.4 for a more detailed discussion of the population eligible to receive benefits).

Several commenters on the 2014 NPRM objected to the Department's reliance on Census data and argued that such reliance caused the Department to overstate the number of persons with hearing and vision disabilities who will actually use the captioning and audio description devices required by this rule. Others from the deaf, hard of hearing, blind, and low vision communities asserted that the number of individuals who experience hearing and vision disabilities is actually much higher than reported in the most current Census.[20] According to these comments, individuals who have recently developed hearing or vision disabilities fail to define themselves as such for purposes of the formal U.S. Census process. However, none of these commenters provided data sources concerning the number of persons who are deaf, hard of hearing, blind, or have low vision, that are as comprehensive as the Census data. Thus, the Department continues to rely on Census data and believes it to be the most accurate available information regarding the number of persons in the population with these disabilities.

While the Department recognizes that it is unlikely that persons with hearing and vision disabilities attend the movies with greater regularity than do persons without disabilities, some individuals with hearing and vision disabilities undoubtedly do not go to movies because the absence of captioning and audio description makes it impossible for them to understand what is happening. The Department also notes that many people with hearing loss are unable to use the assistive listening receivers that the ADA currently requires movie theaters to provide because these devices only provide sound amplification, and, for such individuals, amplification is insufficient to effectively communicate the dialogue and sounds taking place in the movie.[21]

3. Voluntary Compliance

Some movie industry commenters asserted that because many movie theater companies already provide captioning and audio description, the Department should refrain from regulating in this area and continue to rely on ''voluntary compliance'' by the movie theaters. However, individuals with hearing and vision disabilities and other commenters noted that despite the fact that captioning and audio description have been available for more than a decade and those features are widely available to movie theaters at no additional charge, many movie theaters still only show movies with captioning and audio description at intermittent times, and some movie theaters do not offer these services at all.

The Department recognizes that since the publication of its 2010 ANPRM (*see supra* section IV.B) the number of movie theaters that are showing movies with closed movie captioning and audio description, as well as their regularity in offering those features, has increased significantly. This described increase is attributable in large part to settlements of Federal or State disability rights lawsuits brought by private plaintiffs or State attorneys general against individual movie theater companies in particular jurisdictions within the United States.[22] Commenters advised the Department that despite the increase in the availability of captioning and audio description in many parts of the country, these features are still not consistently available at all movie theaters.

The Department believes that access to movie theaters for persons who are deaf or hard of hearing, or blind or have low vision, should not depend upon where they live.[23] The Department believes it is in the interest of both the movie theater industry and persons with disabilities to have consistent requirements for captioning and audio description throughout the United States and that this is best accomplished through revising the ADA's title III regulation. As commenters noted, a consistent, nationally applicable regulation ensures that individuals with hearing and vision disabilities can go to the movies with confidence knowing that their movie theater offers these services. The Department is persuaded that it should move forward with this regulation so that the current and ever-increasing number of individuals with hearing and vision disabilities who are unable to enjoy the services offered by movie theaters are afforded equal access to this facet of American life.

V. Regulatory Process Matters

A. Executive Orders 12866 and 13563—Summary of Regulatory Assessment

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is

[20] For example, a Johns Hopkins University epidemiological study conducted by Frank Lin, M.D., Ph.D., which is believed to articulate the first nationally representative estimate of hearing loss, estimates that approximately 48 million Americans have hearing loss in at least one ear, and approximately 30 million Americans have hearing loss in both ears. ''Hearing loss'' was defined as not being able to hear sounds of 25 decibels or less in speech frequencies. *See* News Release, Johns Hopkins Medicine, *One in Five Americans Has Hearing Loss* (Nov. 14, 2011), *available at http://www.hopkinsmedicine.org/news/media/releases/one_in_five_americans_has_hearing_loss* (last visited Sept. 12, 2016).

[21] ''While we tend to think that the only factor in hearing loss is loudness, there are actually two factors involved: loudness and clarity. Loss generally occurs first in the high pitch, quiet range. A mild loss can cause one to miss 25–40% of speech, depending on the noise level of the surroundings and distance from the speaker. When there is background noise it becomes difficult to hear well, the speech may be audible but may not be understandable.'' Self Help for Hard of Hearing People of Oregon, *Facing the Challenge: A Survivor's Manual for Hard of Hearing People* (revised 4th ed. Spring 2011), *available at http://www.hearinglossky.org/hlasurvival1.html* (last visited Sept. 12, 2016).

[22] *See, e.g.,* Press Release, Illinois Attorney General, *Madigan Announces Settlement with AMC Theatres* (Apr. 4, 2012), *available at http://illinoisattorneygeneral.gov/pressroom/2012_04/20120404.html* (last visited Sept. 12, 2016) (settlement providing for captioning and audio description technology in all AMC theaters in the State of Illinois); *Wash. State Commc'n Access Project* v. *Regal Cinemas, Inc.,* 293 P.3d 413 (Wash. Ct. App. 2013) (upholding trial court decision under Washington Law Against Discrimination requiring six movie theater chains to provide captioning in the screening of movies in order to accommodate persons who are deaf or hard of hearing); Consent Decree, *Arizona ex rel.* v. *Harkins Amusement Enters., Inc.,* No. CV07–703 PHX ROS (D. Ariz. Nov. 7, 2011); Complaint, *Ass'n of Late-Deafened Adults, Inc.* v. *Cinemark Holdings, Inc.,* No. 10548765 (Cal. Super. Ct. Nov. 30, 2010) (complaint relating to later settlement requiring Cinemark to provide closed movie captioning in all of its California theaters); Press Release, Cinemark Holdings, Inc., *Cinemark and ALDA Announce Greater Movie Theatre Accessibility for Customers Who Are Deaf or Hard-of-Hearing* (Apr. 26, 2011), *available at http://www.cinemark.com/pressreleasedetail.aspx?node_id=22850* (last visited Sept. 12, 2016).

[23] It is the Department's understanding that persons who live in communities served only by smaller regional movie theater chains are less likely to have access to captioned and audio-described movies than individuals with disabilities who live in California, Arizona, or any of the major cities with movie theaters operated by Regal, Cinemark, or AMC. The Department bases this belief on its review of the information provided by Captionfish, which is a nationwide search engine that monitors which movie theaters offer both closed and open movie captioning and audio description and updates its Web site regularly. *See* Captionfish, Frequently Asked Questions, *http://www.captionfish.com/faq* (last visited Sept. 12, 2016). The Department also bases this belief on information from comments that accessibility is scarce outside of major metropolitan areas. Advocacy groups commented that they consistently receive complaints from individuals with hearing and vision disabilities who are denied equal access at movie theaters operated by companies not subject to the various settlement agreements.

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. The Department has assessed the costs and benefits of this final rule and believes that the rule's benefits justify its costs, and that the regulatory approach selected maximizes net benefits.

In keeping with Executive Order 12866, the Department has evaluated this rule to assess whether it would likely ''[h]ave an annual effect on the economy of $100 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, or tribal governments or communities.'' E.O. 12866, § 3(f)(1). The Department's Final RA shows that this regulation does not represent an economically ''significant'' regulatory action within the meaning of Executive Order 12866.

The Department's full Final RA can be found on the Department's Web site at *http://www.ada.gov*. The Department refers to sections of the Final RA throughout.

1. Purpose and Need for Rule and Scope of Regulatory Assessment

As described in greater detail in section III, *supra,* and section 1.1 of the Final RA, public accommodations that own, lease, or operate movie theaters have an existing obligation to provide effective communication to persons with disabilities through the use of auxiliary aids and services. This rule provides greater specificity as to how these effective communication obligations are met when showing digital movies that are produced, distributed, or otherwise made available with captioning and audio description.

While there has been an increase in the number of movie theaters exhibiting movies with closed movie captioning (and, to a lesser extent, audio description) due in large part to successful disability rights litigation brought by private plaintiffs and State attorneys general during the past few years, the availability of movies exhibited with closed movie captioning and audio description varies significantly across the U.S. depending upon locality and movie theater ownership. The ADA requirements for effective communication apply to all public accommodations (including movie theaters) in every jurisdiction in the U.S. and should be consistently applied using a uniform ADA standard. The right to access movies exhibited with closed movie captioning and audio description should not depend on whether the person with a disability resides in a jurisdiction where movie theaters subject to a consent decree or settlement exhibit movies with closed movie captioning or audio description. And, even in jurisdictions where theaters exhibit movies with captioning and audio description, many do not make captioning and audio description available at all movie showings. Thus, some persons who are deaf or hard of hearing, or blind or have low vision, still cannot fully take part in movie-going outings with family or friends, join in social conversations about recent movie releases, or otherwise participate in a meaningful way in an important aspect of American culture.

The Department is convinced that regulation is warranted at this time in order to achieve the goals and promise of the ADA. Through this rule, the Department is explicitly requiring movie theaters to exhibit digital movies with closed movie captioning and audio description at all times and for all showings whenever movies are produced, distributed, or otherwise made available with such features unless to do so would result in an undue burden or a fundamental alteration.

The purpose of the Final RA is to capture the *incremental* costs of the rulemaking. As a result, the Final RA only includes the costs that movie theaters will incur as a direct result of this rulemaking. It is the Department's position that movie theaters that have already acquired the necessary equipment prior to the rulemaking have done so consistent with their longstanding obligation to provide effective communication as public accommodations, and as a result, the costs associated with providing closed movie captioning and audio description in such auditoriums cannot be directly attributed to this rulemaking. The analysis also assumes that movie theaters with auditoriums currently equipped to provide closed movie captioning and audio description would also operate and maintain this equipment in the absence of this rule. Therefore, these costs are not included in the Final RA's total costs estimation unless specifically noted.

2. Public Comments on the Initial Regulatory Assessment and Department Responses

This section discusses comments on the Initial Regulatory Assessment dated July 11, 2014 (Initial RA), provided in support of the 2014 NPRM. The Department received 436 comments during the 2014 NPRM comment period from a variety of stakeholders, including movie industry representatives, individuals with disabilities, advocacy groups representing individuals with disabilities, State and Federal entities, academic organizations, private companies, and other private individuals. Many of these comments directly addressed the assumptions, data, or methodology used in the Initial RA.

The Guidance and Section-by-Section Analysis, Appendix F, *infra,* is the primary forum for substantive responses to the comments addressing the proposed regulation generally. A summary and discussion of comments as they relate to small entities can be found below in section VI.B.

General Comments Regarding the Initial RA's Cost Estimation

The Department reviewed a number of comments suggesting that the Department underestimated the costs of complying with this rule. Commenters disagreed with a variety of cost estimates provided in the Initial RA. As a threshold matter, the Department agrees that in some instances, the estimates provided did not accurately capture a particular cost of compliance. For example, after reviewing the public comments, the Department determined that the staff training costs estimated in the Initial RA did not adequately capture the costs to comply with the operational requirements of the rule, and the equipment unit costs used in the Initial RA did not represent the most current market price of the available equipment. As a result, the Department has updated these estimates in response to the public comments received. However, the Department is confident that other estimates were reasonable and remain supported by the Department's independent research. In consideration of all comments, the Department has made adjustments where appropriate. The comments at issue and related comments are specifically addressed below.

Comments Regarding the Cost of Captioning and Audio Description Equipment

In the Initial RA, the Department estimated the costs of compliance with

the proposed rule by estimating the number of hardware units and device units the average movie theater within each venue type[24] would need in order to comply with the scoping requirements, which determine the number of captioning devices and audio description devices a movie theater is required to have and maintain. Because the proposed scoping for captioning devices was based on the number of seats within a movie theater, the Department estimated the average seat count across each venue type. The Department also estimated the average number of auditoriums across each venue type to estimate the number of audio description devices and hardware units needed. One commenter noted that the Department's estimates regarding the number of seats and auditoriums were too low, especially for single-auditorium and miniplex movie theaters. Because of this underestimation, the commenter believed that small movie theater establishments would be required to purchase many more captioning devices than the Department assumed in its cost analysis. Based on industry survey information provided by the National Association of Theater Owners (NATO) in its individual comment, the Department has updated the Final RA cost estimation to reflect new data regarding average auditorium counts across venue types. Data concerning average seat count is no longer relevant because the final rule's scoping for captioning devices is based on the number of auditoriums, rather than the number of seats, within a movie theater. See section 3.3 of the Final RA for a more detailed discussion of the scoping requirements of this rulemaking and their impact on the Final RA.

The Department also received multiple comments concerning the unit costs for the hardware and individual devices as well as the Department's methodology regarding these estimates. NATO provided the most recent unit cost data for all captioning and audio description equipment currently available on the market, and the Department has updated its cost estimates in the Final RA to reflect this updated information. See section 3.4 of the Final RA for a more detailed discussion of the captioning and audio description unit costs and their impact on the Final RA.

In the Initial RA, the Department estimated the upfront costs for the captioning and audio description equipment by averaging the hardware and device unit costs of some equipment available on the market. One commenter stated that the Department's methodology concerning the average hardware and device unit costs for captioning and audio description equipment was insufficient because it only averaged the costs of the less expensive equipment. According to the commenter, many movie theaters purchase the more expensive captioning glasses offered by Sony to satisfy audience demand, and as a result, the Initial RA substantially underestimated the cost of compliance by excluding the cost of Sony's equipment from the average cost estimates. A second commenter pointed out that the intent of the RA is to estimate the minimum cost of compliance, indicating that the Department's methodology and estimate regarding the upfront costs were reasonable.

Executive Order 12866 requires the Department to estimate the costs that movie theaters will incur as a result of this rulemaking. Currently, there is more than one manufacturer of the equipment necessary to provide captioning and audio description, and the cost for the equipment varies among the manufacturers. The Department has not specified the manufacturer from which movie theaters must purchase the equipment, and movie theaters retain the discretion to purchase the equipment of their choice. As a result, the Department has included the cost for all available equipment, including the Sony equipment, in its estimate of the captioning and audio description equipment unit costs for miniplex, multiplex, and megaplex movie theaters. The Department has not added the cost of the Sony equipment to its estimate of hardware and device unit costs for single-auditorium movie theaters because the Department remains convinced that small movie theater establishments are highly unlikely to purchase the more expensive equipment. As the Department's independent research indicates, the less expensive cup holder captioning devices account for the largest percentage of the captioning device market share, and NATO advised the Department that few movie theaters outside of the top movie theater chains actually use Sony's captioning glasses. Therefore, while other large movie theater establishments may choose to use Sony's technology, the Department has excluded this equipment from its estimate of the upfront costs for single-auditorium movie theaters. See section 3.4 of the Final RA for a more detailed discussion of Sony equipment unit costs and their impact on the Final RA.

Comments Regarding Other Cost Estimates: Staff Training, Notice, Installation, Replacement, and Operation and Maintenance

In addition to the comments addressing the captioning and audio description equipment cost estimates, the Department received a number of comments addressing other cost estimates provided in the Initial RA. These comments addressed the Department's estimate of staff training costs, notice costs, acquisition and installation costs, replacement costs, and operation and maintenance costs. Overall, commenters indicated that the Department either failed to include these costs in its estimates or that the Department's estimate for these costs was too low.

The Department originally included staff training costs associated with the rule in its estimate of the annual operations and maintenance costs, but the Department sought public comment on the amount of additional time movie theaters would spend training their employees to operate the captioning and audio description devices and to assist patrons in their use. The Department received a single comment in response to this question. One movie theater anticipated that movie theaters would spend an additional 15 minutes on employee training to ensure that their staff was knowledgeable about the equipment and in compliance with the rule's operational requirements. In consideration of this comment, the Department has included a separate estimate for the staff training costs associated with the operational requirements of the final rule. The information provided by the movie theater commenter serves as the basis for the staff training costs estimate. See section 3.7 of the Final RA for a more detailed discussion of the data, research, and assumptions used to estimate staff training costs.

The Department received only a few comments regarding its position that any cost associated with the notice requirement would be de minimis. One commenter argued that requiring notice in all places where movie times are listed would cost the industry millions of dollars annually because theaters would be required to invest in software

[24] In the Initial RA, the Department used the term ''theater type'' to describe the movie industry's classification of movie theaters based on the number of auditoriums within a movie theater complex. In the Final RA, the Department has replaced ''theater type'' with ''venue type'' in order to avoid potential confusion with the classification of movie theaters based on projection system (*i.e.,* digital vs. analog) and the distinction between indoor movie theaters and drive-in movie theaters. The Final RA divides movie theaters into four venue types: megaplex, multiplex, miniplex, and single-auditorium. See section 2.1.4 of the Final RA.

upgrades, the purchase of new signage on an ongoing basis, the purchase of digital display sets, and increased advertising space to accommodate more text. However, this commenter did not provide any information or data to support this position, and the only other commenter on this issue, a movie theater, agreed with the Department's conclusion that notice costs would be de minimis. According to this movie theater, the notice costs associated with the rule would be minimal for most exhibitors considering that the industry has largely separated itself from print advertising in favor of online advertising and adding icons for captioning and audio description would not be very difficult.

Based on the Department's independent research and the comments received, the Department maintains its position that the costs associated with the notice requirement are de minimis. The notice requirement does not require a movie theater to implement a specific form of notice. Movie theaters routinely use ''CC'' and ''AD'' or ''DV'' to indicate the availability of closed movie captioning and audio description in their communications currently, including on their Web sites and mobile apps, and the Department's research indicates that the inclusion of such symbols does not increase the cost of advertisements already placed or require software upgrades as one commenter indicated. For a more detailed discussion of those costs associated with this rulemaking that the Department has determined to be de minimis, see section 2.4.4.2 of the Final RA.

The Department also disagrees with commenters who criticized the Department's failure to include accurate equipment unit costs and installation costs in the Initial RA. As the Department indicated in the Initial RA, the unit cost estimates for the available equipment included the cost to install the equipment, and these unit cost estimates were based on the most up-to-date data available to the Department during the development of the Initial RA. See section 4.6 of the Initial RA. The Department has updated the equipment unit cost estimates, now referred to as ''acquisition costs'' in the Final RA, to reflect the most recent data concerning the unit costs for all available hardware and devices. The Final RA also now calculates installation costs as a separate cost based on a movie theater's upfront costs. For a more detailed discussion of the data, research, and assumptions used to estimate the installation costs, see section 3.5 of the Final RA.

A couple of comments addressed the replacement costs estimated in the Initial RA, specifically the replacement costs of the individual devices. One commenter estimated that the useful life of the captioning devices is about 5 years. According to NATO, industry data indicates that between 2.5 percent and 15 percent of individual devices must be replaced annually. The Department has updated the estimate of individual device replacement costs to reflect the industry data provided by NATO. To incorporate the individual devices' estimated 4-to-7-year useful life, the Department estimates that 20 percent of all captioning and audio description devices purchased as a result of this rulemaking will be replaced annually. For a more detailed discussion of the data, research, and assumptions used to estimate the replacement costs, see section 3.6 of the Final RA.

Several commenters also argued that the Department's estimate regarding operation and maintenance costs was too low. According to these commenters, the maintenance costs include costs associated with replacement batteries, periodic system testing, and upgrading software, and because these costs are relative to the cost of the equipment, the Department should consider the high cost of the devices when estimating this cost. A few comments seemed to express confusion that the operations and maintenance cost estimate in the Initial RA encompassed the costs associated with installation, replacement, and staff training. The Department has considered these comments and has included separate cost estimates for the costs associated with installation, replacement, and staff training. However, the Department's independent research confirms that 3 percent of total equipment acquisition costs represents an accurate estimate of the annual operation and maintenance costs associated with this rule, especially now that installation, replacement, and staff training costs are estimated separately. The relevant cost category has been renamed ''maintenance and administrative costs'' in the Final RA. For a more detailed discussion of the data, research, and assumptions used to calculate the maintenance and administrative costs of this rule, see section 3.8 of the Final RA.

Comments Regarding the Benefits Estimate

The Department discussed the qualitative benefits associated with this rule in the Initial RA. Without reliable information about the number of individuals who would go to the movies as a result of this rule or the number of captioned and audio-described screenings already shown, the Department determined that the benefits of the rule were difficult to quantify. Nonetheless, the Department determined that many individuals, both those with and without disabilities, would benefit as a result of the rule, and that such benefits justified any associated costs. Furthermore, the Department fully expected that the guarantee of access to movies screened at movie theaters for individuals with hearing or vision impairments would spur some level of new demand for movie attendance and therefore lead to increased box office receipts.

A majority of commenters addressing the Department's benefit analysis recognized the difficulty in quantifying the benefits of the rule but agreed with the Department's conclusions concerning the direct and indirect beneficiaries that this rule would serve. Many comments focused on the number of individuals with hearing and vision disabilities, arguing that the U.S. Census vastly underestimates the number of individuals who are deaf or hard of hearing, or blind or have low vision. Commenters also stated that in addition to helping individuals who are deaf or hard of hearing, movie captioning has the potential to increase the access and enjoyment of movies for a wide variety of people, including individuals with cognitive-communication disorders, language-based learning disabilities, aphasia, central auditory processing disorders, or individuals who are learning English or may be working to improve their literacy skills. Organizations representing individuals with hearing and vision disabilities commented generally that captioning and audio description provide the keys to American culture to the extent that these services help individuals with hearing and vision disabilities to be more familiar with ''everyday events,'' thus allowing them to be more socially integrated into society.

One commenter, however, criticized the Department's benefit analysis. This commenter asserted that the Department failed to justify the rule with relevant, evidence-based research to demonstrate that the proposed rule would advance the intended benefits. The commenter further recommended that the Department conduct an industry-wide survey of movie theaters and individuals with hearing and vision disabilities to determine the number of individuals currently seeking captioning and audio description and their willingness to pay for such services.

The Department maintains its position that the non-quantifiable benefits of this rule justify the costs of requiring captioning and audio description at movie theaters nationwide. The Department received a number of comments from individuals with hearing and vision disabilities, as well as advocacy groups, indicating that individuals with disabilities are currently seeking these accessibility services, but that these services are either consistently unavailable or insufficient to meet their needs. With the information received from such comments and the Department's independent research, the Department does not believe that conducting a nationwide survey is necessary to confirm that this rulemaking will advance the intended benefits. As section 1(c) of Executive Order 13563 highlights, agencies would be remiss to overlook the benefits ''that are difficult or impossible to quantify, including equity, human dignity, [and] fairness.'' With respect to such benefits, this rulemaking will not only ensure that individuals who are deaf or hard of hearing, or blind or have low vision, are afforded equal access to movie theaters across the country, but will also ensure that such individuals are afforded the opportunity to participate in the social experiences that accompany a new movie's release. As a result, the Department remains convinced that this rulemaking will significantly advance the achievement of the intended benefits, and that such benefits justify the costs associated with this rulemaking. See section V.A.4, *infra,* and chapter 5 of the Final RA for a more detailed discussion of the benefits of this rulemaking.

3. Costs—Summary of Likely Economic Impact

This section presents the calculations used to estimate the total costs resulting from the amendments to the title III regulation, which require movie theaters to provide closed movie captioning and audio description when exhibiting digital movies equipped with such features. As previously mentioned, total costs to movie theaters subject to the rulemaking include the following components:

- Acquisition costs for captioning hardware;
- Acquisition costs for audio description hardware;
- Acquisition costs for captioning devices;
- Acquisition costs for audio description devices;
- Installation costs for captioning and audio description equipment;
- Replacement costs for captioning and audio description equipment;
- Staff training costs for the provision of captioning and audio description equipment; and
- Maintenance and administrative costs.

Key Assumptions

Because movie theater complexes vary greatly by the number of auditoriums, and the overall cost of this rule varies in direct relation to the number of auditoriums exhibiting digital movies within a movie theater, the Final RA breaks the movie exhibition industry into four venue types based on size:

- Megaplex (16+ auditoriums);
- Multiplex (8–15 auditoriums);
- Miniplex (2–7 auditoriums); and
- Single-Auditorium movie theaters.

Additionally, uncertainty exists regarding the extent to which movie theaters would offer closed movie captioning and audio description if the Department had not undertaken this rulemaking. Therefore, the Final RA estimates costs against three different baseline scenarios, which are described in greater detail in section 3.2 of the Final RA. The primary analysis incorporates the Medium Accessibility baseline, which is based on data available in NATO's 2015 Accessibility Survey. As shown in Table 1, under this baseline around 72 percent of auditoriums operated in megaplex, multiplex, and miniplex theaters are assumed to be equipped to provide closed movie captioning. Similarly, approximately 71 percent of auditoriums in these movie theaters are assumed to be equipped to provide audio description. The analysis assumes that no single-auditorium movie theater is already equipped to provide closed movie captioning or audio description.

TABLE 1—MEDIUM ACCESSIBILITY BASELINE BY VENUE TYPE–CAPTIONING AND AUDIO DESCRIPTION

Venue type	Captioning Medium Accessibility Baseline %	Audio Description Medium Accessibility Baseline %
Megaplex	72	71
Multiplex	72	71
Miniplex	72	71
Single-Auditorium	0	0

Section 2.1.3 and section 3.2 of the Final RA explain in detail the methodology and data that provide the basis for the Department's assumptions regarding the number of movie theater auditoriums currently equipped to provide closed movie captioning and audio description.

The assumptions regarding the total number of auditoriums and the distribution of these auditoriums by venue type (megaplex, multiplex, miniplex, or single-auditorium) are further detailed in section 3.1 of the Final RA. Finally, section 3.1.3 of the Final RA describes the assumptions made in the analysis regarding the growth of auditoriums and venue types, and section 3.3 of the Final RA provides detailed assumptions and information regarding the scoping requirements by venue type.

Costs Determined To Be De Minimis

The Department has determined that there are a few cost components associated with this rulemaking that are de minimis and therefore have not been estimated in the Final RA's total costs estimation. These include repair costs and costs to comply with the final rule's notice requirement. Repair costs are expected to be de minimis because manufacturers, movie theaters, and the Department's independent research indicate that repair of the captioning and audio description equipment is rare. If equipment breaks down, the answer is replacement rather than repair, and such costs are captured by the hardware and device replacement costs. Additionally, costs associated

with the cleaning or occasional maintenance of the devices are captured by the ongoing maintenance and administrative costs. Any additional repair costs for captioning and audio description equipment are thus expected to be de minimis.

The Department has further determined that the costs associated with the notice requirement will be de minimis. Based on comments received and the Department's independent research, the movie exhibition industry has largely moved away from print advertising in favor of digital advertising, and as one commenter indicated, digital advertising allows movie theaters to add information concerning the availability of captioning and audio description without much difficulty. Currently, movie theaters routinely use ''CC'' and ''AD'' or ''DV'' to indicate the availability of closed movie captioning and audio description in their communications, and the Department's research indicates that the inclusion of such abbreviations does not increase the cost of advertisements. Therefore, the additional time and cost it will take a movie theater to add such information is negligible.

Upfront Costs

The upfront costs of this rulemaking include the costs to acquire and install the necessary captioning and audio description equipment. Movie theaters incur the majority of the upfront costs during the first 2 years of the analysis, as movie theaters with auditoriums currently exhibiting digital movies will purchase and install the necessary equipment throughout 2016 and 2017 in accordance with the 18-month compliance date. However, the cost estimation also includes the costs incurred by new auditoriums opening after the 18-month compliance date. As a result, equipment acquisition and installation costs are incurred over the entire 15-year analysis period in the primary analysis. Table 2 shows the total equipment acquisition and installation costs incurred over the 15-year period of analysis by venue type. Overall, the upfront costs to movie theaters are expected to total $34.2 million when discounted at 7 percent.

TABLE 2—TOTAL UPFRONT COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, DISCOUNTED AT 7 PERCENT

[$ Millions]

Venue type	Captioning hardware acquisition costs	Audio hardware acquisition costs	Captioning device acquisition costs	Audio device acquisition costs	Installation costs	Total upfront costs
Megaplex	$5.0	$0.1	$4.8	$0.8	$0.3	$11.0
Multiplex	7.9	0.2	7.6	1.3	0.5	17.5
Miniplex	0.9	0.0	2.0	0.2	0.1	3.3
Single-Auditorium	0.8	0.2	1.3	0.1	0.1	2.5
Total	14.6	0.5	15.7	2.4	1.0	34.2

*Totals may differ due to rounding.

Section 2.3 of the Final RA provides greater detail as to the Department's methodology and assumptions for estimating the upfront costs of this rulemaking. The data and research providing the basis for these estimates are presented in section 3.3 through section 3.5 of the Final RA.

Ongoing Costs

In addition to the upfront costs, movie theaters will incur ongoing costs as a direct result of this rulemaking. The ongoing costs quantified in the cost estimation include captioning and audio description equipment replacement costs, staff training costs, and maintenance and administrative costs. Table 3 shows the total ongoing costs by venue type. Overall, the ongoing annual costs amount to $54.3 million over the 15-year period of analysis when discounted at 7 percent.

TABLE 3—TOTAL ONGOING COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, DISCOUNTED AT 7 PERCENT

[$ millions]

Venue type	Replacement costs	Training costs	Maintenance and administrative costs	Total ongoing costs
Megaplex	$11.6	$3.5	$2.7	$17.8
Multiplex	18.4	5.6	4.3	28.2
Miniplex	4.0	0.7	0.8	5.5
Single-Auditorium	2.2	0.1	0.5	2.8
Total	36.1	9.9	8.2	54.3

*Totals may differ due to rounding.

Replacement costs are expected to be $36.1 million over the 15-year period of analysis when discounted at 7 percent. Replacement costs include the costs to replace all equipment necessary to provide closed movie captioning and audio description, including the captioning and audio description devices as well as the captioning and audio description hardware. Table 4–6 of the Final RA shows the estimated replacement costs associated with each type of equipment. The data and assumptions used to estimate the replacement costs are discussed in greater detail in section 2.4.1 and section 3.6 of the Final RA.

Staff training is expected to cost approximately $9.9 million over the 15-year period of analysis when discounted at 7 percent. The rule requires staff to

be available to provide patrons with captioning and audio description devices and to direct patrons on the devices' use. This requirement can most easily be met by expanding the already existing training for those employees who will be on-site to manage or oversee overall operations or the exhibition of the movies. Because the operational requirements of this rulemaking apply to all movie theaters subject to the rulemaking, including those with auditoriums that currently provide closed movie captioning and audio description, the Department has estimated the staff training costs for all movie theaters exhibiting digital movies. Section 2.4.2 and section 3.7 of the Final RA explain the data and assumptions used to estimate the staff training costs.

Finally, maintenance and administrative costs are expected to be $8.2 million over the 15-year period of analysis when discounted at 7 percent. These costs include, but are not limited to, the periodic ongoing maintenance, system testing, and cleaning of devices and other additional administrative costs. The data and assumptions used to estimate the maintenance and administrative costs are discussed in greater detail in section 2.4.3 and section 3.8 of the Final RA.

Total Costs

The total costs in the primary analysis are calculated based on the data and assumptions presented in chapters 2 and 3 of the Final RA. As described in section 3.2.2 of the Final RA, the primary analysis incorporates the Medium Accessibility baseline, which is based on data available in NATO's 2015 Accessibility Survey. Table 4 below shows the total costs in the primary analysis by cost category. The total cost impact of the rulemaking over the 15-year period of analysis is $88.5 million when discounted at 7 percent, and $113.4 million when discounted at 3 percent.

TABLE 4—TOTAL COSTS BY COST CATEGORY IN PRIMARY ANALYSIS OVER 15 YEARS

[$ millions]

Cost category	Primary analysis 7% discounted	Primary analysis 3% discounted
Captioning Hardware Acquisition Costs	$14.6	$17.2
Audio Hardware Acquisition Costs	0.5	0.5
Captioning Device Acquisition Costs	15.7	17.6
Audio Device Acquisition Costs	2.4	2.8
Installation Costs	1.0	1.1
Replacement Costs	36.1	49.9
Training Costs	9.9	13.1
Maintenance and Administrative Costs	8.2	11.1
Total Costs	88.5	113.4

* Totals may differ due to rounding.

The total costs are broken down by venue type in table 5. Auditoriums in multiplex movie theaters account for more than half of the total costs ($45.7 million) over the 15-year period of analysis, which is consistent with the fact that multiplex movie theaters operate approximately 52 percent of all auditoriums. The costs to single-auditorium movie theaters over the 15-year period of analysis are approximately $5.3 million when discounted at 7 percent, and $6.3 million when discounted at 3 percent. As detailed in section 3.2.3 of the Final RA, the primary analysis assumes that no single-auditorium movie theater is already equipped to provide closed movie captioning or audio description. As a result, it is assumed that all single-auditorium movie theaters subject to this rulemaking would need to purchase the necessary captioning and audio description equipment.

TABLE 5—TOTAL COSTS BY VENUE TYPE IN PRIMARY ANALYSIS OVER 15 YEARS

[$ millions]

Venue type	Primary analysis 7% discounted	Primary analysis 3% discounted
Megaplex (16+ auditoriums)	$28.7	$37.2
Multiplex (8–15 auditoriums)	45.7	59.1
Miniplex (2–7 auditoriums)	8.8	10.8
Single-Auditorium	5.3	6.3
Total Costs	88.5	113.4

* Totals may differ due to rounding.

In table 6 below, the annualized costs are presented by venue type using 7-percent and 3-percent discount rates. Overall, the annualized cost to the entire movie exhibition industry is $9.7 million when using a 7-percent discount rate, and $9.5 million when using a 3-percent discount rate.

TABLE 6—ANNUALIZED COSTS BY VENUE TYPE IN PRIMARY ANALYSIS

[$ millions]

Venue type	Annualized costs 7% discounted	Annualized costs 3% discounted
Megaplex (16+ auditoriums)	$3.2	$3.1
Multiplex (8–15 auditoriums)	5.0	5.0
Miniplex (2–7 auditoriums)	1.0	0.9
Single-Auditorium	0.6	0.5
Total	9.7	9.5

* Totals may differ due to rounding.

Sensitivity Analyses

Sensitivity analysis is an essential consideration for policy makers in evaluating the rule due to the uncertainty associated with certain key variables used in the cost estimation. The Department was able to find robust data regarding the costs of purchasing captioning and audio description equipment, the number of auditoriums in the country, and several other critical variables. However, there are some input variables that carry uncertainty. No substantive comments with data on these inputs were received in the public comments on the 2014 NPRM.

The sensitivity analyses estimate the costs of this rulemaking when using the following inputs:

- Low Accessibility and High Accessibility baselines;
- Alternate Medium Accessibility baseline;
- Alternate captioning and audio description device replacement rates;
- Increased staff training frequency;
- Single-auditorium unit cost estimates including Sony's technology;
- Increased maintenance and administrative costs; and
- Zero growth after five years.

Detailed information and data regarding these sensitivity analyses can be found in section 4.2 of the Final RA.

4. Benefits—Qualitative Discussion of Benefits

The individuals who will directly benefit from this rule are those persons with hearing or vision disabilities who, as a result of this rule, would be able to attend movies with closed movie captioning or audio description in movie theaters across the country for the first time or on a more consistent basis. Individuals who will indirectly benefit from this rule are the family and friends of persons with hearing and vision disabilities that would be able to share the movie-going experience more fully with their friends or loved ones with hearing and vision disabilities. Although the anticipated benefits of this rulemaking are difficult to quantify, the Department remains convinced that there are significant qualitative benefits of this rulemaking that justify this regulation at this time.

The benefits of this rule are difficult to quantify because the Department has not been able to locate robust data on the rate at which persons with disabilities currently attend movies shown in movie theaters. Moreover, as a result of the increased accommodations required by this rule, it is reasonable to predict that some number of persons with disabilities will likely attend movies for the first time, some number of persons with disabilities will likely attend movies at a rate that is different than they had previously, the number of persons who attend movies as part of a larger group that includes a person with a disability will likely change, and the number of persons with disabilities who would have attended movies anyway but under the rule will have a fuller and more pleasant experience will likely also change. The Department has no feasible way of projecting those figures. In addition, the Department does not know how many people with hearing or vision disabilities currently have consistent access to movie theaters that provide closed movie captioning and audio description. Finally, the Department is not aware of any peer-reviewed academic or professional studies that monetize or quantify the societal benefit of providing closed movie captioning and audio description at movie theaters.

Though the Department cannot confidently estimate the likely number of people who would directly benefit from this rule, it has reviewed data on the number of people with hearing or vision disabilities in the United States. The Census Bureau estimates that 3.3 percent of the U.S. population ages 15 and older has difficulty seeing, which translates into a little more than 8 million individuals in 2010, and a little more than 2 million of those had ''severe'' difficulty seeing. At the same time, the Census Bureau estimates that 3.1 percent of the U.S. population ages 15 and older have difficulty hearing, which was a little more than 7.5 million individuals in 2010, and approximately 1 million of them had ''severe'' difficulty hearing. *See* U.S. Census Bureau, U.S. Department of Commerce, P70–131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), *available at http://www.census.gov/prod/2012pubs/p70-131.pdf* (last visited Sept. 12, 2016). While not all of these individuals would benefit from this rule, many of them will be direct beneficiaries, although they are likely to benefit from this rule in different ways and to varying extents. The type and extent of benefits can depend on personal circumstances and preferences, as well as proximity to movie theaters that otherwise would not offer captioning or audio description but for this rule. Some persons with vision and hearing disabilities have effectively been precluded from going to movies at movie theaters because the only theaters available to them do not offer closed movie captioning or audio description, offer open captioning but only at inconvenient times (such as the middle of the day during the week), or offer captioning or audio description for only a few films and not for every screening of those films. For these persons, the primary benefit will be the ability to see movies when released in movie theaters along with other movie patrons, which they otherwise would not have had the opportunity to do. They will have the value of that movie-going experience, as well as the opportunity to discuss the film socially at the same time as the rest of the movie-viewing public. A person with a hearing or vision disability who previously did not have access to a movie theater that provided closed movie captioning or audio description will experience this benefit to an extent that is different than the extent of the benefit experienced by a person with a hearing or vision disability who previously did have access to a movie

theater that consistently provided closed movie captioning and audio description. In addition, a person who cannot follow a movie at all without the assistance of closed movie captioning is likely to experience this benefit to an extent that is different than the extent of the benefit experienced by a person who can follow parts of a movie without the assistance of closed movie captioning.

There is a social value in movie viewing for many people, not just an entertainment value. As noted previously, movies are a part of our shared cultural experience, and the subject of ''water cooler'' talk and lunchtime conversations. The Supreme Court observed over 60 years ago that motion pictures ''are a significant medium for the communication of ideas'' and ''may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.'' *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501 (1952) (footnote omitted). When individuals who are deaf or hard of hearing, or blind or have low vision, have the opportunity to attend movies that they can actually understand because of captioning or audio description, they are exposed to new ideas and gain knowledge that contributes to the development of their communication and literacy as well as their integration into society.

As previously mentioned, some persons with vision or hearing disabilities may already have access to some movie theaters with captioning or audio description capabilities, but that access may be limited to only some locations and times. Some of these people may be patronizing movie theaters now but less often than they otherwise would, or less often than they would like, if captioning or audio description were available consistently across all theaters. These people may see more movies or save time that they currently must spend monitoring those few accessible movie theaters or showings and perhaps additional time coordinating trips to the movies with family and friends. If all movie theaters are accessible to those who are deaf or hard of hearing, or blind or have low vision, then some persons will now have greater choice among multiple locations and can make choices based on other criteria such as location, times, and other amenities, just as Americans without these disabilities already do.

In addition to the direct beneficiaries of the rule discussed above, others may be indirect beneficiaries of this rule. Family and friends of persons with these disabilities who wish to go to the movies together as a shared social experience will now have greater opportunities to do so. More adults who visit elderly parents with hearing or sight limitations would presumably be able to take their parents on outings and enjoy a movie at a movie theater together, sharing the experience as they may have in the past. The Department received numerous comments from individuals who are deaf, hard of hearing, blind, or have low vision in response to its 2014 NPRM describing how they were unable to take part in the movie-going experience with their friends and family because of the unavailability of captioning or audio description. Parents with disabilities also complained that they could not answer their children's questions about a movie that they saw together because the parents did not understand what had happened in the movie.

There is also a distributional benefit of this rule as some areas of the United States are more likely to have movie theaters with auditoriums that are already equipped to provide closed movie captioning and audio description than others. As noted previously, the Department understands that persons who live in communities served only by smaller, regional movie theater chains are far less likely to have access to captioned and audio-described movies than individuals with disabilities who live in California, Arizona, or any of the major cities with movie theaters operated by Regal, Cinemark, or AMC. Thus, it is possible that more urban areas, or certain cities or States, may have greater access than other areas, cities, or States, creating or exacerbating geographical differences in opportunities that will be equalized by this rulemaking.

Moreover, while not formally quantified, the Department expects that this guarantee of access for individuals with hearing or vision impairments to movies screened at movie theaters will spur some level of new demand for movie attendance and, therefore, lead to increased box office receipts. Unfortunately, there is little data on the demand for movie-viewing in places of public accommodation by persons who are deaf or hard of hearing, or blind or have low vision, and as such, preparing estimates of the increase in movie theater attendance is difficult.

Because the rule sets specific standards for equally effective communication at movie theaters, it should also lead to a decrease or near elimination of confusion regarding what accommodations movie theaters must provide. The current ADA title III regulation does not contain explicit requirements specifying how movie theaters should meet their effective communication obligations, and this is one of the reasons behind the multiple private lawsuits filed throughout the country. Setting explicit requirements at the national level will lead to harmonization across the country.

And finally, there are additional benefits of the rule that relate to equity and fairness considerations generally. *See* E.O. 13563 § 1(c) (underscoring the importance of agency consideration of benefits ''that are difficult or impossible to quantify, including equity, human dignity, [and] fairness''). The Department expects that the regulation will allow for better integration of persons with disabilities into the American social mainstream. Without captioning and audio description at movie theaters, individuals with hearing and vision disabilities commented that they were unable to participate in the social experience that attending the movies affords. Other commenters noted that movie theaters' common practice of ''relegating'' movie patrons with hearing and vision disabilities to ''special showings'' of captioned or audio-described movies at off-peak days and times did not constitute the ''full and equal access'' guaranteed by the ADA. By requiring all movie theaters to provide closed movie captioning and audio description when exhibiting a digital movie distributed with such features, the Department believes that the ADA's guarantees will be more fully met.

The Department views the most significant benefits of the rule to be those relating to issues of fairness, equity, and equal access, all of which are extremely difficult to monetize, and the Department has not been able to robustly quantify and place a dollar value on those. Regardless, the Department believes that the non-quantifiable benefits justify the costs of requiring captioning and audio description at movie theaters nationwide.

5. Alternatives

As required by Executive Order 12866, the Department considered various alternatives to this rule. Chapter 6 of the Final RA provides detailed information regarding these alternatives. Table 7 below summarizes the cost estimates for the primary analysis and other evaluated alternatives to the regulation.

TABLE 7—SUMMARY OF PRIMARY ANALYSIS AND ALTERNATIVE ANALYSES OVER 15 YEARS, DISCOUNTED AT 7 PERCENT

[$ millions]

Cost category	Primary analysis	2-year compliance date	6-month compliance date	NPRM scoping requirement	Analog theaters included
Captioning Hardware Acquisition Costs	$14.6	$14.0	$15.5	$14.6	$17.3
Audio Hardware Acquisition Costs	0.5	0.4	0.5	0.5	0.6
Captioning Device Acquisition Costs	15.7	15.1	16.6	36.1	15.7
Audio Device Acquisition Costs	2.4	2.4	2.6	4.4	2.5
Installation Costs	1.0	1.0	1.1	1.7	1.1
Replacement Costs	36.1	34.5	39.0	73.8	37.0
Training Costs	9.9	9.9	9.9	9.9	10.0
Maintenance and Administrative Costs	8.2	7.8	8.9	13.9	8.8
Total Costs	88.5	85.2	94.1	154.8	93.1

* Totals may differ due to rounding.

B. Executive Order 13132: Federalism

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), requires executive branch agencies to consider whether a rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on State and local governments, a substantial direct effect on the relationship between the Federal government and the States and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a rule is likely to have federalism implications, the agency must consult with State and local elected officials about how to minimize or eliminate the effects. This rule applies to public accommodations that exhibit movies for a fee that are covered by title III of the ADA. To the Department's knowledge there are no State or local laws that specifically address captioning and audio description. As a result, the Department has concluded that this rule does not have federalism implications.

C. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that adequately addresses legal issues to minimize uncertainty. The Department operates a toll-free ADA Information Line—(800) 514–0301 (voice); (800) 514–0383 (TTY)—that the public is welcome to call to obtain assistance in understanding this rule.

D. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA), agencies are prohibited from conducting or sponsoring a ''collection of information'' as defined by the PRA unless in advance the agency has obtained an OMB control number. 44 U.S.C. 3507. Additionally, an agency may not impose a penalty on persons for violating information collection requirements when an information collection required to have a current OMB control number does not have one. *See id.*

This rule includes a requirement that movie theaters provide information to the public about which movies are available with closed movie captioning and audio description when publishing the exhibition times for those movies. *See* § 36.303(g)(8). The Department has determined that this requirement qualifies as a collection of information subject to the PRA. Consistent with the PRA's requirements, the Department published a notice in the **Federal Register** on June 10, 2016, requesting public comment on the potential costs and burdens of this requirement. *See* 81 FR 37643. The comment period for this notice closed on August 9, 2016, and the Department published a second notice in the **Federal Register** on August 30, 2016. *See* 81 FR 59657. The 30-day comment period for the second notice closed on September 29, 2016.

The information collection requirement contained in this regulation was approved by OMB on November 3, 2016, and has been assigned OMB control number 1190–0019.

E. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

F. Duplicative or Overlapping Federal Rules

The Department is not aware of any existing Federal regulations that impose duplicative, overlapping, or conflicting requirements relative to the requirements in the final rule for movie captioning and audio description.

VI. Final Regulatory Flexibility Analysis

As directed by the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), and by Executive Order 13272, the Department is required to consider the potential impact of the proposed rule on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. This process helps agencies to determine whether a rule is likely to impose a significant economic impact on a substantial number of small entities and, in turn, to consider regulatory alternatives to reduce that regulatory burden on those small entities.

This final rule applies to and affects almost all small entities categorized as ''Motion Picture Theaters.'' Small businesses constitute the vast majority of firms in the movie exhibition industry. The current size standard for a small movie theater business is $38.5 million dollars in annual revenue. *See* U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at 28 (July 14, 2014), *available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf* (last visited Sept. 12, 2016). In 2012, the latest year for which detailed breakouts by industry and annual revenue are

available, approximately 98 percent of movie theater firms met the standard for small business, and these firms managed approximately 52 percent of movie theater establishments. *See* U.S. Census Bureau, *Statistics of U.S. Businesses, available at https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html* (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The Department's analysis leads it to conclude that a substantial number of small movie theater firms will experience a significant economic impact as a result of this rule. The Department therefore presents this Final Regulatory Flexibility Analysis (FRFA). The Department has used this analysis to examine other ways, if possible, to accomplish the Department's goals with fewer burdens on small businesses, and the Department has made a number of revisions to the final rule to reduce the cost impact on small firms in the movie exhibition industry.

A. Purpose and Objective of the Final Rule Relative to Movie Theaters Categorized as Small

As previously discussed throughout this rule, the Department's existing regulation implementing the ADA's title III auxiliary aids provision reiterates the obligation of covered entities to ensure equally effective communication with individuals with disabilities and identifies, among other things, ''open and closed captioning,'' and ''audio recordings'' as examples of auxiliary aids and services. 28 CFR 36.303(a)–(c). Recent technological changes in the movie exhibition industry—including widespread conversion from analog film projection to digital cinema systems—make exhibition of captioned and audio-described movies easier and less costly than before. In addition, it is the Department's understanding that, at this time, nearly all first-run motion pictures released by the major domestic movie studios include closed movie captioning (and to a lesser extent, audio description).

Despite these technological advances, movie theaters do not consistently show movies with captioning or audio description, and the availability of these features varies greatly across the country, with small movie theaters in rural areas being less likely to provide them. Thus, patrons who are deaf or hard of hearing, or blind or have low vision, are often shut out from the movie-going experience and cannot fully take part in movie-going outings with family and friends, join in social conversations about recent movie releases, or otherwise participate in a meaningful way in an important aspect of American culture.

The Department believes that regulation is warranted at this time to explicitly require all movie theaters, including those qualifying as small entities, to exhibit movies with closed movie captioning and audio description whenever these theaters exhibit digital movies produced, distributed, or otherwise made available with such features unless to do so would result in an undue burden or a fundamental alteration. As discussed above, the Department is deferring rulemaking on application of these requirements to movie theater auditoriums that exhibit analog movies exclusively. The final rule for movie captioning and audio description rests on the existing obligation of all title III-covered facilities, such as movie theaters—regardless of size—to ensure that persons with disabilities receive ''full and equal enjoyment'' of their respective goods and services, including, as needed, the provision of auxiliary aids and services for persons who are deaf or hard of hearing, or blind or have low vision. The final rule imposes no independent obligation on movie theaters to provide captioning and audio description if the movie is not already available with these features.

The Department expects that implementation of the final rule will lead to consistent levels of accessibility in movie theaters across the country, and that patrons who are deaf or hard of hearing, or blind or have low vision, will be able to use captioning or audio description equipment to better understand movies being exhibited in all movie theaters.

B. Public Comments Regarding the Effects of the Rule on Small Movie Theaters

The Department received 436 comments during the 2014 NPRM comment period from movie industry representatives, individuals with disabilities, advocacy groups representing individuals with disabilities, State and Federal entities, academic organizations, private companies, and other private individuals. Comments that directly addressed the assumptions, data, or methodology used in the Initial RA have been previously discussed above in section V.A.2 and in section 1.3 of the Final RA. This section summarizes the discussion of comments regarding the effects of the rule on small movie theaters.

Proportion of Movie Theaters Qualifying as Small Entities

The Department received comments indicating that the vast majority of movie theaters qualify as small entities, which is supported by the 2012 Statistics of U.S. Businesses (SUSB) data and detailed below. *See infra* section VI.C.

Small Movie Theater Revenues and Available Resources To Comply

One commenter reported that at least one segment of the movie exhibition industry, art house cinemas, generally receive less than 50 percent of their revenue from ticket sales. Another commenter asked the Department to consider that almost half of movie theater gross receipts are paid directly to movie studios. Given these percentages and the fact that the movie exhibition industry as a whole averages a 2 percent profit margin, with small and independent theater owners often operating at an even smaller or negative profit margin, commenters asked the Department to reconsider its interpretation of cost values relative to annual revenue because these figures do not directly represent funds that are available to comply with this rule.

The Department does not have access to publicly available data that provides a consistent, independent source of movie theater profit by revenue category. As discussed in section VI.C below, available data includes firm receipt size from the 2012 SUSB.[25] The Department believes that this dataset is the most relevant publicly available data on annual revenue figures for the movie exhibition industry and is the best source to assess the resources available to movie theaters to comply with the rule.

Alternatives To Reduce Burdens on Small Movie Theaters

Commenters made various suggestions concerning alternatives to reduce the regulatory burden for small movie theaters. These suggestions pertained to the following areas: (1) The scoping for devices; (2) the compliance date; (3) the deferral of rulemaking for movie theaters exhibiting movies in analog format; and (4) the deferral of rulemaking for a subset of small movie theaters. The Department is aware of

[25] U.S. Census Bureau, *Statistics of U.S. Businesses, available at https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html* (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The information is available in an Excel file which lists all information by NAICS Code. The relevant NAICS Code for Motion Picture Theaters (except Drive-Ins) is 512131.

potential limitations to compliance for small movie theaters and has taken measures to lessen the impact on those firms. As explained in sections 1.4 and 6.1 of the Final RA and in section VI.F below, the Department has decided to defer the decision whether to engage in rulemaking with respect to movie theater auditoriums that exhibit analog movies exclusively, to reduce the scoping requirements for both captioning and audio description devices, and to increase the time movie theaters have to comply with the rule's captioning and audio description scoping requirements (now 18 months). These revisions are expected to reduce the cost impact to small firms in the movie exhibition industry.

Response to Comments From the Small Business Administration Office of Advocacy (SBA)

This section specifically addresses comments of the SBA Office of Advocacy in response to the proposed rule. Most of the concerns expressed by SBA were also expressed by other commenters.

SBA's comments on the 2014 NPRM focused on the following five issues: Lowering the scoping for captioning and audio description devices; deferral of coverage of analog theaters; providing a longer compliance date for the requirements of the rule; the breadth of the definition of ''movie theater''; and the application of the undue burden defense for small business movie theaters. After consideration of these comments and related comments from other commenters, the Department has made a number of changes in the final rule.

First, the Department has significantly lowered the scoping requirements for captioning and audio description devices in response to comments from SBA and other commenters that the Department should not have used seat count as a means of determining the number of devices that would actually be needed to meet demand from people with hearing and vision disabilities. The revised scoping bases the required number of devices on the number of auditoriums in a theater showing digital movies rather than the number of seats.

Second, the Department has decided to defer the decision whether to apply the specific requirements of this rule to movie theater auditoriums that show analog movies exclusively. As discussed in the section-by-section analysis, the number of movie theaters that only show analog movies is rapidly declining, and it is unclear whether these theaters will be economically viable in the future, or whether analog movies will even be available for commercial showings.

Third, the Department has extended the compliance date for all movie theaters subject to this rulemaking. Movie theaters now have 18 months to comply with the rule's scoping requirements, and additional time is afforded to movie theaters that convert auditoriums from an analog projection system to a digital projection system after the compliance date of the rule. After considering the comments on the 2014 NPRM, the Department has concluded that 18 months allows movie theaters sufficient time to order and install the necessary equipment while accounting for potential manufacturer backlogs or the need to raise the necessary funds to purchase the equipment.

Fourth, SBA specifically asked whether the definition of ''movie theater'' was intended to encompass small movie theaters that occasionally show digital movies using a Blu-ray projector, pop-ups and film festivals, or limited arrangement showings held at alternative venues. The Department believes that in most instances, the requirements of the rule will not apply in these circumstances. As the definition indicates, a ''movie theater,'' for purposes of this rulemaking, means ''a facility * * * that contains one or more auditoriums that are used primarily for the purpose of showing movies to the public for a fee.'' § 36.303(g)(1)(vii). Thus, an auditorium generally used for other purposes that temporarily shows movies during a film festival, even if a fee is charged, would not fall within this definition. By contrast, a movie theater that primarily shows digital movies to the public for a fee remains covered by the requirements of paragraph (g) even if it allows its auditoriums to be used for an annual film festival. Theaters with analog auditoriums that are not otherwise covered by the specific requirements of § 36.303(g) and temporarily bring in portable Blu-ray or other types of digital projectors to show digital movies are also not likely to fall within the requirements of paragraph (g) because the compliance date provision assumes conversion of the theater to a digital projection system. In addition, it is the Department's understanding that Blu-ray projection systems are not capable of delivering closed movie captions to patrons at their seat; these systems only have the capacity to show captions on the screen, something not required by this rule.

The Department notes that film festivals, pop-up movie theaters, and other alternative venues for showing movies still qualify as places of entertainment and are considered public accommodations under the ADA. Thus, they continue to be subject to the longstanding general ADA requirement to provide effective communication under § 36.303, unless doing so would be a fundamental alteration of the program or service or would constitute an undue burden. In addition, if a festival or limited showing programmer schedules the screening of a movie that is already distributed with closed movie captions and audio description using a movie theater auditorium that is subject to the requirements in paragraph (g) as discussed above, then the effective communication obligation would require the festival to ensure that the accessible features are available at all scheduled screenings of a movie distributed with such features.

Finally, SBA asked that the Department provide additional guidance for small businesses regarding the availability of the undue burden limitation. Under the ADA, a public accommodation is relieved of its obligation to provide a particular auxiliary aid (but not all auxiliary aids) if to do so would result in an undue burden or a fundamental alteration. As stated earlier in the preamble and in existing technical assistance materials, the Department's title III regulation specifically defines undue burden as ''significant difficulty or expense'' and, emphasizing the flexible and individualized nature of any such determination, lists five factors that must be considered when determining whether an action would constitute an undue burden. 28 CFR 36.104; *see also* U.S. Department of Justice, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* III–4.3600 (1993), *available at http://www.ada.gov/taman3.html.* These factors include: (1) The nature and cost of the action; (2) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question, to any parent corporation or entity; (4) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; and the number, type, and location of its

facilities; and (5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity. 28 CFR 36.104. This limitation entails a fact-specific examination of the cost of a specific action and the specific circumstances of a particular public accommodation. This limitation is also designed to ensure that the needs of small businesses, as well as large businesses, are addressed and protected.

The Department intends to publish technical assistance that will address the requirements of the final rule and the limitations on the obligations under paragraph (g) prior to the time the rule takes effect. In addition, the Department's wide-ranging outreach, education, and technical assistance program continue to be available to assist businesses to understand their obligations under the ADA. Additional information about the ADA's requirements, including the requirement to provide effective communication and the limitations on that obligation, is also available on the Department's ADA Web site at *www.ada.gov.*

C. Characteristics of Impacted Small Entities

The Regulatory Flexibility Act defines a ''small entity'' as a small business (as defined by the SBA Size Standards) or a small organization such as a nonprofit that is ''independently owned and operated'' and is ''not dominant in its field.'' *See* 5 U.S.C. 601(3), (4). For Motion Picture Theaters (except Drive-Ins) (NAICS Code 512131), the SBA Size Standards categorize any firm with less than $38.5 million in annual revenue as a small business.[26] As a result, small entities constitute the vast majority of firms in the movie exhibition industry. The latest data providing detailed breakouts of annual revenue by industry comes from the 2012 Statistics of U.S. Businesses (SUSB).[27] This dataset provides information regarding the number of firms,[28] establishments,[29] and estimated annual receipts [30] (annual revenue) for each of the 17 revenue size categories in the movie exhibition industry. According to this data, 12 of the 17 revenue size categories contain firms with estimated annual receipts of less than the $38.5 million SBA size standard for a small business in this industry. Because these firms are considered small businesses by the SBA size standards, they are also considered small entities for purposes of this FRFA. An additional category of firms with annual receipts between $35 million and $40 million contains firms that may or may not have annual revenue below the $38.5 million threshold. For the purposes of this analysis, however, all firms in this category are assumed to have revenues lower than the $38.5 million size standard and are therefore considered to be small entities.

The 2012 SUSB data on the movie exhibition industry includes both digital and analog movie theaters but excludes drive-in movie theaters. The number and percentage of firms and establishments by revenue category is presented in table 8. According to the 2012 SUSB, 1,876 movie theater firms operated 4,540 movie theater establishments. Approximately 1,833 of those firms (98 percent) are categorized as a small business according to the SBA size standard ($38.5 million) and therefore are small entities for purposes of this FRFA. The 1,833 firms categorized as small entities operated approximately 2,381 movie theater establishments (52 percent of the total).

TABLE 8—MOTION PICTURE THEATERS (EXCEPT DRIVE-INS) FIRMS AND ESTABLISHMENTS BY REVENUE CATEGORY, 2012 STATISTICS OF U.S. BUSINESSES

[NAICS 512131]

Firms with annual revenue	Number of firms	Percentage of total firms (%)	Cumulative total of firms (%)	Number of establishments	Percentage of total establishments (%)	Cumulative total of establishments (%)
Less than $100,000	244	13.0	13.0	246	5.4	5.4
$100,000 to $499,999	618	32.9	45.9	630	13.9	19.3
$500,000 to $999,999	332	17.7	63.6	353	7.8	27.1
$1,000,000 to $2,499,999	399	21.3	84.9	460	10.1	37.2
$2,500,000 to $4,999,999	125	6.7	91.6	189	4.2	41.4
$5,000,000 to $7,499,999	35	1.9	93.4	66	1.5	42.8
$7,500,000 to $9,999,999	19	1.0	94.5	49	1.1	43.9
$10,000,000 to $14,999,999	26	1.4	95.8	107	2.4	46.3
$15,000,000 to $19,999,999	9	0.5	96.3	41	0.9	47.2
$20,000,000 to $24,999,999	10	0.5	96.9	60	1.3	48.5

[26] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at 28 (July 14, 2014), *available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf* (last visited Sept. 12, 2016).

[27] The SBA's Office of Advocacy partially funds the Census Bureau to produce data on employer firm size including the number of firms, number of establishments, employment, and annual payroll and annual sales/receipts/revenue for employment size of firm categories by location and industry as part of the SUSB program. *See* U.S. Census Bureau, *Statistics of U.S. Businesses, available at https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html* (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The information is available in an Excel file which lists all information by NAICS Code.

[28] The U.S. Census Bureau defines a ''firm'' as a ''business organization consisting of one or more domestic establishments in the same state and industry that were specified under common ownership or control. The firm and the establishment are the same for single-establishment firms. For each multi-establishment firm, establishments in the same industry within a state will be counted as one firm—the firm employment and annual payroll are summed from the associated establishments.'' U.S. Census Bureau, *Statistics of U.S. Businesses: Glossary, available at https://www.census.gov/programs-surveys/susb/about/glossary.html* (last visited Sept. 12, 2016).

[29] The U.S. Census Bureau defines an ''establishment'' as ''a single physical location where business is conducted or where services or industrial operations are performed.'' U.S. Census Bureau, *North American Industry Classification System: Frequently Asked Questions (FAQs), available at http://www.census.gov/eos/www/naics/faqs/faqs.html#q2* (last visited Sept. 12, 2016).

[30] ''Receipts (net of taxes collected from customers or clients) are defined as operating revenue for goods produced or distributed, or for services provided. Receipts excludes local, state, and federal sales and other taxes collected from customers or clients and paid directly to a tax agency. Receipts are acquired from economic census data for establishments in industries that are in-scope to the economic census; receipts are acquired from IRS tax data for single-establishment businesses in industries that are out-of-scope to the economic census; and payroll-to-receipts ratios are used to estimate receipts for multi-establishment businesses in industries that are out-of-scope to the economic census. Statistics of U.S. Businesses tabulations provide summed establishment receipts which creates some duplication of receipts for large multi-establishment enterprises. Receipts data are available for years ending in 2 and 7 only.'' U.S. Census Bureau, *Statistics of U.S. Businesses: Glossary, available at https://www.census.gov/programs-surveys/susb/about/glossary.html* (last visited Sept. 12, 2016).

TABLE 8—MOTION PICTURE THEATERS (EXCEPT DRIVE-INS) FIRMS AND ESTABLISHMENTS BY REVENUE CATEGORY, 2012 STATISTICS OF U.S. BUSINESSES—Continued

[NAICS 512131]

Firms with annual revenue	Number of firms	Percentage of total firms (%)	Cumulative total of firms (%)	Number of establishments	Percentage of total establishments (%)	Cumulative total of establishments (%)
$25,000,000 to $29,999,999	6	0.3	97.2	66	1.5	49.9
$30,000,000 to $34,999,999	4	0.2	97.4	66	1.5	51.4
$35,000,000 to $39,999,999	6	0.3	97.7	48	1.1	52.4
$40,000,000 and greater *	43	2.3	100.0	2,159	47.6	100.0
Total Firms (Less than $40,000,000)	1,833	98	.....	2,381	52	.....
Total Firms	1,876	.....	.....	4,540	.....	.....

* This category sums the firms and establishments included in the following categories: $40,000,000 to $49,999,999; $50,000,000 to $74,999,999; $75,000,000 to $99,999,999; $100,000,000 and greater.

Table 9 presents the number of firms, the number of establishments, and the annual revenue of firms by revenue size category. The calculated average annual revenue per firm and the average annual revenue per establishment are also provided.

TABLE 9—MOTION PICTURE THEATERS (EXCEPT DRIVE-INS) FIRMS AND ESTABLISHMENTS, ANNUAL REVENUE BY REVENUE CATEGORY, 2012 STATISTICS OF U.S. BUSINESSES

[NAICS 512131]

Firms with annual revenue	Number of firms	Number of establishments	Annual revenue for all firms ($ millions)	Annual revenue per firm *	Annual revenue per establishment *
Less than $100,000	244	246	$13.3	$54,508	$54,065
$100,000 to $499,999	618	630	158.5	256,537	251,651
$500,000 to $999,999	332	353	237.3	714,762	672,241
$1,000,000 to $2,499,999	399	460	615.4	1,542,318	1,337,793
$2,500,000 to $4,999,999	125	189	424.4	3,394,864	2,245,280
$5,000,000 to $7,499,999	35	66	192.4	5,497,029	2,915,091
$7,500,000 to $9,999,999	19	49	146.2	7,697,211	2,984,633
$10,000,000 to $14,999,999	26	107	312.3	12,013,115	2,919,075
$15,000,000 to $19,999,999	9	41	127.8	14,200,444	3,117,171
$20,000,000 to $24,999,999	10	60	143.1	14,314,600	2,385,767
$25,000,000 to $29,999,999	6	66	136.4	22,734,000	2,066,727
$30,000,000 to $34,999,999	4	66	** n/a	** n/a	** n/a
$35,000,000 to $39,999,999	6	48	165.1	27,514,000	3,439,250
$40,000,000 and greater	43	2,159	10,520	244,639,651	4,872,397

* Calculated.
** Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

D. Costs to Impacted Small Entities

Annual revenue data from the SUSB program is used, together with information regarding likely per-theater upfront and ongoing annual costs (section 4.1.4 of the Final RA), to estimate the impact of this rulemaking on small entities relative to their resources. As described in section 2.1.4 of the Final RA, movie theater complexes vary greatly by the number of auditoriums that they contain, and the per-theater cost varies according to the number of auditoriums within a theater exhibiting digital movies. Therefore, the Final RA breaks the movie exhibition industry into four venue types based on size:

- Megaplex (16+ auditoriums);
- Multiplex (8–15 auditoriums);
- Miniplex (2–7 auditoriums); and
- Single-Auditorium movie theaters.

The FRFA uses the estimated number of movie theaters by venue type to determine the cost impact per firm. Table 10 presents estimates of the percentage of movie theaters by venue type, calculated from the 2015 distribution of auditoriums by venue type (table 3–3 of the Final RA) and the average number of auditoriums per venue type.[31] The table indicates that approximately 40 percent of movie theater establishments are multiplex theaters, and 43 percent are either miniplex (22 percent) or single-auditorium theaters (21 percent), with the remaining 17 percent being megaplex theaters.

[31] *See* NATO, Statement of Position on RIN 1190–AA63, CRT Docket No. 126, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description 22, *available at http://www.regulations.gov/contentStreamer?documentId=DOJ-CRT-2014-0004-0401&attachmentNumber=4&disposition=attachment&contentType=pdf* (last visited Sept. 12, 2016).

TABLE 10—ESTIMATED NUMBER OF MOVIE THEATERS BY VENUE TYPE

[2015]

Venue type	Number of auditoriums exhibiting digital movies (2015)	÷	Average number of auditoriums by venue type	=	Estimated number of movie theaters by venue type (2015)	Percentage of movie theaters by venue type (2015)
Megaplex	12,812	÷	18	=	712	17
Multiplex	20,322	÷	12	=	1,693	40
Miniplex	4,666	÷	5	=	933	22
Single-Auditorium	889	÷	1	=	889	21
Total	38,688	÷		=	4,227	100

As previously discussed, movie theaters, including small movie theaters, will incur upfront costs as well as ongoing costs to comply with the requirements of this rulemaking. Table 11 below presents the undiscounted upfront costs incurred by the average movie theater within each venue type.

TABLE 11—AVERAGE PER MOVIE THEATER UPFRONT COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, UNDISCOUNTED

[$]

Venue type	Captioning hardware acquisition	Audio description hardware acquisition	Captioning device acquisition	Audio description device acquisition	Installation costs	Total upfront costs
Megaplex	$16,158	$205	$8,728	$1,470	$797	$27,358
Multiplex	10,772	205	5,819	980	533	18,309
Miniplex	4,488	205	4,364	490	286	9,834
Single-Auditorium	1,097	308	1,864	190	104	3,562

* Totals may differ due to rounding.

Because movie theaters will incur the highest costs to acquire the necessary equipment, tables 12 through 19 provide the data used to estimate these costs. Table 12 presents the average number of auditoriums by venue type and estimates the relevant number of captioning hardware units required by the scoping requirements using the one-unit-per-auditorium assumption discussed in section 3.3.1 of the Final RA. The average number of auditoriums across each venue type was provided by NATO in its public comment on the 2014 NPRM.

TABLE 12—CAPTIONING HARDWARE SCOPING REQUIREMENT PER VENUE TYPE

Venue type	Average number of auditoriums	Captioning hardware units required per venue type
Megaplex (16+ auditoriums)	18	18
Multiplex (8–15 auditoriums)	12	12
Miniplex (2–7 auditoriums)	5	5
Single-Auditorium	1	1

Similarly, table 13 presents the average number of auditoriums by venue type and estimates the relevant number of audio description hardware units required by the scoping requirements using the one-unit-per-movie-theater assumption discussed in section 3.3.2 of the Final RA. The average number of auditoriums across each venue type was provided by NATO in its public comment on the 2014 NPRM.

TABLE 13—AUDIO DESCRIPTION HARDWARE SCOPING REQUIREMENTS PER VENUE TYPE

Venue type	Average number of auditoriums	Audio description hardware units required per venue type
Megaplex (16+ auditoriums)	18	1
Multiplex (8–15 auditoriums)	12	1
Miniplex (2–7 auditoriums)	5	1

TABLE 13—AUDIO DESCRIPTION HARDWARE SCOPING REQUIREMENTS PER VENUE TYPE—Continued

Venue type	Average number of auditoriums	Audio description hardware units required per venue type
Single-Auditorium	1	1

Tables 14 and 15 below estimate the minimum number of captioning devices required per venue type. The Department emphasizes that these figures are merely estimates based on the average number of auditoriums across each venue type. The exact number of captioning and audio description devices required at a particular movie theater establishment depends on the number of auditoriums showing digital movies.

TABLE 14—CAPTIONING DEVICE SCOPING REQUIREMENTS PER VENUE TYPE

[Estimated]

Venue type	Minimum number of captioning devices required per venue type
Megaplex (16+ auditoriums)	12
Multiplex (8–15 auditoriums)	8
Miniplex (2–7 auditoriums)	6
Single-Auditorium	4

TABLE 15—AUDIO DESCRIPTION DEVICE SCOPING REQUIREMENTS PER VENUE TYPE

[Estimated]

Venue type	Average number of auditoriums	Minimum number of audio description devices required per venue type
Megaplex (16+ auditoriums)	18	9
Multiplex (8–15 auditoriums)	12	6
Miniplex (2–7 auditoriums)	5	3
Single-Auditorium	1	2

Finally, the unit costs for the necessary equipment are presented in table 16, Table 17, Table 18, and Table 19 below. This information was provided in NATO's public comment on the 2014 NPRM. For further detail regarding the unit costs used to develop the total equipment acquisition costs estimate, please see section 3.4 of the Final RA.

TABLE 16—CAPTIONING HARDWARE UNIT COSTS

Technology	Cost per captioning hardware unit
Doremi Captiview	$864
USL	1,371
Sony	500
Average (Excluding Sony)	1,118
Average (All Technologies)	912

TABLE 17—ADDITIONAL COST FOR AUDIO DESCRIPTION HARDWARE

Technology	Cost per theater for audio description hardware
Doremi Captiview	$615
USL	0
Sony	0
Average (Excluding Sony)	308
Average (All Technologies)	205

TABLE 18—CAPTIONING DEVICE UNIT COSTS

Technology	Cost per captioning device
Doremi Captiview	$453
USL	479
Sony	1,250
Average (Excluding Sony)	466
Average (All Technologies)	727

TABLE 19—AUDIO DESCRIPTION DEVICE UNIT COSTS

Technology	Cost per audio description device
Doremi Captiview	$121
USL	69
Sony	300
Average (Excluding Sony)	95
Average (All Technologies)	163

In addition to incurring upfront costs, movie theaters will also incur ongoing costs to comply with the final rule. Table 20 below presents the estimated total ongoing costs and the annual ongoing costs that the average movie theater within each venue type will incur over the 15-year period of analysis. More detailed information about how these costs were calculated can be found in section 3.6 (replacement costs), section 3.7 (training costs), and section 3.8 (maintenance and administrative costs) of the Final RA.

TABLE 20—AVERAGE PER MOVIE THEATER ONGOING COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, UNDISCOUNTED

[$]

Venue type	Total replacement costs	Total staff training costs	Total maintenance and administrative costs	Total ongoing costs	Ongoing costs per year
Megaplex	$46,957	$7,058	$11,952	$65,968	$4,398
Multiplex	31,373	4,705	7,999	44,077	2,938
Miniplex	19,255	1,961	4,296	25,512	1,701
Single-Auditorium	7,566	392	1,556	9,514	634

* Totals may differ due to rounding.

Table 21 summarizes the estimated per movie theater costs by venue type, as explained above and in further detail in section 4.1.4 of the Final RA. The first column in table 21 presents the average upfront costs (acquisition, installation) by venue type while the second column shows the average ongoing annual costs (replacement, training, and maintenance and administrative costs) by venue type. The rightmost column shows the total undiscounted cost to an average theater by venue type over the 15-year period of analysis.

TABLE 21—AVERAGE PER MOVIE THEATER COSTS, UNDISCOUNTED

[$]

Venue type	Average per theater upfront costs (acquisition, installation)	Average annual per theater ongoing costs (replacement, training, maintenance and administrative)	Total per theater costs over period of analysis
Megaplex	$27,358	$4,398	$93,325
Multiplex	18,309	2,938	62,386
Miniplex	9,834	1,701	35,346
Single-Auditorium	3,562	634	13,076

The FRFA quantifies the impact on small entities by calculating the average upfront costs and the ongoing costs as a percentage of average annual revenue. As presented in the table above, the per movie theater costs are calculated by venue type. However, the SUSB program provides no information regarding the venue types operated by firms in each revenue category. As a result, the analysis uses the following information to estimate the venue types operated by firms in each revenue category:

- The average annual revenue per auditorium is approximately $200,000 to $250,000.[32]
- Industry research indicates that the firms with the largest annual revenue operate most megaplex and multiplex movie theaters, whereas the firms with smaller annual revenues operate most miniplex and single-auditorium movie theaters.

Based on this information, the FRFA makes the following assumptions regarding the venue types operated by firms in each revenue category:

- Firms with less than $499,999 in annual revenue operate single-auditorium movie theaters.[33] As presented in table 9, firms with less than $100,000 in annual revenue have an average annual revenue of $54,065 per theater; firms with $100,000 to $499,999 in annual revenue have an average annual revenue of $251,651 per theater. These average revenue figures are close to or below NATO's estimated annual revenue per auditorium.
- Firms with annual revenues from $500,000 to $999,999 operate miniplex movie theaters (2–7 auditoriums). The average annual revenue in this category is $714,762, which is equivalent to the revenue generated by approximately three auditoriums according to NATO's estimated annual revenue per auditorium.
- Firms with annual revenues between $1 million and $2.5 million operate miniplex and multiplex movie theaters. Costs to firms with annual revenues between $1 million and $2.5 million are an average of the costs to miniplex and multiplex movie theaters.
- Firms with annual revenues between $2.5 million and $40 million operate multiplex and megaplex movie theaters. Costs to firms with revenues between $2.5 million and $40 million are estimated using a weighted average[34] of the costs to multiplex and megaplex movie theaters based on the number of movie theaters presented in table 10.

Using the above assumptions, table 22 presents the estimated upfront and ongoing annual costs for small entity movie theater firms, grouped into four revenue categories.

TABLE 22—VENUE TYPE, UPFRONT COSTS, AND ONGOING COSTS BY REVENUE CATEGORY IN FRFA

Firms with annual revenue of	Venue type used to estimate costs to firms	Estimated upfront costs to average movie theater stablishment	Estimated annual ongoing costs to average movie theater establishment
Less than $499,999	Single-Screen	$3,562	$634
$500,000 to $999,999	Miniplex	9,834	1,701
$1,000,000 to $2,499,999	Miniplex/Multiplex	* 14,071	* 2,320
$2,500,000 to $39,999,999	Multiplex/Megaplex	** 20,987	** 3,370

* Average of Miniplex/Multiplex costs.
** Weighted Average of Multiplex and Megaplex costs based on number of theaters (table 10).

Table 23 below shows the upfront costs as a percentage of annual revenue for firms by revenue category. The average costs per firm are derived from the average number of establishments per firm (first column) and the average upfront costs per theater for each revenue category (second column). As the table shows, the upfront costs make

[32] NATO, Attachment A, Spring 2014 Accessibility Survey Results, submitted in RIN 1190–AA63, CRT Docket No. 126, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description, *available at https://www.regulations.gov/contentStreamer?documentId=DOJ-CRT-2014-0004-0401&attachmentNumber=3&disposition=attachment&contentType=pdf* (last visited Sept. 12, 2016).

[33] According to the 2012 SUSB, firms with less than $499,999 in annual revenue operated 19.3 percent of all establishments in 2012. *See* U.S. Census Bureau, *Statistics of U.S. Businesses, available at http://www.census.gov/econ/susb/* (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The information is available in an Excel file which lists all information by NAICS Code. The relevant NAICS Code for Motion Picture Theaters (except Drive-Ins) is 512131. This figure is slightly less than the estimate in table 10, which finds that 21 percent of all movie theaters are single-auditorium.

[34] According to table 10, there are approximately 2,405 megaplex and multiplex theaters, of which 712 are megaplexes and 1,693 are multiplexes. The weighted average assumes that 30 percent of the movie theaters in this revenue category are megaplex movie theaters (712/2,405) and 70 percent are multiplex movie theaters (1,693/2,405).

up less than 1.5 percent of annual revenue for all firms except those with revenues of less than $100,000. For all firms with revenues of $2,500,000 or greater, the upfront cost was less than 1 percent of annual revenues.

As discussed previously, the data from the 2012 SUSB that is provided in this section also includes data from movie theaters operating auditoriums that exhibit analog movies exclusively, which are not subject to the requirements of this rulemaking. Based on its own independent research and analysis, the Department believes that most firms with annual revenue less than $100,000 are not subject to the requirements of this rule. Although the FRFA calculates the costs as a percent of annual revenue for this category of firms, the information available to the Department supports its view that most of these firms are likely operating single auditoriums that exhibit analog movies exclusively and are therefore not subject to the requirements of this rule. First, according to industry experts, the average annual revenue per auditorium is approximately $200,000 to $250,000, thus making it reasonable to assume that firms with annual revenue less than $100,000 operate single-auditorium movie theaters. Second, the Department received information from industry experts that the majority of single-auditorium movie theaters still use analog projection systems. Third, commenters indicated that the remaining movie theaters with analog projection systems have not converted to digital projection systems because they cannot afford the high cost to do so ($60,000 to $150,000 per auditorium [35]). Therefore, it is reasonable to assume that most of the movie theater firms with less than $100,000 in annual revenue operate movie theaters with analog auditoriums that are not subject to this rulemaking. In addition, all movie theaters with auditoriums exhibiting digital movies—including any firms with less than $100,000 in annual revenue—continue to have available to them the individualized and fact-specific undue burden limitation specified in § 36.303(a).

TABLE 23—AVERAGE UPFRONT COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED

[2015 $]

Revenue category	Establishments per firm	Average upfront costs per establishment	Average upfront costs per firm	Average revenue per firm	Upfront costs as a percentage of revenue
Less than $100,000 *	1.01	$3,562	$3,591	$54,508	6.6
$100,000 to $499,999	1.02	3,562	3,631	256,537	1.4
$500,000 to $999,999	1.06	9,834	10,456	714,762	1.5
$1,000,000 to $2,499,999	1.15	14,071	16,223	1,542,318	1.1
$2,500,000 to $4,999,999	1.51	20,987	31,732	3,394,864	0.9
$5,000,000 to $7,499,999	1.89	20,987	39,575	5,497,029	0.7
$7,500,000 to $9,999,999	2.58	20,987	54,124	7,697,211	0.7
$10,000,000 to $14,999,999	4.12	20,987	86,368	12,013,115	0.7
$15,000,000 to $19,999,999	4.56	20,987	95,606	14,200,444	0.7
$20,000,000 to $24,999,999	6.00	20,987	125,920	14,314,600	0.9
$25,000,000 to $29,999,999	11.00	20,987	230,853	22,734,000	1.0
$30,000,000 to $34,999,999	16.50	20,987	346,280	** n/a	** n/a
$35,000,000 to $39,999,999	8.00	20,987	167,893	27,514,000	0.6

* Likely firms operating single-auditorium movie theaters that exhibit analog movies exclusively, and therefore not subject to this rulemaking.
** Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

Table 24 presents the average annual ongoing cost as a percentage of average annual revenue for firms in each revenue category. For all firms, except those with annual revenues of $100,000 or less, annual ongoing costs make up less than 0.3 percent of annual revenue.

TABLE 24—AVERAGE ANNUAL ONGOING COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED

[2015 $]

Revenue category	Establishment/ firm	Average ongoing costs per establishment	Average annual ongoing cost per firm	Average revenue per firm	Annual ongoing cost as a percentage of revenue
Less than $100,000 *	1.01	$634	$639	$54,508	1.2
$100,000 to $499,999	1.02	634	647	256,537	0.3
$500,000 to $999,999	1.06	1,701	1,808	714,762	0.3
$1,000,000 to $2,499,999	1.15	2,320	2,674	1,542,318	0.2
$2,500,000 to $4,999,999	1.51	3,370	5,096	3,394,864	0.2
$5,000,000 to $7,499,999	1.89	3,370	6,356	5,497,029	0.1
$7,500,000 to $9,999,999	2.58	3,370	8,692	7,697,211	0.1
$10,000,000 to $14,999,999	4.12	3,370	13,870	12,013,115	0.1
$15,000,000 to $19,999,999	4.56	3,370	15,354	14,200,444	0.1

[35] *See* Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many Movies,* New Republic (Sep. 12, 2014), *available at http://www.newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film* (last visited Sept. 12, 2016).

TABLE 24—AVERAGE ANNUAL ONGOING COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED—Continued

[2015 $]

Revenue category	Establishment/ firm	Average ongoing costs per establishment	Average annual ongoing cost per firm	Average revenue per firm	Annual ongoing cost as a percentage of revenue
$20,000,000 to $24,999,999	6.00	3,370	20,222	14,314,600	0.1
$25,000,000 to $29,999,999	11.00	3,370	37,074	22,734,000	0.2
$30,000,000 to $34,999,999	16.50	3,370	55,611	** n/a	** n/a
$35,000,000 to $39,999,999	8.00	3,370	26,963	27,514,000	0.1

* Likely firms operating single-auditorium movie theaters that exhibit analog movies exclusively, and therefore not subject to this rulemaking.
** Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

E. Reporting, Recordkeeping, and Other Compliance Requirements

The final rule imposes no new recordkeeping or reporting requirements. However, the final rule does require that movie theaters disclose to the public information concerning the availability of captioning and audio description for movies shown in their auditoriums. Specifically, § 36.303(g)(8) of the final rule requires movie theaters to inform the public of the availability of captioning and audio description on all notices of movie showings and times at the box office and other ticketing locations, on Web sites and mobile apps, in newspapers, and over the telephone. This requirement applies to any movie theater showing digital movies with captioning and audio description on or after January 17, 2017. Notices of movie showings and times posted by third parties not subject to or under the control of a covered movie theater are not subject to this requirement.

As discussed throughout the Final RA, movie theaters, including small entities, may incur costs as a result of complying with the final rule. These costs are detailed in section 7.4 of the Final RA and section VI.D above but do not include the costs associated with the notice requirement. As discussed in section V.A.3 above, the Department expects that the additional cost and burden of noting which screenings will be captioned or audio-described is de minimis when a movie theater is already preparing a communication listing movie titles and screening times. Therefore, the Department anticipates that the costs and burdens associated with this requirement will also be de minimis for small entities.

Additionally, the Department does not expect that movie theater personnel will need to acquire additional professional skills to comply with this requirement. A specific form of notice is not required. Movie theaters routinely use ''CC'' and ''AD'' or ''DV'' to indicate the availability of closed movie captioning and audio description in their communications, and the Department's research indicates that the inclusion of such abbreviations does not require additional technical knowledge. Moreover, the movie exhibition industry has largely moved away from print advertising in favor of digital advertising. As one commenter indicated, digital advertising allows movie theaters to add information concerning the availability of captioning and audio description without much difficulty or cost.

More detailed information on the estimated burden and costs associated with the final rule's notice requirement is provided in the Department's 60-day Paperwork Reduction Act Notice published in the **Federal Register** on June 10, 2016. 81 FR 37643. The Department published a second notice in the **Federal Register** on August 30, 2016. 81 FR 59657. The 30-day comment period for the second notice closed on September 29, 2016.

F. Measures Taken To Limit Impact on Small Entities

The Department is aware of potential limitations to compliance for small entities—specifically, small movie theater firms with less than $38.5 million in annual revenue—and has taken measures to lessen the impact on those entities. In addition to soliciting comments regarding methods to reduce the regulatory impact on small movie theaters, the Department also participated in a roundtable sponsored by the Office of Advocacy of the SBA at which organizations representing small movie theaters as well as individual owners expressed their views. As a result of the information provided, the Department considered a variety of alternatives in the final rule. The different alternatives considered and their relevance to small movie theaters are summarized below. See chapter 6 of the Final RA for further information and detail regarding the alternatives that the Department considered.

Changes to the Compliance Date

In the final rule, movie theaters have 18 months to acquire and install the necessary equipment to provide closed movie captioning and audio description in their auditoriums exhibiting digital movies. The Department also considered other compliance windows, including a 6-month and a 2-year compliance window. Some commenters suggested that the Department defer the requirements of this rule for small movie theaters with annual revenue less than $500,000 because these movie theaters might have financial difficulty complying with the requirements.

The Department ultimately decided that an 18-month compliance date was the most appropriate choice for all movie theaters exhibiting digital movies and is only deferring application of the rule's requirements for movie theater auditoriums that exhibit analog movies exclusively. The Department's decision regarding the 18-month compliance date in the final rule is based on the Department's independent research and the information provided in comments during the 2014 NPRM comment period. Based on this information, the Department determined that 6 months may be an insufficient amount of time for movie theaters to comply with the requirements of this rulemaking, especially small movie theaters. However, the Department believes that an 18-month compliance date gives small movie theaters, especially those struggling financially as a result of the unrelated costs of digital conversion, a sufficient amount of time to plan and budget accordingly. Although some commenters suggested a deferral for a category of smaller movie theaters, the Department found that to be unnecessary because movie theaters do not have to comply with requirements of the final rule to the extent that

complying would constitute an undue burden or a fundamental alteration.

Changes to the Scoping Requirements

In the 2014 NPRM, the Department proposed scoping requirements for captioning devices based on the number of seats in a movie theater, which were equivalent to approximately 2 percent of seats. The Department further proposed that movie theaters maintain one audio description device per auditorium, with a minimum of two devices per movie theater. However, in light of the public comments received and proposals made by the movie exhibition industry and multiple disability advocacy groups, those scoping requirements have been reduced in the final rule. Because movie theaters are rarely at 100 percent occupancy, the Department determined that the number of seats within a movie theater is an inappropriate proxy for determining the number of captioning devices required. One commenter noted that the scoping requirements based on seat count could disproportionately impact small movie theaters because many single-auditorium movie theaters are historic establishments with many seats but low occupancy rates. Additionally, usage data indicates that audio description devices are used less frequently than the proposed scoping required. As a result, the Department adopted lower scoping requirements for both captioning and audio description devices based on the number of auditoriums showing digital movies within a movie theater. The reduced scoping in the final rule substantially lowers costs per movie theater and thus reduces burdens on small movie theaters.

Auditoriums Exhibiting Analog Movies Exclusively

The Department considered giving movie theaters with auditoriums equipped to exhibit analog movies exclusively 4 years to comply with the rule's requirements, as opposed to deferring the decision whether to engage in rulemaking with respect to such auditoriums (see section 1.4.1 and section 6.3 of the Final RA). Based on public comments and analysis of the most current data, the Department ultimately decided to defer analog auditoriums from coverage of this rule. As previously discussed, the movie industry continues to undergo significant changes in the production and distribution of movies, resulting in the near elimination of first-run movies in analog film format. Most movie theaters have converted to digital projection systems to the extent that they are financially able to do so, and as a result, small theaters that still have analog projection systems tend to have fewer financial resources than other movie theaters. The Department rejected the alternative 4-year compliance date for analog movie theaters and is deferring until a later date the decision whether to apply the rule's requirements to movie theater auditoriums exhibiting analog movies exclusively. Because the remaining analog movie theaters likely qualify as small entities, the deferral of rulemaking with respect to analog auditoriums will reduce the burdens on small movie theaters.

List of Subjects for 28 CFR Part 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Individuals with disabilities, Penalties, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and 42 U.S.C. 12186 and 12205a, and for the reasons set forth in Appendix A to 28 CFR part 36, chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

■ 1. The authority citation for part 36 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b), 12205a.

Subpart A—General

■ 2. In § 36.303:

■ a. Redesignate paragraph (g) as paragraph (h); and

■ b. Add new paragraph (g) to read as follows:

§ 36.303 Auxiliary aids and services.

* * * * *

(g) *Movie theater captioning and audio description*—(1) *Definitions.* For the purposes of this paragraph (g)—

(i) *Analog movie* means a movie exhibited in analog film format.

(ii) *Audio description* means the spoken narration of a movie's key visual elements, such as the action, settings, facial expressions, costumes, and scene changes. *Audio description* generally requires the use of an audio description device for delivery to a patron.

(iii) *Audio description device* means the individual device that a patron may use at any seat to hear audio description.

(iv) *Captioning device* means the individual device that a patron may use at any seat to view closed movie captioning.

(v) *Closed movie captioning* means the written display of a movie's dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds or sound effects. *Closed movie captioning* generally requires the use of a captioning device for delivery of the captions to the patron.

(vi) *Digital movie* means a movie exhibited in digital cinema format.

(vii) *Movie theater* means a facility, other than a drive-in theater, that is owned, leased by, leased to, or operated by a public accommodation and that contains one or more auditoriums that are used primarily for the purpose of showing movies to the public for a fee.

(viii) *Open movie captioning* means the written on-screen display of a movie's dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds and sound effects.

(2) *General.* A public accommodation shall ensure that its movie theater auditoriums provide closed movie captioning and audio description whenever they exhibit a digital movie that is distributed with such features. Application of the requirements of paragraph (g) of this section is deferred for any movie theater auditorium that exhibits analog movies exclusively, but may be addressed in a future rulemaking.

(3) *Minimum requirements for captioning devices.* A public accommodation shall provide a minimum number of fully operational captioning devices at its movie theaters in accordance with the following Table:

Number of movie theater auditoriums exhibiting digital movies	Minimum required number of captioning devices
1	4
2–7	6
8–15	8
16 +	12

(4) *Minimum requirements for audio description devices.* (i) A public accommodation shall provide at its movie theaters a minimum of one fully operational audio description device for every two movie theater auditoriums exhibiting digital movies and no less than two devices per movie theater. When calculation of the required number of devices results in a fraction, the next greater whole number of devices shall be provided.

(ii) A public accommodation may comply with the requirements in paragraph (g)(4)(i) of this section by using the existing assistive listening receivers that the public accommodation is already required to provide at its movie theaters in accordance with Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.

(5) *Performance requirements for captioning devices and audio description devices.* Each captioning device and each audio description device must be properly maintained by the movie theater to ensure that each device is fully operational, available to patrons in a timely manner, and easily usable by patrons. Captioning devices must be adjustable so that the captions can be viewed as if they are on or near the movie screen, and must provide clear, sharp images in order to ensure readability of captions.

(6) *Alternative technologies.* (i) A public accommodation may meet its obligation to provide captioning and audio description in its movie theaters to persons with disabilities through any technology so long as that technology provides communication as effective as that provided to movie patrons without disabilities.

(ii) A public accommodation may use open movie captioning as an alternative to complying with the requirements specified in paragraph (g)(3) of this section, either by providing open movie captioning at all showings of all movies available with captioning, or whenever requested by or for an individual who is deaf or hard of hearing prior to the start of the movie.

(7) *Compliance date for providing captioning and audio description.* (i) A public accommodation must comply with the requirements in paragraphs (g)(2)–(6) of this section in its movie theaters that exhibit digital movies by June 2, 2018.

(ii) If a public accommodation converts a movie theater auditorium from an analog projection system to a system that allows it to exhibit digital movies after December 2, 2016, then that auditorium must comply with the requirements in paragraph (g) of this section by December 2, 2018, or within 6 months of that auditorium's complete installation of a digital projection system, whichever is later.

(8) *Notice.* On or after January 17, 2017, whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies, it shall ensure that all notices of movie showings and times at the box office and other ticketing locations, on Web sites and mobile apps, in newspapers, and over the telephone, inform potential patrons of the movies or showings that are available with captioning and audio description. This paragraph does not impose any obligation on third parties that provide information about movie theater showings and times, so long as the third party is not part of or subject to the control of the public accommodation.

(9) *Operational requirements.* On or after January 17, 2017, whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies, it shall ensure that at least one employee is available at the movie theater to assist patrons seeking or using captioning or audio description whenever a digital movie is exhibited with these features. Such assistance includes the ability to—

(i) Locate all necessary equipment that is stored and quickly activate the equipment and any other ancillary systems required for the use of the captioning devices and audio description devices;

(ii) Operate and address problems with all captioning and audio description equipment prior to and during the movie;

(iii) Turn on open movie captions if the movie theater is relying on open movie captioning to meet the requirements of paragraph (g)(3) of this section; and

(iv) Communicate effectively with individuals with disabilities, including those who are deaf or hard of hearing or who are blind or have low vision, about how to use, operate, and resolve problems with captioning devices and audio description devices.

(10) This section does not require the use of open movie captioning as a means of compliance with paragraph (g) of this section, even if providing closed movie captioning for digital movies would be an undue burden.

■ 3. Appendix F to part 36 is added to read as follows:

Appendix F to Part 36—Guidance and Section-by-Section Analysis

Section 36.303(g)(1) Definitions

In the Notice of Proposed Rulemaking, 79 FR 44976 (Aug. 1, 2014) (NPRM), the Department proposed § 36.303(g)(1), which set forth definitions for certain terms specifically referenced in paragraph (g). The Department sought public comment on these proposed definitions.

''*Analog Movie*''

Although the Department did not specifically propose a definition of ''analog movie'' in the NPRM, the Department defined the term in the preamble and solicited comment on the state of analog movies and their availability. In the final rule, the Department has added a definition of ''analog movie'' in order to distinguish between movies shown in digital cinema format and movies shown in analog format. ''Analog movie'' is defined to mean ''a movie exhibited in analog film format.''

''*Audio Description*''

In the NPRM, the Department used the term ''audio description'' to refer to the spoken description of information describing the visual elements of a movie to an individual who is blind or has low vision and who is unable to see the images and action on the screen. Proposed § 36.303(g)(1)(i) defined ''audio description'' as the ''provision of a spoken narration of key visual elements of a visually delivered medium, including, but not limited to, actions, settings, facial expressions, costumes, and scene changes.'' Although the Department believes that the term ''audio description'' is most commonly used to describe this service, it sought public comment on whether to use this or some other nomenclature.

All commenters addressing this issue agreed with the Department's proposal and supported the use of the term and the Department's definition. In the final rule, the Department has retained the term ''audio description,'' and has slightly modified the definition for clarity to read as follows: ''*Audio description* means the spoken narration of a movie's key visual elements, such as the action, settings, facial expressions, costumes, and scene changes. *Audio description* generally requires the use of an audio description device for delivery to a patron.''

''*Audio Description Device*''

In the NPRM, at proposed § 36.303(g)(1)(iii), the Department used the term ''individual audio description listening device'' to refer to the ''individual device that patrons may use at their seats to hear audio description.'' The sole commenter on this definition expressed concern that the term ''individual audio description listening device'' was unnecessarily long. The Department agrees with the commenter and has revised the name of the device accordingly in the final rule. The final rule retains the text of the proposed definition with minor edits.

''*Captioning Device*''

In the NPRM, at proposed § 36.303(g)(1)(iv), the Department used the term ''individual captioning device'' to refer to the ''individual device that patrons may use at their seats to view the closed captions.'' The sole commenter on this definition recommended that the Department shorten the nomenclature for this device to ''captioning device.'' The Department agrees with the commenter and has revised the name of the device accordingly in the final rule. The final rule retains the text of the proposed definition with minor edits.

''*Closed Movie Captioning*''

The NPRM defined ''closed movie captioning'' as ''the written text of the movie dialogue and other sounds or sound making (*e.g.* sound effects, music, and the character who is speaking).'' The NPRM further provided that closed movie captioning be available only to individuals who request it, and that, generally, it requires the use of an individual captioning device to deliver the captions to the patron.

Commenters were equally split as to whether the Department should use ''closed movie captioning'' or some other language to refer to the technology. Some commenters urged the Department to use the term ''closed captioning.'' Other commenters disagreed, however, and stated that the Department should avoid using the term ''closed captioning'' to distinguish it from the ''closed captioning'' that is turned on at home by a person viewing the television. In the final rule, the Department is retaining the term ''closed movie captioning,'' but the definition is modified for clarity to read: ''*Closed movie captioning* means the written display of a movie's dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds or sound effects. *Closed movie captioning* generally requires the use of a captioning device for delivery of the captions to the patron.''

''*Digital Movie*''

The Department has added a definition of ''digital movie,'' meaning ''a movie exhibited in digital cinema format.''

''*Movie Theater*''

The NPRM proposed defining ''movie theater'' as ''a facility other than a drive-in theater that is used primarily for the purpose of showing movies to the public for a fee'' in order to make clear which facilities are subject to the specific captioning and audio description requirements set forth in § 36.303(g). The Department intended this definition to exclude drive-in movie theaters as well as facilities that screen movies if the facility is not used primarily for the purpose of showing movies for a fee, such as museums, hotels, resorts, or cruise ships, even if they charge an additional fee. The Department asked for public comment on the proposed definition and whether it adequately described the movie theaters that should be covered by this regulation.

Commenters generally supported the Department's proposed definition for ''movie theater,'' but there were some concerns about the proposed definition's scope. Some commenters asserted that the definition of ''movie theater'' should be expanded to include the institutions that the Department expressly excluded, such as museums, hotels, resorts, cruise ships, amusement parks, and other similar public accommodations that show movies as a secondary function, whether or not they charge a fee. One commenter expressed concern that such entities might believe that they are otherwise exempt from any requirement to furnish auxiliary aids and services to ensure effective communication, and another commenter urged the Department to consider developing additional regulations that would specifically address public accommodations that are not covered by the proposed definition but otherwise exhibit movies or other video content.

The Department declines to make any changes at this time to address public accommodations that do not meet the definition of ''movie theater'' and are, therefore, not subject to the requirements of paragraph (g). The Department's title III regulation has always made clear that all public accommodations must provide effective communication to the public through the provision of auxiliary aids and services, including, where appropriate, captioning and audio description. *See generally* 28 CFR 36.303; 28 CFR part 36, app. A. The requirements of this rule were not intended to supplant the general obligation to provide effective communication through the provision of auxiliary aids and services. They are only intended to provide clarity about how ''movie theaters'' must meet this obligation. The Department notes that many public accommodations that screen movies as a secondary function already provide appropriate auxiliary aids and services, and where the Department has identified the need for enforcement action, these types of public accommodations have been willing to comply with the ADA and the effective communication requirement. *See, e.g.,* Press Release, U.S. Department of Justice, *Justice Department Reaches Settlement with National Museum of Crime and Punishment to Improve Access for People with Disabilities* (Jan. 13, 2015), *available at http://www.justice.gov/opa/pr/justice-department-reaches-settlement-national-museum-crime-and-punishment-improve-access* (last visited Sept. 12, 2016).

Two commenters asked the Department to revise the definition of ''movie theater'' to clarify that public accommodations used as temporary screening locations during film festivals, such as pop-up tents, convention centers, and museums with theaters, are not subject to the requirements of paragraph (g). According to such commenters, most movies screened at festivals are not ready for distribution, and typically have not yet been distributed with captioning and audio description. To the extent a film is already distributed with these features, the commenters argued that the myriad of logistics entailed in coordinating a festival may preclude a film festival from making such features available.

The Department does not believe that its definition of ''movie theater'' encompasses the temporary facilities described by the commenters that host film festivals. However, operators of film festivals, just like any other public accommodation that operates a place of entertainment, are still subject to the longstanding general requirement under § 36.303 to provide effective communication unless doing so would be a fundamental alteration of the program or service or would constitute an undue burden. Moreover, if a festival programmer schedules the screening of a movie that is already distributed with captioning and audio description at a movie theater that is subject to the requirements in paragraph (g), then the effective communication obligation would require the festival to ensure that the accessible features are available at all scheduled screenings of a movie distributed with such features.

The Department also received several comments regarding the exclusion of drive-in movie theaters in the proposed definition. Many commenters agreed that drive-in movie theaters should not be subject to the requirements of paragraph (g) because the technology still does not exist to exhibit movies with closed movie captioning and audio description in this setting. A few commenters pointed out innovative ways for drive-in movie theaters to provide captioning and audio description and argued that such options are feasible. For example, one commenter suggested that drive-in movie theaters provide audio description through a second low-power FM broadcast transmitter or on a second FM channel. However, these commenters did not clearly identify technology that is currently available or under development to provide closed movie captioning in this setting. Finally, one commenter expressed concern that if audio description was broadcast at a drive-in theater, it would likely be heard by patrons who do not require audio description and would result in a fundamental alteration of the movie-going experience for such patrons.

The Department declines to change its position that drive-in movie theaters should be excluded from the requirements of paragraph (g). Given the diminishing number of drive-in movie theaters, the current lack of accessible technology to provide closed movie captioning and audio description in this setting, and the fact that it is unlikely that such technology will be developed in the future, the Department remains convinced that rulemaking regarding drive-in movie theaters should be deferred until the necessary technology becomes commercially available.

For the reasons discussed above, the Department has retained the text of the proposed definition of ''movie theater'' with minor edits. The final rule defines ''movie theater'' as ''a facility, other than a drive-in theater, that is owned, leased by, leased to, or operated by a public accommodation and that contains one or more auditoriums that are used primarily for the purpose of showing movies to the public for a fee.''

''*Open Movie Captioning*''

The NPRM proposed defining ''open movie captioning'' as ''the provision of the written text of the movie dialogue and other sounds or sound making in an on-screen text format that is seen by everyone in the movie theater.''

While commenters were evenly split on whether the new regulation should use the term ''open movie captioning'' or ''open captioning,'' the Department chose the former to avoid confusion and emphasize that the term refers only to captioning provided at movie theaters. The final rule defines ''open movie captioning'' as ''the written on-screen display of a movie's dialogue and non-speech information, such

as music, the identity of the character who is speaking, and other sounds and sound effects.''

Section 36.303(g)(2) General

In the NPRM, the Department proposed at § 36.303(g)(2)(i) that ''[a] public accommodation that owns, leases, leases to, or operates a movie theater shall ensure that its auditoriums have the capability to exhibit movies with closed movie captions.'' That paragraph further provided that in all cases where the movies the theater intends to exhibit are produced, distributed, or otherwise made available with closed movie captions, the public accommodation must ensure that it acquires the captioned version of those movies and makes closed movie captions available at all scheduled screenings of those movies. An identical provision requiring movie theaters to exhibit movies with audio description was proposed at § 36.303(g)(3)(i). The Department proposed applying the requirements for closed movie captioning and audio description to all movie screens (auditoriums) in movie theaters that show digital movies and sought public comment as to the best approach to take with respect to movie theaters that show analog movies. The Department sought public comment on whether it should adopt one of two options regarding the specific obligation to provide captioning and audio description at movie theater auditoriums that display analog movies. Option 1 proposed covering movie theater screens (auditoriums) that display analog movies but giving them 4 years to come into compliance with the requirements of § 36.303(g). Option 2 proposed deferring the decision whether to apply the rule's requirements to movie theater screens (auditoriums) showing analog movies and considering additional rulemaking at a later date.

Many commenters generally agreed with the provisions as they related to movie theaters displaying digital movies. These commenters stressed, however, that movie theaters should in no way be prohibited or limited from exhibiting a movie that is not available with captioning or audio description, or be required to add captioning and audio description when these features are not available.

Commenters were split in response to the Department's question concerning the best approach to take with respect to analog movie theaters. A slight majority of commenters supported deferral for movie theater auditoriums that exhibit analog movies exclusively. In support of Option 2, these commenters pointed to the state of the movie industry, the financial condition of many small movie theaters, and the unintended consequences of a 4-year compliance date. According to the comments, there are very few remaining movie theaters that display analog movies exclusively, and despite the industry's urging that such movie theaters must convert to digital to remain viable, many of these movie theaters have not converted because they cannot afford the high cost to do so. Therefore, these commenters argued that a regulation covering analog movie theaters will have minimal overall impact in addition to being an unnecessary strain on small businesses, considering the high cost of compliance for such movie theaters.

The remaining commenters responding to this question stated that the Department should adopt Option 1's 4-year compliance date for movie theaters displaying analog movies. These commenters reasoned that fairness and equality concerns justified adoption of Option 1 because, in their view, Option 2 could incentivize more movie theaters to delay their digital conversion, resulting in fewer movie theaters being subject to the regulation, and individuals with hearing and vision disabilities continuing to face unequal access to movie theaters. A few disability groups argued that because a movie theater is subject to title III of the ADA regardless of whether it displays analog movies or digital movies, adoption of Option 2 could be seen as carving out an exception within the ADA where none exists otherwise.

In consideration of these comments and the Department's independent research, the Department has decided to defer until a later date the decision whether to engage in rulemaking with respect to movie theater auditoriums that exhibit analog movies exclusively. Thus, the final rule makes clear that the requirements of paragraph (g) apply only to movie theaters with auditoriums that show digital movies. The Department agrees with commenters that very few analog movie theaters remain, and that the number of such movie theaters has declined rapidly in recent years. The Department believes that it is prudent to wait until it is clear whether there will be any movie theaters that continue to show analog movies and whether analog movies will continue to be produced at all, or distributed with captioning and audio description. Although movie theater auditoriums that exhibit analog movies exclusively are not subject to the specific requirements of paragraph (g) at this time, such movie theaters are nonetheless public accommodations and subject to the effective communication requirements of title III.

The final rule provides that ''[a] public accommodation shall ensure that its movie theater auditoriums provide closed movie captioning and audio description whenever they exhibit a digital movie that is distributed with such features. Application of the requirements of paragraph (g) is deferred for any movie theater auditorium that exhibits analog movies exclusively, but may be addressed in a future rulemaking.''

The requirements of paragraph (g) do not in any way prohibit a movie theater from displaying a movie that has not been made available with captioning and audio description features nor do the requirements require a movie theater to independently add such features to a movie that is not distributed with such features. In addition, all movie theaters, regardless of size, status of conversion to digital cinema, or economic viability, continue to have available to them the individualized and fact-specific undue burden limitation specified in § 36.303(a). This regulation does not change the availability of this compliance limitation nor the circumstances under which it can be asserted. *See* 28 CFR 36.104 (defining undue burden and listing factors to be considered in determining whether an action would result in an undue burden). It does, however, provide clarity about how movie theaters can meet their longstanding effective communication obligations under the ADA.

The Department notes that even if a movie theater cannot initially install captioning and audio description equipment in all of its auditoriums because it is an undue burden, the movie theater is still obligated to comply with renumbered § 36.303(h) and provide alternatives to full compliance by providing captioning and audio description in some of its auditoriums up to the point where the cost becomes an undue burden. In such a situation, the movie theater should take steps to maximize the range of movie options for customers who are deaf or hard of hearing, or blind or have low vision, by dispersing the available equipment throughout their auditoriums so that the theater is able to exhibit as many movies as possible with captioning and audio description throughout the day and evening on weekdays and weekends. If, for example, a six-auditorium movie theater can only afford to install captioning equipment in half of its auditoriums, and it has auditoriums with different capacities, it should install captioning equipment in a large, a medium, and a small auditorium. This distribution of equipment would permit exhibition of different types of movies, as blockbusters generally are shown in larger auditoriums first and lower budget or older movies may only be shown in medium or small auditoriums.

It has been, and continues to be, the Department's position that it would not be a fundamental alteration of the business of showing movies in theaters to exhibit movies already distributed with closed movie captioning and audio description in order to ensure effective communication for individuals who are deaf or hard of hearing, or blind or have low vision. The service that movie theaters provide is the screening or exhibiting of movies. The use of captioning and audio description to make that service available to those who are deaf or hard of hearing, or blind or have low vision, does not change that service. Rather, the provision of such auxiliary aids is the means by which these individuals gain access to movie theaters' services and thereby achieve the ''full and equal enjoyment,'' 42 U.S.C. 12182(a), of the screening of movies. *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 15–17, *Arizona ex rel. Goddard* v. *Harkins Amusement Enters., Inc.,* 603 F.3d 666 (9th Cir. 2010) (No. 08–16075); *see also* NPRM, 79 FR 44976, 44982–83 (Aug. 1, 2014). The Department received no public comments challenging that position.

Section 36.303(g)(3) Minimum Requirements for Captioning Devices

In the NPRM, the Department proposed that movie theaters be required to have available a minimum number of captioning devices equal to approximately half the number of assistive listening receivers already mandated for assembly areas by sections 219 and 706 of the 2010 Standards.

The calculation was based on a movie theater's total seating capacity and 2010 Census data estimating that 3.1 percent of the U.S. population ages 15 and older (7.6 million) has difficulty hearing. *See* U.S. Census Bureau, U.S. Department of Commerce, P70–131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), *available at http://www.census.gov/prod/2012pubs/p70-131.pdf* (last visited Sept. 12, 2016). Thus, the proposed § 36.303(g)(2)(iii)(A) required that a movie theater maintain captioning devices for approximately 2–4 percent of all available seats and stated that: ''a public accommodation that owns, leases, leases to, or operates a movie theater shall provide individual captioning devices in accordance with the following Table [below]. This requirement does not apply to movie theaters that elect to exhibit all movies at all times at that facility with open movie captioning.''

Capacity of seating in movie theater	Minimum required number of individual captioning devices
100 or less	2.
101 to 200	2 plus 1 per 50 seats over 100 seats or a fraction thereof.
201 to 500	4 plus 1 per 50 seats over 200 seats or a fraction thereof.
501 to 1000	10 plus 1 per 75 seats over 500 seats or a fraction thereof.
1001 to 2000	18 plus 1 per 100 seats over 1000 seats or a fraction thereof.
2001 and over	28 plus 1 per 200 seats over 2000 seats or a fraction thereof.

The Department received more than 70 comments on its proposed scoping requirements for captioning devices. All commenters disagreed with the formula in the NPRM, and with the exception of a very few individuals and a law school clinic, commenters uniformly maintained that the Department's proposed requirements substantially overestimated the number of captioning devices necessary for a variety of reasons.

Many commenters asserted that seating capacity does not equate with the need for captioning devices because movie theaters are rarely at 100 percent seat occupancy, and not all Americans attend the movies simultaneously. They stressed that even at peak attendance times (weekends), average seat occupancy rates are substantially less than half of capacity while small movie theaters in rural areas with one or two auditoriums report even lower attendance rates. Other commenters noted that old historic theaters often have large seating capacities, despite low attendance rates. And some noted that at large, multi-auditorium complexes, not all auditoriums are simultaneously in use at all times. Thus, these commenters asserted that average movie attendance during weekend hours, not the number of theater seats, most accurately predicts anticipated demand for captioning devices.

Some commenters maintained that the Department's proposed scoping requirements significantly overestimated the need for captioning devices because the percentage of persons in the population who have difficulty hearing does not reflect those who will actually benefit from or use the devices. In their view, captioning devices will not be used by the vast majority of individuals who are deaf or hard of hearing because such devices are only needed by persons who have ''severe'' difficulty hearing, and assistive listening receivers, which amplify the volume of sound, are already required and available at movie theaters. These commenters also cited statistics showing that a significant percentage of Americans do not attend the movies at least once a year, and while hearing loss disproportionately affects seniors, they represent a smaller proportion of persons who actually attend the movies.

Commenters also stressed that in their experience, the Department's proposed scoping requirements for captioning devices far exceed demand in those movie theaters that currently stock and advertise the availability of such devices. To support this conclusion, NATO offered device usage data from five movie theater companies (which included a small business with a total screen (auditorium) count in the 1–75 range, three regional companies with a total screen (auditorium) count in the 300–700 range, and a national company with a 2000+ screen (auditorium) count) that stock and advertise the availability of captioning devices on their Web sites, at ticket counters, and on third-party Web sites. According to NATO, that data showed that even though four of these five companies stocked far fewer captioning devices than the NPRM proposed, actual demand rarely, if ever, exceeded supply even at peak attendance times. Other movie theaters and a trade association also submitted tracking records to confirm the same.

Several commenters objected to the Department's proposed scoping requirements because they provided a fixed, nonadjustable number that was not tied to actual consumer demand and failed to account for variations in attendance based on theater location and patron demographics. These commenters noted that while movie theaters near areas with a high concentration of residents or students who are deaf or hard of hearing may experience greatest demand for devices, a movie theater in a small rural area may have only a few requests. Many commenters also expressed concern that because the Department's proposed scoping requirements would result in the vast majority of movie theaters having to purchase expensive technology far in excess of what is needed or would be used, those movie theaters would likely avoid investing in new, superior technology as it becomes available.

Although commenters overwhelmingly disagreed with the Department's proposed approach to scoping, most did not suggest a formula for determining the number of captioning devices that should be required. Instead, they recommended that the number of required devices be based on one or more factors, including actual or average weekend movie attendance, percentage of individuals who have severe hearing difficulty and will likely use the devices, demand for devices, number of movie theater seats, screen count, and patron demographics. For example, a Federal agency recommended that the Department set scoping requirements in accordance with the optimal number of devices sufficient to provide accessibility to the disability community (based on relevant factors such as device usage, demand, and weekend theater attendance) while minimizing the burden on small businesses. A few movie theaters maintained that any minimum device requirement would be a waste of resources and unnecessary because movie theaters seek to satisfy their patrons' needs, and as a result, many already advertise and provide captioning devices upon request.

NATO and four advocacy groups representing persons who are deaf or hard of hearing [1] submitted a Joint Comment offering a three-tiered approach to scoping that was referenced and supported by many commenters. First, the Joint Comment recommended that movie theaters obtain a minimum number of captioning devices based on the number of screens (auditoriums) displaying digital movies, in accordance with the following:

Single Screen: 4 devices
Miniplex (2–7 screens): 6 devices
Multiplex (8–15 screens): 8 devices
Megaplex (16+ screens): 12 devices

Second, in order to address the limited circumstances when demand for captioning devices exceeds minimum requirements, the Joint Comment proposed that movie theaters record weekend demand for captioning devices and adjust the number of devices biannually to be equal to 150 percent of the average weekend demand during a 6-month tracking period. For example, under this formula, a movie theater that is initially required to have 6 devices and calculates an average actual weekend demand of 8 devices during a tracking period must increase the number of available devices to 12 (150 percent of 8). Finally, the Joint Comment recommended that the Department require every movie theater company to submit an annual report of its tracking records to the Department.

After considering all comments, census data, statistics regarding movie theater attendance, actual usage data, and its

[1] Those advocacy groups are the National Association of the Deaf, the Hearing Loss Association of America, the Association of Late Deafened Adults, and the Alexander Graham Bell Association for the Deaf and Hard of Hearing.

independent research, the Department has modified its approach to captioning device scoping and has adopted a final rule that requires movie theaters to have on hand the minimum number of captioning devices proposed in the Joint Comment. Thus, the final rule at renumbered § 36.303(g)(3)(i) states that ''[a] public accommodation shall provide a minimum number of fully operational captioning devices at its movie theaters in accordance with the following Table:''

Number of movie theater auditoriums exhibiting digital movies	Minimum required number of captioning devices
1	4
2–7	6
8–15	8
16+	12

The Department imposes these requirements because its own research and analysis confirms that they will easily satisfy maximum weekend demand for captioning devices at movie theaters across the nation in almost every location. Thus, the Department believes that the final rule obligates movie theaters to provide the optimum number of captioning devices sufficient to provide accessibility to individuals with disabilities who will need and use them, without requiring movie theaters to purchase equipment that may likely never be used.

Despite NATO's and a number of other comments to the contrary, the Department has also decided not to impose specific requirements at this time for providing additional captioning devices when actual demand for them exceeds the rule's minimum requirements. While the Department acknowledges that there are a few movie theaters located in areas where there is an unusually high concentration of individuals who are deaf or hard of hearing, comments, usage data, and independent research all indicate that only in those rare circumstances is there a reasonable possibility that regular demand for devices may exceed the rule's minimum requirements. That same information also reflects that many movie theaters located in markets that consistently have an unusually large number of patrons with hearing difficulties are already making voluntary efforts to satisfy consumer demand. For example, because open movie captioning is popular with many movie patrons who are deaf or hard of hearing, some movie theaters near schools that educate persons who are deaf provide open-captioned screenings on-demand, or in accordance with a convenient, regular, and frequent schedule. In any event, the Department currently lacks adequate information and data to craft an appropriate standard to address these situations.

In addition, the Department decided not to impose a recordkeeping requirement on movie theaters at this time, even though some commenters suggested that the Department do so in order to require movie theaters to keep records of actual demand for devices. The NPRM did not solicit information about existing movie theater recordkeeping practices with respect to the provision of assistive listening receivers or captioning and audio description devices, and the Department lacks adequate data as to the costs and the burdens of imposing such a requirement on all movie theaters. Moreover, the Department has not previously imposed this type of recordkeeping requirement on public accommodations, and it declines to do so without more information about the need and the costs. The Department intends, however, to reach out to stakeholders in the future and obtain additional information about whether it should consider engaging in supplemental rulemaking regarding a recordkeeping requirement and imposing a standard that addresses situations when actual demand exceeds the rule's minimum requirements.

In the interim, for those movie theaters that are located in the few places where there is an unusually high concentration of individuals who are deaf or hard of hearing, the Department strongly encourages these public accommodations to voluntarily work with the local disability community to identify and maintain an appropriate number of captioning devices, or to utilize other approaches, including open movie captioning, to satisfy their patrons' regular and actual demand.

Section 36.303(g)(4) Minimum Requirements for Audio Description Devices

In order to ensure that individuals who are blind or have low vision have access to audio-described movies when such movies are available, movie theaters must provide a reasonable number of audio description devices. In the NPRM, the Department proposed at § 36.303(g)(3)(ii)(A) that movie theaters maintain one audio description device per auditorium, with a minimum of two devices per movie theater. However, the Department noted at proposed § 36.303(g)(3)(ii)(B) that ''[a] movie theater may comply with this requirement by using receivers it already has available as assistive listening devices in accordance with the requirements in Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.'' The Department theorized that many movie theaters utilized the newer, multi-channel assistive listening receivers, and as a result, most movie theaters would not be required to purchase additional devices in order to comply with this requirement.

The Department received extensive comments regarding the proposed scoping for audio description devices. Although commenters overwhelmingly supported the proposed rule's goal of ensuring access to audio description in movie theaters, only three commenters agreed with the proposed scoping.

Several commenters recommended a greater number of audio description devices than the Department proposed in the NPRM to accommodate an increase in the number of individuals who are blind or have low vision who will likely attend the movies if accessible technologies are available. A few commenters recommended two audio description devices per auditorium, citing a movie theater's usage data to support the suggestion. One commenter, concerned that a movie theater should be able to accommodate a larger group of blind or visually impaired movie patrons, recommended at least eight audio description devices per movie theater, or two devices per auditorium, whichever is greater. Finally, one commenter proposed requiring three audio description devices per auditorium to accommodate a larger user pool, and to counteract a reduction in available devices that may arise in the event of equipment failure, or when devices are being recharged.

The majority of commenters, however, stated that the recommended scoping was excessive and too inflexible. These commenters reasoned that the proposed scoping failed to consider attendance variability or demographics, and inhibited movie theaters from moving devices between locations to effectively meet demographic needs. Commenters recommended basing the number of required audio description devices on factors such as weekend attendance, annual attendance, tracked usage rates, and market demand. The Department received a large number of comments from movie theaters stating that current requests by patrons for audio description devices are extremely low. Additionally, a trade association submitted comments stating that member companies reported signing out a maximum of 1–4 audio description devices at any time, and that these companies never had more requests for devices than the number of devices available. Based on this information, the trade association recommended that the Department require one audio description device for every two auditoriums, with a minimum of two devices per movie theater.

In addition to comments criticizing the proposed scoping, commenters also addressed the Department's belief that most movie theaters utilize multi-channel headsets to meet their assistive listening device obligations. A couple of movie theaters indicated that they have the dual-channel receivers. However, a trade association commented that many movie theaters still rely on single-channel headsets to meet their assistive listening device obligations and that the Department erred in assuming that most movie theaters would not need to buy additional devices in order to comply with these scoping requirements.

In consideration of the comments received and the Department's independent research, the Department has adjusted the required number of audio description devices to one device for every two auditoriums. The Department believes that the available data supports its view that the revised scoping ensures that movie theaters will have available an adequate number of devices without requiring movie theaters to purchase more equipment than is likely necessary. The final rule at renumbered § 36.303(g)(4)(i) reads as follows: ''A public accommodation shall provide at its movie theaters a minimum of one fully operational audio description device for every two movie theater auditoriums exhibiting digital movies and no less than two devices per movie theater. When calculation of the required

number of devices results in a fraction, the next greater whole number of devices shall be provided.'' The Department has retained the provision in proposed § 36.303(g)(3)(ii)(B) regarding the use of multi-channel assistive listening receivers to meet this requirement. The Department notes that if movie theaters are purchasing new receivers to replace existing single-channel receivers, they may choose to purchase two-channel receivers and then use them to meet both their requirements to provide assistive listening receivers and audio description devices if use of the two-channel receivers is compatible with their audio description and assistive listening systems. The Department does not, however, intend this provision to discourage movie theaters from using induction loop systems for sound amplification while using a different system for transmission of audio description. Renumbered § 36.303(g)(4)(ii) states that ''[a] public accommodation may comply with the requirements in paragraph (g)(4)(i) by using the existing assistive listening receivers that the public accommodation is already required to provide at its movie theaters in accordance with Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.''

Section 36.303(g)(5) Performance Requirements for Captioning Devices and Audio Description Devices

In the NPRM, the Department proposed performance requirements for the individual devices used by movie patrons at their individual seats. Proposed § 36.303(g)(2)(iii)(B) stated that the individual devices needed to be adjustable; be available to patrons in a timely manner; provide clear, sharp images; be properly maintained; and be easily usable by the patron in order to ensure effective communication.

While the comments were generally supportive of the existence of performance requirements, there were differences of opinion expressed about the specifics of this provision. Some commenters supported the Department's language, but others expressed concern that the requirements as written were vague and subjective. For example, a few commenters proposed that the Department define specific quantifiable and technical standards, and several commenters suggested that the Department develop a program to encourage the development of better accessibility technology due to their concerns associated with the design and quality of current technology.

The Department also received conflicting comments with respect to adding requirements beyond those proposed in the NPRM. Several commenters suggested that the Department require captioning devices to have an adjustable font size while many disagreed, stating that an adjustable font size requirement would be problematic. Other commenters believed that the Department should require that all devices be clean, in addition to being available and functional. Commenters also suggested requiring quality assurance procedures, frequent testing, and regular maintenance schedules to ensure that the devices are functional and deliver complete and accurate captions and audio description. One commenter encouraged the Department to require that movie theaters maintain the most recent technology in a range of device styles and consult with customers and consumer groups to decide which devices to purchase. Although the NPRM language focused on captioning devices, many of the comments urged the Department to ensure that both captioning and audio description devices are maintained and readily available.

After considering all comments, the Department has decided to retain the performance requirements as proposed in the NPRM with minor structural edits and to make clear that the requirements for maintenance and timely availability apply to both types of devices. The Department declines to impose any additional requirements related to ensuring the functionality of the captioning and audio description devices provided by movie theaters. The rule imposes the responsibility on movie theaters to ensure that the equipment is fully operational (meets all of the performance requirements in the regulation) and available. The Department believes that movie theaters are able to determine the best approach for ensuring compliance with the regulatory requirements and notes that § 36.211(b) (Maintenance of accessible features) ''does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.''

The Department also declines to include specific technical specifications regarding the captioning and audio description devices. The Department notes that its approach to performance requirements for captioning and audio description devices is similar to the approach the Department took with respect to performance standards for video remote interpreting services. *See* § 36.303(f).

The Department also declines to impose an obligation that movie theaters must upgrade to the most recent technology. While the Department is in favor of technological development, such a requirement is beyond the scope of this regulation. Additionally, the Department believes that many of the concerns about current devices raised by commenters (*e.g.,* poor power connection or poor signal) are adequately addressed by the requirements in paragraphs (g)(3) through (5)—that devices be fully operational and maintained.

Renumbered § 36.303(g)(5) of the final rule retains the performance requirements proposed in the NPRM, but it has been restructured for clarity.

Section 36.303(g)(6) Alternative Technologies

Although commenters on the 2010 Advance Notice of Proposed Rulemaking, 75 FR 43467 (July 26, 2010) (ANPRM), encouraged the Department to require open movie captioning at movie theaters, the Department declined to make such a proposal in the NPRM, noting that in the debate leading up to passage of the ADA, the House Committee on Education and Labor explicitly stated that ''[o]pen-captioning, for example, of feature films playing in movie theaters, is not required by this legislation.'' H.R. Rep. No. 101–485, pt. 2, at 108 (1990). The Senate Committee on Labor and Human Resources included a statement in its report on the ADA to the same effect. S. Rep. No. 101–116, at 64 (1989). As the House Committee also recognized, however, ''technological advances * * * may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.'' H.R. Rep. No. 101–485, pt. 2, at 108.

The Department included a provision in the NPRM giving movie theater owners and operators the choice to use other technologies to comply with the captioning and audio description requirements of this rule. Proposed § 36.303(g)(2)(ii) provided that ''[m]ovie theaters may meet their obligation to provide captions to persons with disabilities through use of a different technology, such as open movie captioning, so long as the communication provided is as effective as that provided to movie patrons without disabilities. Open movie captioning at some or all showings of movies is never required as a means of compliance with this section, even if it is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium.''

Commenters disagreed on whether this provision struck an appropriate balance between the cost to movie theaters, the benefit to individuals with hearing and vision disabilities, and the impact on the movie-going experience for individuals without disabilities. The majority of comments on this provision concerned open movie captioning. Although some commenters expressed concern that an open-movie-captioning requirement would have an impact on the cinematic experience of hearing patrons, most commenters argued that the Department should require open movie captioning. Several open-movie-captioning requirements were proposed by commenters, including: Requiring open movie captioning at 100 percent of showings; requiring one open-captioned movie per day; requiring dedicated open-captioned auditoriums; or requiring open movie captioning if closed movie captioning is unavailable for any reason. One commenter who supported an open-movie-captioning requirement asserted that 95 percent of the deaf and hard of hearing community prefers open movie captioning to the use of captioning devices.

The commenters proposing an open-movie-captioning requirement ultimately disagreed with the Department's interpretation of the legislative history as indicating congressional intent that the ADA did not require the provision of open movie captions at movie theaters. One commenter reasoned that because modern open movie captioning is significantly different from the open movie captioning available in 1990, the legislative history on this point represents a latent ambiguity. Therefore, in this commenter's view, the Department is not bound by the legislative history concerning open movie captioning and is free to require it. Other commenters, however, agreed with the

Department's statement in the NPRM and argued that because the legislative history states that open movie captioning is not required as a means of compliance with the ADA, the rule should not mandate any conditions concerning open-captioned showings.

In response to the Department's questions concerning the parameters of the option to provide open movie captioning rather than closed movie captioning, several commenters suggested that the Department define what constitutes a ''timely request'' when a movie patron requests open movie captioning. These commenters provided a variety of suggestions, which ranged from the specific (*e.g.,* 1 hour or 1 day before the showing) to the ambiguous (*e.g.,* it should be reasonably easy).

Other comments also addressed whether the Department adequately addressed new technology. One commenter agreed that the ''different technology'' language encompassed any future technology, but further suggested that the effectiveness of new technologies should be judged from the baseline of ''as effective as captioning and/or audio description devices.'' Other commenters disagreed and criticized the rule for not addressing other currently available technologies, such as hearing loop systems, Invisivision™ glasses, or smart phone applications.

After considering all of the comments, the Department has decided to retain the option to comply with the captioning and audio description requirements of this rule through the use of any other technology that is or becomes available to provide effective communication to patrons with hearing and vision disabilities, including open movie captioning. The Department has clarified, however, that in those circumstances where a public accommodation chooses to use open movie captioning at all showings of all movies available with captioning or at all times it receives a request to turn on open movie captions prior to the start of the movie, it is not also required to comply with the specific requirement to obtain captioning devices. However, if a public accommodation only makes open movie captioning available to patrons who are deaf or hard of hearing at some showings of movies available with captioning, it will still have to comply with the requirements to provide captioning devices because it must provide effective communication at all showings of all movies available with captioning.

The Department has made other changes to the structure and language of this provision in response to comments and to better preserve the intent and longevity of this paragraph. The final rule now reads ''through any technology,'' instead of ''through use of different technology.'' Although the Department declines to endorse specific technologies, the Department believes that the revised language better articulates the purpose of this paragraph to encompass current and future technologies that may serve individuals with hearing and vision disabilities. The requirement that public accommodations provide auxiliary aids and services to ensure communication as effective as that provided to movie patrons without disabilities remains unchanged as that is the standard for effective communication required by § 36.303(c). *See* 28 CFR part 36, app. C (explaining that public accommodations must provide appropriate auxiliary aids and services ''to ensure that communication with persons with disabilities is as effective as communication with others'').

The Department maintains its view that Congress did not intend the ADA to require movie theaters to provide open movie captioning. Although the technology to provide open movie captioning has changed and enables movie theaters to provide the service more easily, open movie captioning as it exists today remains visible to all movie patrons and has not changed in this respect. As a result, the Department's position remains consistent with the legislative history on this point, and the final rule retains the language (with some minor edits) in proposed § 36.303(g)(2)(ii), which provided that ''[o]pen movie captioning at some or all showings of movies is never required as a means of compliance with this section, even if it is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium.'' In the final rule, however, the Department has moved this language to new § 36.303(g)(10).

The revised provision addressing other technologies, renumbered in the final rule as § 36.303(g)(6), enables a public accommodation to meet its obligation to provide captioning and audio description through alternative technologies that provide effective communication for movie patrons with hearing and vision disabilities. Section 36.303(g)(6) further provides that a public accommodation may use open movie captioning as an alternative to complying with the captioning device scoping requirements of this rule by providing open movie captioning at all showings, or whenever requested by or for an individual who is deaf or hard of hearing.

Section 36.303(g)(7) Compliance Date for Providing Captioning and Audio Description

In the NPRM, the Department proposed at § 36.303(g)(4)(i) that all movie theaters with auditoriums displaying digital movies must comply with the requirements of the rule within 6 months of the publication date of the final rule. The Department also proposed to give movie theaters that converted their auditoriums with analog projection systems to digital projection systems after the publication date of the rule an additional 6 months from the date of conversion to comply with the rule's requirements. Although the Department expressed the belief that 6 months was sufficient time for movie theaters to order and install the necessary equipment, train employees on how to use the equipment and assist patrons in using it, and notify patrons of the availability of these services, the Department requested public comment on the reasonableness of a 6-month compliance date.

The Department received many comments both against and in favor of the proposed 6-month compliance date. A minority of comments from a few disability advocacy groups and a few private citizens supported the proposed 6-month compliance date. These commenters asserted that because most movie theaters had already committed to providing captioning and audio description to their patrons by the end of 2014, the 6-month compliance date was, in their view, reasonable.

The vast majority of commenters, however, asserted that 6 months was not enough time for the remaining movie theaters to comply with the requirements of this rule. These comments raised concerns about manufacturers' ability to sustain the sudden, increased demand that the scoping requirements would likely create for captioning and audio description devices. Industry commenters stated that movie theaters already experience considerable delays between order date and delivery date and that, with increased demand and a limited supply, the prices of these devices would likely increase, especially for lower volume purchasers. Industry commenters further advised the Department that a trained technician must install the captioning and audio description equipment and that their experience indicates that there is a waiting period for such services. Commenters also expressed concern that the compliance date proposed in the NPRM was drastically different from the phased compliance date proposed in the ANPRM and that the Department's rationale for the change was insufficient.

Finally, some commenters expressed concern that small movie theaters in particular would have difficulty complying with the requirements of the rule within the proposed 6-month compliance date. Commenters advised that small movie theaters would need additional time to raise the necessary funds or adjust their budgets in order to purchase the equipment.

Based on these concerns, commenters offered a variety of alternative compliance dates. The Joint Comment suggested that the Department require movie theaters to issue purchase orders for the equipment within 6 months of the final rule's publication, but require fully functional and operational devices and trained staff either within 2 years of the final rule's publication or 6 months of system delivery, whichever came first. Other commenters suggested compliance dates ranging from 1 year to 4 years. One major movie theater chain in particular recommended an 18-month compliance date, stating that this is the amount of time that it currently takes to order and install the necessary equipment. Some commenters suggested a sliding compliance schedule based on a movie theater's gross revenue or a movie theater's size, and others suggested a phased compliance date similar to the schedule articulated in the ANPRM.

In consideration of these comments and the Department's independent research, the Department agrees that 6 months may be an insufficient amount of time for movie theaters to comply with the requirements of paragraph (g) of this section, and the Department instead will require compliance beginning 18 months from the date of publication of the final rule. The Department believes that an 18-month compliance period

sufficiently accounts for potential delays that may result from manufacturer backlogs, installation waitlists, and other circumstances outside a movie theater's control. This date also gives small movie theaters that are financially impacted as a result of the unrelated costs of digital conversion a sufficient amount of time to plan and budget accordingly. The Department declines to include a requirement that movie theaters issue purchase orders for the equipment within 6 months of the final rule's publication because such a requirement is unenforceable without imposing recordkeeping and reporting requirements.

The final rule continues to provide additional time for movie theaters converting their auditoriums from analog projection systems to digital projection systems after the publication date of the final rule. Once the installation of a digital projection system is complete, meaning that the auditorium has installed the equipment needed to exhibit a digital movie, the movie theater has at least an additional 6 months to ensure compliance with the requirements of the rule and provide closed movie captioning and audio description when showing digital movies in that auditorium. Renumbered § 36.303(g)(7)(ii) states that ''[i]f a public accommodation converts a movie theater auditorium from an analog projection system to a system that allows it to exhibit digital movies after December 2, 2016, then that auditorium must comply with the requirements in paragraph (g) of this section by December 2, 2018, or within 6 months of that auditorium's complete installation of a digital projection system, whichever is later.'' The Department believes that this approach will provide movie theaters in the process of converting to digital projection after the publication date of the rule a sufficient amount of time to acquire the necessary equipment to provide captioning and audio description.

Section 36.303(g)(8) Notice

The Department believes that it is essential that movie theaters provide adequate notice to patrons of the availability of captioned and audio-described movies. In the NPRM, the Department proposed at § 36.303(g)(5) that movie theaters provide information regarding the availability of captioning and audio description for each movie in communications and advertisements intended to inform potential patrons of movie showings and times and provided by the theaters through Web sites, posters, marquees, newspapers, telephone, and other forms of communication.

Commenters on the NPRM unanimously supported the inclusion of some form of a notice requirement in the final rule but differed on the scope of that requirement. Some commenters supported requiring notice in all places where a captioned or audio-described movie is advertised, and another commenter asked the Department to include as many forms of communication as possible in the language of the final rule, including mobile phone applications. These commenters reasoned that individuals who are deaf or hard of hearing, or blind or have low vision, should be able to find this information easily. Several other commenters, however, asked the Department to limit the notice requirement to the box office, ticketing locations, and the movie theater's Web site. Although such commenters raised concerns about the high cost associated with a requirement that covers all communications and advertisements, they offered no other rationale for why they were proposing a limited requirement.

In addition to the scope of the requirement, commenters also addressed the form of the notice required. One commenter requested that the Department require a uniform notice by all movie theaters, and another commenter suggested that the Department require movie theaters to include within the notice the universal symbols for captioning and audio description as well as the type of device available.

Other commenters pointed to industry realities in order to highlight their concerns with the proposed provision. Some commenters expressed concern that movie theaters would be liable for a third party's failure to include information about captioning and audio description availability in their communications although movie theaters lack control over these communications. Commenters also advised the Department that there may be circumstances where compliance with the notice requirement would be difficult for some types of media. These commenters contend, for example, that movie theaters often book a film without knowing whether it is captioned or audio-described and that print deadlines may materialize before that information is available.

After considering these comments and the information available to the Department, the Department has revised its proposed notice language. The Department agrees that notice may not be necessary on all forms of communications and advertisements but disagrees that the notice obligation should be limited only to the box office, ticketing locations, and the movie theater's Web site. For example, telephone recordings serve an especially important medium of communication for individuals who are blind or have low vision and who may not utilize Web-based or print media to access information concerning movie showings. Similarly, newspapers serve an especially important medium of communication for individuals who may not use Web-based media generally. Moreover, according to the Department's research, movie theaters utilize proprietary mobile phone applications to inform potential patrons of movie showings and times, and some already advertise the availability of captioning and audio description devices on these applications.[2] Therefore, the Department has decided to require movie theaters to provide notice on communications and advertisements provided at or on any of the following: The box office and other ticketing locations, Web sites, mobile apps, newspapers, and the telephone.

The Department declines to require a specific form of notice to describe the availability of captioning or audio description. The Department notes that movie theaters already appear to be using a relatively uniform method of advising the public about the availability of captioning and audio description. A review of Web sites and newspaper advertising indicates that movie theaters routinely use ''CC'' and ''OC'' to indicate the availability of closed and open movie captioning and ''AD'' or ''DV'' to indicate the availability of audio description.

As the Department specifically noted in the NPRM and makes clear in the final rule, the rule does not impose obligations on independent third parties that publish information about movies, and these third parties will not face liability under the ADA if they fail to include information about the availability of captioning and audio description at movie theaters.

Renumbered § 36.303(g)(8) of the final rule requires that whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies on or after January 17, 2017, its notices of movie showings and times, provided at the box office and other ticketing locations, on Web sites and mobile apps, in newspapers, and over the telephone, must inform potential patrons of the movies that are being shown with captioning and audio description. The final rule further provides that this obligation does not extend to third parties that provide information about movie theater showings and times, as long as the third party is not under the control of the public accommodation.

This provision applies to movie theaters once they provide captioning and audio description for digital movies on or after the effective date of the rule, January 17, 2017. Thus, movie theaters that already show digital movies with closed movie captions and audio description must comply with this provision as soon as the rule takes effect.

Section 36.303(g)(9) Operational Requirements

In response to the ANPRM, the Department received a significant number of comments from individuals with disabilities and groups representing persons who are deaf or hard of hearing and who are blind or have low vision strongly encouraging the Department to include a requirement that movie theater staff know how to operate captioning and audio description equipment and be able to communicate with patrons about the use of individual devices. Having considered those

[2] The Department's research indicates that the following movie theater companies operate mobile phone applications and advertise the availability of captioning and audio description on these platforms: Regal Entertainment Group, AMC Theatres, Cineplex Entertainment, and Harkins Theatres. *See, e.g.,* American Multi-Cinema, Inc., AMC Theatres (Version 5.2.2, 2016) (mobile application software), *available at https://itunes.apple.com/us/app/amc-theatres/id509199715?ls=1&mt=8* (last visited Sept. 12, 2016); Regal Cinemas, Inc., Regal—Movie Tickets and Showtimes for Regal Cinemas, United Artists and Edwards Theatres (Version 3.4.2, 2016) (mobile application software), *available at https://itunes.apple.com/us/app/regal-cinemas/id502912815?mt=8* (last visited Sept. 12, 2016).

comments, the Department included in the NPRM proposed § 36.303(g)(6), which required movie theaters to ensure that at least one individual was on location at each facility and available to assist patrons whenever showing a captioned or audio-described movie. The proposed § 36.303(g)(6) further required that such individual be able to operate and locate all of the necessary equipment and be able to communicate effectively with individuals with hearing and vision disabilities about the uses of, and potential problems with, the equipment.

All of the comments on the NPRM that addressed this proposed language acknowledged that staff training regarding the operation of equipment is vital to the proper functioning of the rule. A number of commenters stated that on numerous occasions when they attempted to go to a movie advertised as having captioning or audio description, there was no staff available who knew where the captioning devices were kept or how to turn on the captioning or audio description for the movie. Many of these commenters indicated that they were unable to experience the movie fully because of the lack of trained personnel, even if the auditorium was properly equipped and the movie was actually available with captioning or audio description.

A handful of commenters requested that the Department expand its proposed operational requirement, emphasizing concerns about movie theater staff's current knowledge concerning the operation of available equipment. One commenter encouraged the Department to specifically require all movie theater personnel to be properly and uniformly trained in providing such services, and other commenters suggested that all movie theater personnel be trained as to the availability of these services. Other comments encouraged the Department to enumerate specific requirements to ensure that movie theater staff is capable of operating the captioning and audio description equipment, including a requirement that management document employee training and a requirement that employees receive periodic refresher courses.

A few commenters questioned the need for the proposed language in § 36.303(g)(6)(iii), which required movie theaters to ''[c]ommunicate effectively with individuals who are deaf or hard of hearing and blind or have low vision regarding the uses of, and potential problems with, the equipment for such captioning or audio description.'' One commenter asserted that an ''effective communication'' requirement in the proposed paragraph (g)(6)(iii) was superfluous given the overarching requirements in § 36.303(c). Other commenters supported the proposed language, stating that movie theater staff, including managers, often are not knowledgeable on how to properly communicate with individuals who are deaf, hard of hearing, blind, or have low vision. A State government also pointed out that in *Camarillo* v. *Carrols Corp.,* 518 F.3d 153, 157 (2d Cir. 2008) (per curiam), the Second Circuit held that a public accommodation's failure to provide employee training on effective communication with individuals with disabilities can constitute a violation of title III, specifically 42 U.S.C. 12182(b)(2)(A)(iii).

The final rule retains the operational requirements proposed in the NPRM in renumbered § 36.303(g)(9) and adds the requirement that if a movie theater is relying on open movie captioning to meet the requirements of paragraph (g)(3), it must also ensure that there is an employee available at the theater who knows how to turn on the captions. The Department declines to add a specific requirement that all personnel be trained, as it believes that it is sufficient if a movie theater has at least one knowledgeable employee on location at all times to ensure that the service is available and provided without interruption. While the Department agrees that it would be a good idea for movie theaters to implement reasonable staff training programs and periodic refresher courses, the Department declines to take these recommendations and has not included in the final rule specific logistical requirements concerning movie theater staff training.

The Department has decided to retain in the final rule the language in proposed § 36.303(g)(6)(iii) requiring movie theater staff to effectively communicate with individuals who are deaf or hard of hearing, or blind or have low vision, regarding the uses of, and potential problems with, the captioning and audio description devices. The Department notes, however, that communicating effectively with patrons about the availability of captioning at a movie theater would not require a movie theater to hire a sign language interpreter. Communication with a person who is deaf or hard of hearing about the availability of these services or how to use the equipment involves a short and relatively simple exchange and therefore can easily be provided through signage, instructional guides, or written notes.

Final § 36.303(g)(9) requires that whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies on or after January 17, 2017, at least one theater employee must be available to assist patrons seeking or using the captioning or audio description equipment. The employee must be able to quickly locate and activate the necessary equipment; operate and address problems with the equipment prior to and during the movie; turn on the open movie captions if the movie theater is relying on open movie captions to meet its effective communication requirements; and communicate effectively with individuals with disabilities about how to use, operate, and resolve problems with the equipment.

This provision applies to movie theaters once they provide captioning and audio description for digital movies on or after the effective date of the rule, January 17, 2017. Thus, movie theaters that already show digital movies with closed movie captions and audio description must comply with this provision as soon as the rule takes effect.

Section 36.303(g)(10)

Section 36.303(g)(10) in the final rule provides that ''[t]his section does not require the use of open movie captioning as a means of compliance with paragraph (g), even if providing closed movie captioning for digital movies would be an undue burden.'' The NPRM proposed similar language at § 36.303(g)(2)(ii). See discussion of comments on final § 36.303(g)(6), *supra.*

Dated: November 21, 2016.

Loretta E. Lynch,

Attorney General.

[FR Doc. 2016–28644 Filed 12–1–16; 8:45 am]

BILLING CODE 4410–13–P

FEDERAL REGISTER

Vol. 81 Friday,

No. 232 December 2, 2016

Part VI

The President

Executive Order 13749—Providing for the Appointment in the Competitive Service of Certain Employees of the Foreign Service

Executive Order 13750—Providing for the Appointment of Alumni of the Fulbright U.S. Student Program, the Benjamin A. Gilman International Scholarship Program, and the Critical Language Scholarship Program to the Competitive Service

Federal Register
Vol. 81, No. 232
Friday, December 2, 2016

Presidential Documents

Title 3—

The President

Executive Order 13749 of November 29, 2016

Providing for the Appointment in the Competitive Service of Certain Employees of the Foreign Service

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* The Federal Government benefits from a workforce that can be recruited from the broadest and deepest pools of qualified candidates for our highly competitive, merit-based positions. The recruitment and retention of workforce participants who serve in the Foreign Service of the Department of State under a Limited Non-Career Appointment under section 309 of the Foreign Service Act of 1980, Public Law 96–465 (22 U.S.C. 3949), as amended, are critical to our ability to meet consular staffing levels (now in substantial deficit) and thereby enhance our capacity to meet high national security standards and efficiently process visas in accordance with our policy of ''open doors, safe borders.'' Program participants undergo a rigorous merit-based evaluation process, which includes a written test and an oral assessment and to which a veteran preference applies, and develop advanced- to superior-level skills in languages and in cultural competence in particular regions, skills that are essential for mission-critical positions throughout the entire Federal workforce.

Executive Order 13597 of January 19, 2012, sought to ensure that 80 percent of nonimmigrant visa applicants be interviewed within three weeks of receiving an application. The Department of State's ability to maintain this 80 percent benchmark will come under increasing pressure in the future given current and projected staffing shortfalls through 2023. These staffing gaps could adversely affect the Department of State's ability to sustain border security and immigration control at peak efficiency and effectiveness, which will have effects on tourism, job creation, and U.S. economic growth. Use of the Limited Non-Career Appointment hiring authority will provide flexibility to address, for the foreseeable future, both this increased demand and recurring institutional and national needs across the Federal Government.

Accordingly, pursuant to my authority under 5 U.S.C. 3302(1), and in order to achieve a workforce that represents all segments of society as provided in 5 U.S.C. 2301(b)(1), I find that conditions of good administration make necessary an exception to the competitive hiring rules for certain positions in the Federal civil service.

Sec. 2. The head of any agency in the executive branch may appoint in the competitive service an individual who served for at least 48 months of continuous service in the Foreign Service of the Department of State under a Limited Non-Career Appointment under section 309 of the Foreign Service Act of 1980, and who passes such examination as the Office of Personnel Management (OPM) may prescribe.

Sec. 3. In order to be eligible for noncompetitive appointment to positions under section 2 of this order, such an individual must:

(a) have received a satisfactory or better performance rating (or equivalent) for service under the qualifying Limited Non-Career Appointment; and

(b) exercise the eligibility for noncompetitive appointment within a period of 1 year after completion of the qualifying Limited Non-Career Appointment.

Such period may be extended to not more than 3 years in the case of persons who, following such service, are engaged in military service, in the pursuit of studies at an institution of higher learning, or in other activities that, in the view of the appointing authority, warrant an extension of such period. Such period may also be extended to permit the adjudication of a background investigation.

Sec. 4. A person appointed under section 2 of this order shall become a career conditional employee.

Sec. 5. Any law, Executive Order, or regulation that would disqualify an applicant for appointment in the competitive service shall also disqualify a person for appointment under section 2 of this order. Examples of disqualifying criteria include restrictions on employing persons who are not U.S. citizens or nationals, who have violated the anti-nepotism provisions of the Civil Service Reform Act, 5 U.S.C. 2302(b)(7), 3110, who have knowingly and willfully failed to register for Selective Service when required to do so, 5 U.S.C. 3328(a)(2), who do not meet occupational qualifying standards prescribed by OPM, or who do not meet suitability factors prescribed by OPM.

Sec. 6. The Office of Personnel Management is authorized to issue such additional regulations as may be necessary to implement this order. Any individual who meets the terms of this order, however, is eligible for non-competitive eligibility with or without additional regulations.

Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof, or the status of that department or agency within the Federal Government; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
November 29, 2016.

[FR Doc. 2016–29165
Filed 12–1–16; 11:15 am]
Billing code 3295–F7–P

Presidential Documents

Executive Order 13750 of November 29, 2016

Providing for the Appointment of Alumni of the Fulbright U.S. Student Program, the Benjamin A. Gilman International Scholarship Program, and the Critical Language Scholarship Program to the Competitive Service

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* The Federal Government benefits from a workforce that can be recruited from the broadest and deepest pools of qualified candidates for our highly competitive, merit-based positions. The issuance of an order granting Non-Competitive Eligibility (NCE) to certain alumni of the Fulbright U.S. Student Program, the Benjamin A. Gilman International Scholarship Program, and the Critical Language Scholarship (CLS) Program, all of which are academic exchange programs carried out under the authorities of the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act, and the International Academic Opportunity Act of 2000, title III of Public Law 106–309, would be in the best interest of the Federal Government. Participants in these programs develop advanced- to superior-level skills in languages and cultural competence in regions that are strategically, diplomatically, and economically important to the United States. It is in the interest of the Federal Government to retain the services of these highly skilled individuals, particularly given that the Federal Government aided them in the acquisition of their skills. Participants in the Fulbright, Gilman, and CLS programs are drawn from highly competitive, merit-based national selection processes to which a veterans' preference applies to ensure that the most qualified individuals are selected.

Accordingly, pursuant to my authority under 5 U.S.C. 3302(1), and in order to achieve a workforce that is drawn from all segments of society as provided in 5 U.S.C. 2301(b)(1), I find that conditions of good administration make necessary an exception to the competitive hiring rules for certain positions in the Federal civil service.

Sec. 2. *Establishment.* The head of any agency in the executive branch may appoint in the competitive service any person who is certified by the Secretary of State or designee as having participated successfully in the Fulbright, Gilman, or CLS international exchange programs, and who passes such examination as the Office of Personnel Management (OPM) may prescribe.

Sec. 3. The Secretary of State or designee shall issue certificates, upon request, to persons whom the Department of State determines have completed the requirements of a program described in section 1 of this order.

Sec. 4. Any appointment under this order shall be effected within a period of 1 year after completion of the appointee's participation in the programs described in section 1. Such period may be extended to not more than 3 years for persons who, following participation in the programs described in section 1, are engaged in military service, in the pursuit of studies at an institution of higher learning, or in other activities which, in the view of the appointing authority, warrant an extension of such period.

Such period may also be extended to permit the adjudication of a background investigation.

Sec. 5. A person appointed under section 2 of this order becomes a career conditional employee.

Sec. 6. Any law, Executive Order, or regulation that would disqualify an applicant for appointment in the competitive service shall also disqualify an applicant for appointment under this order. Examples of disqualifying criteria include restrictions on employing persons who are not U.S. citizens or nationals, who have violated the anti-nepotism provisions of the Civil Service Reform Act, 5 U.S.C. 2302(b)(7), 3110, who have knowingly and willfully failed to register for Selective Service when required to do so, 5 U.S.C. 3328(a)(2), who do not meet occupational qualifying standards prescribed by OPM, or who do not meet suitability factors prescribed by OPM.

Sec. 7. The Office of Personnel Management is authorized to issue such additional regulations as may be necessary to implement this order. Any individual who meets the terms of this order, however, is eligible for non-competitive hiring with or without additional regulations.

Sec. 8. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof, or the status of that department or agency within the Federal Government; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,

November 29, 2016.

[FR Doc. 2016–29169

Filed 12–1–16; 11:15 am]

Billing code 3295–F7–P

FEDERAL REGISTER

Vol. 81 Friday,

No. 232 December 2, 2016

Part VII

The President

Proclamation 9547—National Impaired Driving Prevention Month, 2016
Proclamation 9548—World AIDS Day, 2016
Proclamation 9549—To Modify the Harmonized Tariff Schedule of the United States and for Other Purposes

Federal Register
Vol. 81, No. 232
Friday, December 2, 2016

Presidential Documents

Title 3—

The President

Proclamation 9547 of November 30, 2016

National Impaired Driving Prevention Month, 2016

By the President of the United States of America

A Proclamation

Driving drunk, drugged, or distracted poses a significant threat to drivers, passengers, pedestrians, and all who share our roads. During the holiday season, incidents of impaired driving occur more frequently, and every December, we observe National Impaired Driving Prevention Month to highlight steps we can take to improve safety on our streets and raise awareness of these preventable dangers.

Recently, the number of traffic crash fatalities caused by impaired driving has unfortunately increased—last year, preventable alcohol-related driving fatalities accounted for nearly one-third of all traffic fatalities. Consumption of alcohol by drivers, even those who are of legal drinking age, is highly dangerous, and drug use, including prescription drug use, can also harm judgment, perception, and the motor skills used when driving. Distracted driving—including eating, tending to passengers, and using a cell phone—can also be dangerous and is equally preventable.

We can all do our part to keep our roads safe and prevent these tragedies. As passengers, we can reduce our interactions with drivers and lessen distractions. As friends and family members, we can look out for loved ones who may be drinking and help them get home safely. And as citizens, we can always call 911 to report any dangerous driving we observe.

My Administration has worked to help Americans who struggle with substance use disorders and substance misuse, which can lead to incidents of drunk or drugged driving. We are also striving to give law enforcement officers the resources and support they need to combat impaired driving, and we must encourage the development of technologies like ignition interlock devices, which can prevent impaired individuals from getting behind the wheel. Through the Drive Sober or Get Pulled Over campaign, States and communities across our country are working to increase road patrols and sobriety checkpoints, in addition to raising awareness and improving education on the dangers of impaired driving. You can learn more about what we are doing to prevent impaired driving by visiting *www.WhiteHouse.gov/ONDCP/DruggedDriving*, *www.NHTSA.gov/DriveSober*, and *www.Distraction.gov*.

Whether encouraging parents to set a good example for their teen drivers or educating every driver on the dangers of unsafe driving, we must recommit to doing everything we can to prevent driving-related injuries and fatalities. This month, let us continue empowering drivers to make responsible decisions and educating the American people on ways they can help keep our roads safe and our futures bright.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 2016 as National Impaired Driving Prevention Month. I urge all Americans to make responsible decisions and take appropriate measures to prevent impaired driving.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

[FR Doc. 2016–29186
Filed 12–1–16; 12:30 pm]
Billing code 3295–F7–P

Presidential Documents

Proclamation 9548 of November 30, 2016

World AIDS Day, 2016

By the President of the United States of America

A Proclamation

Thirty-five years ago the first documented cases of AIDS brought about an era of uncertainty, fear, and discrimination. HIV/AIDS has taken tens of millions of lives—and far too many people with HIV have struggled to get the care, treatment, and compassion they deserve. But in the decades since those first cases, with ingenuity, leadership, research, and historic investments in evidence-based practices, we have begun to move toward an era of resilience and hope—and we are closer than ever to reaching an AIDS-free generation. On World AIDS Day, we join with the international community to remember those we have lost too soon, reflect on the tremendous progress we have made in battling this disease, and carry forward our fight against HIV/AIDS.

By shining a light on this issue and educating more communities about the importance of testing and treatment, we have saved and improved lives. Although we have come far in recent decades, our work is not yet done and the urgency to intervene in this epidemic is critical. In the United States, more than 1.2 million people are living with HIV. Gay and bisexual men, transgender people, youth, black and Latino Americans, people living in the Southern United States, and people who inject drugs are at a disproportionate risk. People living with HIV can face stigma and discrimination, creating barriers to prevention and treatment services.

My Administration has made significant efforts to fight HIV/AIDS, including by encouraging treatment as prevention, expanding access to pre-exposure prophylaxis, eliminating waiting lists for medication assistance programs, and working toward a vaccine. Thanks to the Affordable Care Act, no one can be denied coverage for pre-existing conditions like HIV, and millions of people can now access quality, affordable health insurance plans that cover important services like HIV testing and screening. In 2010, I introduced the first comprehensive National HIV/AIDS Strategy in the United States, and last year, through an Executive Order, I updated it to serve as a guiding path to 2020. This update builds on the primary goals of the original Strategy, including reducing the number of HIV-infected individuals and HIV-related health disparities, improving health outcomes for anyone living with HIV and increasing their access to care, and strengthening our coordinated national response to this epidemic.

Currently, more than 36 million people, including 1.8 million children, are living with HIV/AIDS across the globe, and the majority of people living with HIV reside in low- to middle-income countries. We need to do more to reach those who are at risk for contracting HIV/AIDS, and the United States is helping shape the world's response to this crisis and working alongside the international community to end this epidemic by 2030. We have strengthened and expanded the President's Emergency Plan for AIDS Relief (PEPFAR), with now more than $70 billion invested, to accelerate our progress and work to control this epidemic with comprehensive and data-focused efforts. With PEPFAR support for more than 11 million people on life-saving treatment and through contributions to the Global Fund to Fight AIDS, Tuberculosis, and Malaria—including a new pledge

of more than $4 billion through 2019—there are now more than 18 million people getting HIV treatment and care. Because in sub-Saharan Africa young women and adolescent girls are over eight times more likely to get HIV/AIDS than young men, we launched a comprehensive prevention program to reduce HIV infections among this population in 10 sub-Saharan African countries. This summer, PEPFAR established an innovative investment fund to expand access to quality HIV/AIDS services for key populations affected by the epidemic and reduce the stigma and discrimination that persists. We have also helped prevent millions of new infections worldwide, including in more than 1.5 million babies of HIV-positive mothers who were born free of HIV. By translating groundbreaking research and scientific tools into action, for the first time we are seeing early but promising signs of controlling the spread of HIV.

Accelerating the progress we have made will require sustained commitment and passion from every sector of society and across every level of government around the world. A future where no individual has to suffer from HIV/AIDS is within our reach, and today, we recommit to ensuring the next generation has the tools they need to continue fighting this disease. Let us strive to support all people living with HIV/AIDS and rededicate ourselves to ending this epidemic once and for all. Together, we can achieve what once seemed impossible and give more people the chance at a longer, brighter, AIDS-free future.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 1, 2016, as World AIDS Day. I urge the Governors of the States and the Commonwealth of Puerto Rico, officials of the other territories subject to the jurisdiction of the United States, and the American people to join me in appropriate activities to remember those who have lost their lives to AIDS and to provide support and compassion to those living with HIV.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

[FR Doc. 2016–29192
Filed 12–1–16; 12:30 pm]
Billing code 3295–F7–P

Presidential Documents

Proclamation 9549 of December 1, 2016

To Modify the Harmonized Tariff Schedule of the United States and for Other Purposes

By the President of the United States of America

A Proclamation

1. Section 1205(a) of the Omnibus Trade and Competitiveness Act of 1988 (the ''1988 Act'') (19 U.S.C. 3005(a)) directs the United States International Trade Commission (the ''Commission'') to keep the Harmonized Tariff Schedule of the United States (HTS) under continuous review and periodically to recommend to the President such modifications to the HTS as the Commission considers necessary or appropriate to accomplish the purposes set forth in that subsection. Pursuant to sections 1205(c) and (d) of the 1988 Act (19 U.S.C. 3005(c) and (d)), the Commission has recommended modifications to the HTS to conform the HTS to amendments made to the International Convention on the Harmonized Commodity Description and Coding System and the Protocol thereto (the ''Convention'').

2. Section 1206(a) of the 1988 Act (19 U.S.C. 3006(a)) authorizes the President to proclaim modifications to the HTS based on the recommendations of the Commission under section 1205 of the 1988 Act, if the President determines that the modifications are in conformity with United States obligations under the Convention and do not run counter to the national economic interest of the United States. I have determined that the modifications to the HTS proclaimed in this proclamation pursuant to section 1206(a) of the 1988 Act are in conformity with United States obligations under the Convention and do not run counter to the national economic interest of the United States.

3. Presidential Proclamation 6763 of December 23, 1994, implemented with respect to the United States the trade agreements resulting from the Uruguay Round of multilateral trade negotiations, including Schedule XX-United States of America, annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 (Schedule XX), that were entered into pursuant to sections 1102(a) and (e) of the 1988 Act (19 U.S.C. 2902(a) and (e)), and approved in section 101(a) of the Uruguay Round Agreements Act (URAA) (19 U.S.C. 3511(a)).

4. Pursuant to the authority provided in section 111 of the URAA (19 U.S.C. 3521) and sections 1102(a) and (e) of the 1988 Act, Proclamation 6763 included the staged reductions in rates of duty that the President determined to be necessary or appropriate to carry out the terms of Schedule XX. In order to ensure the continuation of such rates of duty for imported goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed, including certain technical or conforming changes within the tariff schedule.

5. Presidential Proclamation 7857 of December 20, 2004, implemented the United States-Australia Free Trade Agreement (USAFTA) with respect to the United States and, pursuant to section 201 of the United States-Australia Free Trade Agreement Implementation Act (the ''USAFTA Act'') (19 U.S.C. 3805 note), the staged reductions in rates of duty that the President determined to be necessary or appropriate to carry out or apply articles 2.3,

2.5, and 2.6 of the USAFTA and the schedule of reductions with respect to Australia set forth in Annex 2-B of the USAFTA. In order to ensure the continuation of such staged reductions in rates of duty for originating goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed.

6. Presidential Proclamation 7971 of December 22, 2005, implemented the United States-Morocco Free Trade Agreement (USMFTA) with respect to the United States and, pursuant to section 201 of the United States-Morocco Free Trade Agreement Implementation Act (the ''USMFTA Act'') (19 U.S.C. 3805 note), the staged reductions in rates of duty that the President determined to be necessary or appropriate to carry out or apply articles 2.3, 2.5, 2.6, 4.1, 4.3.9, 4.3.10, 4.3.11, 4.3.13, 4.3.14, and 4.3.15 of the USMFTA and the schedule of reductions with respect to Morocco set forth in Annex IV of the USMFTA. In order to ensure the continuation of such staged reductions in rates of duty for originating goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed.

7. Presidential Proclamations 7987 of February 28, 2006, 7991 of March 24, 2006, 7996 of March 31, 2006, 8034 of June 30, 2006, 8111 of February 28, 2007, 8331 of December 23, 2008, and 8536 of June 12, 2010, implemented the Dominican Republic-Central America-United States Free Trade Agreement (the ''CAFTA-DR Agreement'') with respect to the United States and, pursuant to section 201 of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (the ''CAFTA-DR Act'') (19 U.S.C. 4031), the staged reductions in rates of duty that the President determined to be necessary or appropriate to carry out or apply articles 3.3, 3.5, 3.6, 3.21, 3.26, 3.27, and 3.28, and Annexes 3.3 (including the schedule of the United States duty reductions with respect to originating goods), 3.27, and 3.28 of the CAFTA-DR Agreement. In order to ensure the continuation of such staged reductions in rates of duty for originating goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed.

8. Presidential Proclamation 8332 of December 29, 2008, implemented the United States-Oman Free Trade Agreement (USOFTA) with respect to the United States and, pursuant to section 201 of the United States-Oman Free Trade Agreement Implementation Act (the ''USOFTA Act'') (19 U.S.C. 3805 note), the staged reductions in duty that the President determined to be necessary or appropriate to carry out or apply articles 2.3, 2.5, 2.6, 3.2.8, and 3.2.9, and the schedule of duty reductions with respect to Oman set forth in Annex 2–B of the USOFTA. In order to ensure the continuation of such staged reductions in rates of duty for originating goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed.

9. Presidential Proclamation 8341 of January 16, 2009, implemented the United States-Peru Trade Promotion Agreement (USPTPA) with respect to the United States and, pursuant to section 201 of the United States-Peru Trade Promotion Agreement Implementation Act (the ''USPTPA Act'') (19 U.S.C. 3805 note), the staged reductions in duty that the President determined to be necessary or appropriate to carry out or apply articles 2.3, 2.5, 2.6, 3.3.13, and Annex 2.3 of the USPTPA. In order to ensure the continuation of such staged reductions in rates of duty for originating goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed.

10. Presidential Proclamation 8783 of March 6, 2012, implemented the United States-Korea Free Trade Agreement (USKFTA) with respect to the United States and, pursuant to section 201 of the United States-Korea Free Trade Agreement Implementation Act (the ''USKFTA Act'') (19 U.S.C. 3805 note), the staged reductions in duty that the President determined to be necessary or appropriate to carry out or apply articles 2.3, 2.5, 2.6, and the schedule of duty reductions with respect to Korea set forth in Annex 2–B, Annex 4–B, and Annex 22–A of the USKFTA. In order to ensure the continuation of such staged reductions in rates of duty for originating goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed.

11. Presidential Proclamation 8894 of October 29, 2012, implemented the United States-Panama Trade Promotion Agreement (PTPA) with respect to the United States and, pursuant to section 201 of the United States-Panama Trade Promotion Agreement Implementation Act (the ''PTPA Act'') (19 U.S.C. 3805 note), the staged reductions in duty that the President determined to be necessary or appropriate to carry out or apply articles 3.3, 3.5, 3.6, 3.26, 3.27, 3.28, and 3.29, and the schedule of duty reductions with respect to Panama set forth in Annex 3.3 of the PTPA. In order to ensure the continuation of such staged reductions in rates of duty for originating goods under tariff categories that are being modified to reflect the amendments to the Convention, I have determined that additional modifications to the HTS are necessary or appropriate to carry out the duty reductions previously proclaimed.

12. Presidential Proclamation 9466 of June 30, 2016, implemented the World Trade Organization Declaration on the Expansion of Trade in Information Technology Products (the ''Declaration'') and, pursuant to section 111(b) of the URAA (19 U.S.C. 3521(b)), modified the HTS to include the schedule of duty reductions necessary or appropriate to carry out the Declaration. These modifications to the HTS were set out in Annex I to that proclamation, and included certain technical errors that affected the tariff treatment accorded to certain goods covered by the Declaration. I have determined that modifications to the HTS are necessary to correct the technical errors.

13. Presidential Proclamation 9466 of June 30, 2016, implemented amendments to sections 112(b)(3)(A) and 112(c)(1) of the African Growth and Opportunity Act (AGOA) (19 U.S.C. 3721(b)(3)(A) and 3721(c)(1)), as amended by sections 103(b)(2) and 103(b)(3) of the Trade Preferences Extension Act of 2015 (TPEA) (Public Law 114–27). That proclamation, in part, modified the HTS to extend the regional apparel article program and the third-country fabric program through September 30, 2025. These modifications to the HTS included certain technical errors. I have determined that modifications to the HTS are necessary to correct the technical errors.

14. Executive Order 13742 of October 7, 2016, authorized by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) and the National Emergencies Act (50 U.S.C. 1601 *et seq.*), revoked the ban on the importation into the United States of any jadeite or rubies mined or extracted from Burma and any articles of jewelry containing jadeite or rubies mined or extracted from Burma. Presidential Proclamation 9383 of December 21, 2015, previously modified the HTS to include additional U.S. Note 4 to Chapter 71 of the HTS, which prohibited the importation of any jadeite or rubies mined or extracted from Burma and any articles of jewelry containing jadeite or rubies mined or extracted from Burma. Importation of those products was previously prohibited under the Burmese Freedom and Democracy Act of 2003 (the ''BFDA'') (Public Law 108–61), as amended by section 6(a) of the Tom Lantos Block Burmese JADE Act of 2008 (the ''JADE Act'') (Public Law 110–286), before its expiration on July 28, 2013. I have determined that the deletion of additional U.S. Note 4 to Chapter 71 of the HTS is necessary to the implementation of Executive Order 13742.

15. Section 604 of the Trade Act of 1974, as amended (the ''Trade Act'') (19 U.S.C. 2483), authorizes the President to embody in the HTS the substance of the relevant provisions of that Act, and of other acts affecting import treatment, and actions taken thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction. Section 1206(c) of the 1988 Act, as amended (19 U.S.C. 3006(c)), provides that any modifications proclaimed by the President under section 1206(a) of that Act may not take effect before the thirtieth day after the date on which the text of the proclamation is published in the *Federal Register*.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including but not limited to sections 1102 and 1206 of the 1988 Act, section 111 of the URAA, section 201 of the USAFTA Act, section 201 of the USMFTA Act, section 201 of the CAFTA-DR Act, section 201 of the USOFTA Act, section 201 of the USPTPA Act, section 201 of the USKFTA, section 201 of the PTPA Act, section 112 of AGOA, section 604 of the Trade Act, 50 U.S.C. 1701 *et seq.*, and 50 U.S.C. 1601 *et seq.*, do proclaim that:

(1) In order to modify the HTS to conform it to the Convention or any amendment thereto recommended for adoption, to promote the uniform application of the Convention, to establish additional subordinate tariff categories, and to make technical and conforming changes to existing provisions, the HTS is modified as set forth in Annex I of Publication 4653 of the United States International Trade Commission, titled, ''Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1988,'' which is incorporated by reference into this proclamation.

(2) In order to provide for the continuation of previously proclaimed staged duty reductions in the Rates of Duty 1–Special subcolumn for originating goods of Morocco under the USMFTA that are classifiable in the provisions modified by Annex I of Publication 4653 and entered, or withdrawn from warehouse for consumption, on or after each of the dates specified in section (a) of Annex II of Publication 4653, the HTS is modified as follows:

(a) The Rates of Duty 1–Special subcolumn is modified by inserting in such subcolumn for each subheading the rate of duty specified for such subheading in the table column titled 2017 before the symbol ''MA'' in parentheses; and

(b) For each of the subsequent dated table columns, the rates of duty in such subcolumn for such subheadings set forth before the symbol ''MA'' in parentheses are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof.

(3) In order to provide for the continuation of previously proclaimed staged duty reductions in the Rates of Duty 1–Special subcolumn for originating goods of Australia under the USAFTA that are classifiable in the provisions modified by Annex I of Publication 4653 and entered, or withdrawn from warehouse for consumption, on or after each of the dates specified in section (b) of Annex II of Publication 4653, the HTS is modified as follows:

(a) The Rates of Duty 1–Special subcolumn for each of the subheadings enumerated in subsection B is modified by inserting in such subcolumn for each subheading the rate of duty specified for such subheading in the table column titled 2017 before the symbol ''AU'' in parentheses; and

(b) For each of the subsequent dated table columns, the rates of duty in such subcolumn for such subheadings set forth before the symbol ''AU'' in parentheses are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof.

(4) In order to provide for the continuation of previously proclaimed staged duty reductions in the Rates of Duty 1–Special subcolumn for originating goods under general note 29 to the HTS that are classifiable in the provisions modified by Annex I of Publication 4653 and entered, or withdrawn from warehouse for consumption, on or after each of the dates specified in subsections (c)(1) and (c)(2) of Annex II of Publication 4653, the HTS is modified as follows:

(a) The rate of duty in the HTS set forth in the Rates of Duty 1–Special subcolumn for each of the HTS subheadings enumerated in subsection (c)(1) of Annex II is modified by inserting in such subcolumn for each subheading the rate of duty specified in the table column titled 2017 before the symbol ''P'' in parentheses;

(b) The rates of duty for such subheadings set forth before the symbol ''P'' in parentheses are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof;

(c) The Rates of Duty 1–Special subcolumn for each of the HTS subheadings enumerated in subsection (c)(2) of Annex II is modified by inserting in such subcolumn for each subheading the rate of duty specified in the table column titled 2017 before the symbol ''P+'' in parentheses; and

(d) For each of the subsequent dated table columns in such subsection set forth before the symbol ''P+'' in parentheses, are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof.

(5) In order to provide for the continuation of previously proclaimed staged duty reductions in the Rates of Duty 1–Special subcolumn for originating goods of Peru under the USPTPA that are classifiable in the provisions modified by Annex I of Publication 4653 and entered, or withdrawn from warehouse for consumption, on or after each of the dates specified in section (d) of Annex II of Publication 4653, the HTS is modified as follows:

(a) The rate of duty in the HTS set forth in the Rates of Duty 1–Special subcolumn for each of the HTS subheadings enumerated in section (d) of Annex II is modified by inserting in such subcolumn for each subheading the rate of duty specified for such subheading in the table column titled 2017 before the symbol ''PE'' in parentheses; and

(b) For each of the subsequent dated table columns, the rates of duty in such subcolumn for such subheadings set forth before the symbol ''PE'' in parentheses are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof.

(6) In order to provide for the continuation of previously proclaimed staged duty reductions in the Rates of Duty 1–Special subcolumn for originating goods of Oman under the USOFTA that are classifiable in the provisions modified by Annex I of Publication 4653 and entered, or withdrawn from warehouse for consumption, on or after each of the dates specified in section (e) of Annex II of Publication 4653, the HTS is modified as follows:

(a) The rate of duty in the HTS set forth in the Rates of Duty 1–Special subcolumn for each of the HTS subheadings enumerated in section (e) of Annex II is modified by inserting in such subcolumn for each subheading the rate of duty specified for such subheading in the table column titled 2017 before the symbol ''OM'' in parentheses; and

(b) For each of the subsequent dated table columns, the rates of duty in such subcolumn for such subheadings set forth before the symbol ''OM'' in parentheses are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof.

(7) In order to provide for the continuation of previously proclaimed staged duty reductions in the Rates of Duty 1–Special subcolumn for originating goods of Korea under the USKFTA that are classifiable in the provisions modified by Annex I of Publication 4653 and entered, or withdrawn from warehouse for consumption, on or after each of the dates specified

in section (f) of Annex II of Publication 4653, the HTS is modified as follows:

(a) The rate of duty in the HTS set forth in the Rates of Duty 1–Special subcolumn for each of the HTS subheadings enumerated in section (f) of Annex II shall be modified by inserting in such subcolumn for each subheading the rate of duty specified for such subheading in the table column titled 2017 before the symbol ''KR'' in parentheses; and

(b) For each of the subsequent dated table columns, the rates of duty in such subcolumn for such subheadings set forth before the symbol ''KR'' in parentheses are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof.

(8) In order to provide for the continuation of previously proclaimed staged duty reductions in the Rates of Duty 1–Special subcolumn for originating goods of Panama under the PTPA that are classifiable in the provisions modified by Annex I of Publication 4653 and entered, or withdrawn from warehouse for consumption, on or after each of the dates specified in section (g) of Annex II of Publication 4653, the HTS is modified as follows:

(a) The Rates of Duty 1–Special subcolumn is modified by inserting in such subcolumn for each subheading the rate of duty specified for such subheading in the table column titled 2017 before the symbol ''PA'' in parentheses; and

(b) For each of the subsequent dated table columns, the rates of duty in such subcolumn for such subheadings set forth before the symbol ''PA'' in parentheses are deleted and the rates of duty for such dated table column are inserted in each enumerated subheading in lieu thereof.

(9) In order to make technical corrections necessary to provide the intended tariff treatment to goods covered by the Declaration in accordance with Presidential Proclamation 9466 of June 30, 2016, the HTS is modified as set forth in Annex III of Publication 4653.

(10) In order to make technical corrections necessary to provide that the regional apparel article program and the third-country fabric program are effective through September 30, 2025, in accordance with Presidential Proclamation 9466 of June 30, 2016, the HTS is modified as set forth in Annex III of Publication 4653.

(11) In order to implement Executive Order 13742 of October 7, 2016, as authorized by the International Emergency Economic Powers Act, National Emergencies Act, the BFDA, and the JADE Act, the HTS is modified by deleting additional U.S. Note 4 to Chapter 71 of the HTS.

(12) (a) The modifications and technical rectifications to the HTS set forth in Annex I of Publication 4653 shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after the later of (i) January 1, 2017, or (ii) the thirtieth day after the date of publication of this proclamation in the *Federal Register*.

(b) The modifications to the HTS set forth in Annexes II and III of Publication 4653 shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after the respective dates specified in each section of such Annex for the goods described therein.

(13) Any provisions of previous proclamations and Executive Orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of December, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

[FR Doc. 2016–29200
Filed 12–1–16; 12:30 pm]
Billing code 3295–F7–P

Reader Aids

Federal Register

Vol. 81, No. 232

Friday, December 2, 2016

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and Code of Federal Regulations are located at: **www.ofr.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, DECEMBER

86555–86904 1
86905–84708 2

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
9547 87379
9548 87399
9549 87401

Executive Orders:
13749 87391
13750 87393

5 CFR

330 86555
532 86561
731 86555
890 86905
894 86905
9801 86563

Proposed Rules:
890 ..... 86898, 86902

7 CFR

Proposed Rules:
271 86614
272 86614
273 86614

10 CFR

2 86906
10 86906
26 86906
30 86906
40 86906
50 86906
55 86906
61 86906
63 86906
70 86906
71 86906
72 86906
73 86906
74 86906
100 86906

14 CFR

25 86910
39 ..... 86567, 86912
71 86570

Proposed Rules:
39 ..... 86627, 86630, 86975, 86977
71 86633

15 CFR

740 86571

16 CFR

306 86914

18 CFR

375 86573
388 86573

19 CFR

201 86575

20 CFR

404 ..... 86915, 86928

Proposed Rules:
401 86979

23 CFR

630 86924
635 86924

24 CFR

91 86947
92 86947

25 CFR

140 86953
141 86953
211 86953
213 86953
225 86953
226 86953
227 86953
243 86953
249 86953

26 CFR

1 86953
300 86955

27 CFR

Proposed Rules:
9 86980

28 CFR

36 87348

29 CFR

38 87130

Proposed Rules:
1904 86987
1910 86987
1915 86987
1926 86987

31 CFR

1010 86577

33 CFR

117 86579

37 CFR

Proposed Rules:
201 ..... 86634, 86643, 86656
202 ..... 86634, 86643, 86656

40 CFR

82 86778
180 ..... 86579, 86580, 86960

Proposed Rules:
49 86988
52 ..... 86662, 86664
63 87003

81 86664

47 CFR

1 86586
25 86586
64 87274
73 86586
74 86586

49 CFR

Proposed Rules:
390 86673
391 86673
571 86684

50 CFR

300 86966
622 ....86970, 86971, 86973

Proposed Rules:
17 87246
648 86687

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List December 1, 2016

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.