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Rules and Regulations

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AE–76–P

Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is adopting certain amendments containing the regulations applicable to commodity pool operators (CPOs) and commodity trading advisors (CTAs). The amendments (Final Rules) are consistent with and/or expand upon no-action and exemptive letters issued by the Commission's Division of Swap Dealer and Intermediary Oversight (DSIO). In particular, the Commission intends to increase regulatory certainty by amending two regulations. In the first, the Commission is providing clarification that the exclusion from the CPO definition currently provided for a registered investment company (RIC) should be claimed by the entity most commonly understood to solicit for or ''operate'' the RIC, *i.e.,* its investment adviser, and is adding an exclusion for the investment advisers of business development companies (BDCs), which share many operational similarities with RICs. In the second, the Commission is adopting amendments to the ''Reporting Person'' definition that would eliminate the filing requirements for Forms CPO–PQR and CTA–PR for certain classes of CPOs and CTAs.

DATES:

Effective date: The effective date for this final rule is January 9, 2020.

Compliance date: Compliance with Regulation 4.5(c)(5) (17 CFR 4.5(c)(5)) by registered investment advisers with respect to RICs affected by the amendment to Regulation 4.5(a)(1) (17 CFR 4.5(a)(1)) shall be required by March 1, 2021.

FOR FURTHER INFORMATION CONTACT: Joshua Sterling, Director, 202–418–6056, *jsterling@cftc.gov,* Amanda Olear, Associate Director, at 202–418–5283 or *aolear@cftc.gov;* Elizabeth Groover, Special Counsel, at 202–418–5985 or *egroover@cftc.gov;* Chang Jung, Special Counsel at 202–418–5202 or *cjung@cftc.gov,* and Michael Ehrstein, Special Counsel, at 202–418–5957 or *mehrstein@cftc.gov,* Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

a. Statutory and Regulatory Background

i. Existing Statutory and Regulatory Authorities

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by regulating the swaps market. As amended by the Dodd-Frank Act, section 1a(11) of the Commodity Exchange Act (CEA or the Act) defines the term ''commodity pool operator,'' as any person [2] engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, with respect to that commodity pool, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests.[3] CEA section 1a(12) defines a ''commodity trading advisor,'' as any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in commodity interests.[4] CEA section

[1] Public Law 111–203, 124 Stat. 1376 (2010), *available at https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf* (last retrieved Jul. 17, 2019).

[2] Regulation 1.3 defines ''person'' as including individuals, associations, partnerships, corporations, and trusts. 17 CFR 1.3. The Commission's regulations are found at 17 CFR Ch. I (2019).

[3] 7 U.S.C. 1a(11). The CEA is found at 7 U.S.C. 1, *et seq.* (2019). Both the Act and the Commission's regulations are accessible through the Commission's website, *https://www.cftc.gov.*

[4] 7 U.S.C. 1a(12)(A)(i). The CTA definition also includes any person who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning the value of or advisability of trading in commodity interests, and any person that is registered with the Commission as a CTA. 7 U.S.C. 1a(12)(A)(ii)–(iii).

4m(1) generally requires each person who satisfies the CPO or CTA definitions to register as such with the Commission.[5] With respect to CPOs, the CEA also authorizes the Commission, acting by rule or regulation, to include within, or exclude from, the term ''commodity pool operator'' any person engaged in the business of operating a commodity pool, if the Commission determines that the rule or regulation will effectuate the purposes of the Act.[6] CEA section 1a(12)(B) provides multiple exclusions from the CTA definition, and similarly affords the Commission the authority to exclude such other persons not within the intent of that provision as the Commission may specify by rule, regulation, or order.[7]

Part 4 of the Commission's regulations governs the operations and activities of CPOs and CTAs.[8] Those regulations implement the statutory authority provided to the Commission by the CEA and establish multiple registration exemptions and exclusions for CPOs and CTAs.[9] Part 4 also contains regulations that establish the ongoing compliance obligations applicable to CPOs and CTAs registered or required to be registered. These requirements pertain to the commodity pools and separate accounts that the CPOs and CTAs operate and advise, and among other things, provide customer protection, disclosure, and reporting to a registrant's commodity pool participants or advisory clients.

ii. The October 2018 Proposal

In response to information received from members of the public, as well as CFTC staff's own internal review of the Commission's regulatory regime, the Commission published for public comment in the **Federal Register** on October 18, 2018, a Notice of Proposed Rulemaking (NPRM, or the Proposal), proposing several amendments to the regulations applicable to CPOs and CTAs.[10] Specifically, the Commission proposed regulatory amendments that would add to 17 CFR part 4:

(1) An exemption from registration in Regulation 4.13 for CPOs that is generally consistent with the terms of Staff Advisory 18–96; [11]

(2) A requirement in Regulation 4.13 that any person claiming or affirming an exemption from CPO registration pursuant to Regulations 4.13(a)(1)–(a)(5) certify that neither the claimant nor its principals are statutorily disqualified pursuant to CEA Sections 8a(2) or 8a(3);

(3) An exemption from the recordkeeping requirements in Regulation 4.23 for U.S.-based CPOs of offshore commodity pools that permits the CPO to maintain the pool's original books and records in the pool's offshore location;

(4) An exemption from registration in Regulations 4.13 and 4.14 for persons acting as CPOs or CTAs for family offices and/or their family clients, as those terms are defined in regulations adopted by the Securities and Exchange Commission (SEC);

(5) A clarification that the exclusion from the CPO definition currently provided by Regulation 4.5(a)(1) for a RIC should be claimed by the entity most commonly understood to solicit for or ''operate'' the RIC, *i.e.,* the RIC's investment adviser;

(6) An exclusion in Regulation 4.5 from the CPO definition for the investment advisers of BDCs;

(7) Relief permitting general solicitation in commodity pools offered by CPOs pursuant to exemptions in Regulations 4.7 and 4.13(a)(3), consistent with the Jumpstart Our Business Start-ups Act of 2012 (JOBS Act); and

(8) Amendments to the ''Reporting Person'' definition in Regulation 4.27 that would eliminate the filing requirements for Forms CPO–PQR and CTA–PR for certain classes of CPOs and CTAs.[12]

Several of the proposed amendments are consistent with, or expansions of, relief that is currently available through a staff advisory or through no-action and exemptive letters issued over the years by staff of the Commission's DSIO and its predecessors. The Commission proposed these amendments intending to simplify the regulatory landscape for CPOs and CTAs without reducing the protections or benefits provided by those regulations, to increase public awareness about available relief by incorporating commonly relied upon no-action or exemptive relief in Commission regulations, and to generally reduce the regulatory burden without sacrificing the Commission's customer protection and other regulatory interests.

b. Public Comments and Ex Parte Meetings

The Commission requested comment generally on all aspects of the Proposal, and also solicited comment through targeted questions about each of the proposed amendments. Overall, the Commission received 28 individual comment letters responsive to the NPRM: Six from legal and market professional groups; 13 from law firms; seven from individual family offices; one from a government-sponsored enterprise (GSE) actively involved in the housing industry; and one from the National Futures Association (NFA), a registered futures association,[13] who through delegation by the Commission, assists Commission staff in administering the CPO and CTA regulatory program.[14] Additionally, Commission staff participated in

[5] 7 U.S.C. 6m(1).

[6] 7 U.S.C. 1a(11)(B).

[7] 7 U.S.C. 1a(12)(B)(vii). The Commission most recently relied on the authority in this provision in issuing an Order excluding Farm Credit System institutions from that definition, due to their similarities to banks, a type of entity that is already excluded by CEA section 1a(12)(B)(i). *See* Order Excluding Farm Credit System Institutions From the Commodity Exchange Act's Definition of ''Commodity Trading Advisor,'' 81 FR 89447 (Dec. 12, 2016). CEA section 1a(12)(C) requires that the exclusions in CEA section 1a(12)(B) only apply, if the furnishing of such excluded CTA services by such persons is solely incidental to the conduct of their business or profession. 7 U.S.C. 1a(12)(C).

[8] *See* 17 CFR part 4, generally.

[9] *See, e.g.,* 17 CFR 4.13 and 4.14 (providing multiple registration exemptions to qualifying persons meeting the CPO and CTA definitions, respectively).

[10] *See* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR 52902 (Oct. 18, 2018) (Proposal).

[11] Offshore Commodity Pools Relief for Certain Registered CPOs from Rules 4.21, 4.22, and 4.23(a)(10) and (a)(11) and From the Books and Records Requirement of Rule 4.23, Commodity Futures Trading Commission, Division of Trading & Markets (Apr. 11, 1996), *available at https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm* (last retrieved Oct. 10, 2019) (Staff Advisory 18–96).

[12] Proposal, 83 FR 52903–04.

[13] *See* CEA section 17, 7 U.S.C. 21.

[14] Comments were submitted by the following entities: Alscott, Inc.* (Dec. 7, 2018); Alternative Investment Management Association (AIMA) (Letter 1: Dec. 17, 2018, and Letter 2: Oct. 7, 2019); Buchanan, Ingersoll, and Rooney, PC* (Dec. 12, 2018); Commodore Management Company* (Dec. 12, 2018); Dechert, LLP (Dechert) (Dec. 17, 2018); Freddie Mac (Dec. 17, 2018); Fried, Frank, Harris, Shriver, & Jacobson, LLP (Fried Frank) (Dec. 17, 2018); Investment Adviser Association (IAA) (Dec. 17, 2018); Kramer, Levin, Naftalis, & Frankel, LLP* (Dec. 17, 2018); LBCW Investments* (Dec. 5, 2018); Managed Funds Association (MFA) (Dec. 14, 2018); Marshall Street Capital* (Dec. 13, 2018); McDermott, Will, & Emery, LLP* (Dec. 17, 2018); McLaughlin & Stern, LLP* (Dec. 5, 2018); Moreland Management Company* (Dec. 13, 2018); Morgan, Lewis, & Bockius, LLP* (Dec. 18, 2018); NFA (Dec. 17, 2018); New York City Bar Association, the Committee on Futures and Derivatives (NYC Bar Derivatives Committee) (Jan. 4, 2019); Norton, Rose, Fulbright US, LLP* (Dec. 17, 2018); Perkins Coie, LLP* (Dec. 17, 2018); the Private Investor Coalition, Inc. (PIC) (Nov. 28, 2018); Ridama Capital * (Dec. 13, 2018); Schiff Hardin, LLP (two offices)* (Dec. 13 and 17, 2018); the Securities Industry and Financial Management Association Asset Management Group (SIFMA AMG) (Letter 1: Dec. 17, 2018, and Letter 2: Sept. 13, 2019); Vorpal, LLC* (Dec. 17, 2018); Willkie, Farr, and Gallagher, LLP (Willkie) (Dec. 11, 2018); and Wilmer Hale, LLP (Wilmer Hale) (Dec. 7, 2018). Those entities marked with an ''*'' submitted substantively identical, brief comments, specifically supporting the detailed comments and suggested edits submitted to the Commission by PIC.

multiple *ex parte* meetings concerning the Proposal.[15]

This is the second of two **Federal Register** releases the Commission is publishing, finalizing amendments from the Proposal. In particular, this release adopts amendments seeking to add to 17 CFR part 4 items 5, 6, and 8 from the list of the Proposal initiatives above.[16] For the reasons stated in the Proposal, and in light of comments received, the Commission is adopting these amendments with modifications and an interpretation of the notice requirements in Regulations 4.5(c) and (d).

II. Final Rules

a. Regulation 4.5: Amendments to the CPO Exclusion

i. Background and Proposed Rules

In the Proposal, the Commission proposed two specific amendments to paragraphs (a)(1) and (b)(1) of Regulation 4.5, which, together, provide an exclusion from the CPO definition for the operators of RICs. First, the Commission proposed amendments clarifying that the investment adviser, registered as such (RIA) under the Investment Advisers Act of 1940, as amended (IA Act),[17] would be the person required to claim the CPO exclusion on behalf of a particular RIC.[18] Even though the Commission previously determined that a RIC's RIA, as the principal sponsor and entity managing the operations of a RIC, is the appropriate person to serve as the CPO for regulatory purposes, the RIC had been listed as both the excluded CPO and the ''qualifying entity'' covered by the exclusion in Regulation 4.5.[19]

The second amendment proposed by the Commission was intended to extend the exclusionary relief of Regulation 4.5 to also cover the RIAs of BDCs, consistent with relief provided through a no-action letter issued by DSIO staff in 2012.[20] BDCs are a category of closed-end investment company established by Congress for the purpose of making capital more readily available to small, developing, and financially troubled companies that do not have ready access to the public capital markets or other forms of conventional financing.[21] Due to their limited purpose, BDCs generally use and trade commodity interests for hedging or managing investment and commercial risks of the operating companies in which they invest.[22] Consequently, the types of commodity interests BDCs use are typically limited to interest rate and currency swaps, with some limited use of credit default swaps and other commodity interests.[23]

As the Commission emphasized in the Proposal, and as discussed by DSIO staff in the BDC No-Action Letter, BDCs operate in a manner similar to closed-end RICs, despite not being registered as such, and are subject to many of the same provisions of the Investment Company Act of 1940, as amended (ICA).[24] In fact, the list of legal and operational similarities between BDCs and RICs is quite long.[25] Although BDCs meet the definition of an ''investment company'' under section 3 of the ICA,[26] they are exempt from registration as such by virtue of filing, pursuant to ICA section 54, an election to be subject to various ICA provisions.[27] Prior to the issuance of the BDC No-Action Letter, BDC operators were required to register with the Commission as CPOs, due to their inability to claim or rely upon the CPO exclusion for RICs, the original language of which did not contemplate relief for entities similar to, but not registered as, investment companies.[28]

Pursuant to the BDC No-Action Letter, operators of BDCs have received no-action relief from CPO registration, provided that: (1) The entity has elected to be treated as a BDC under ICA section 54 and will remain regulated as such; (2) the operator has not marketed and will not market participations in the BDC to the public as an investment in a commodity pool, or otherwise as an investment in a vehicle for the trading of commodity interests; (3) the operator represents that it limits its use of commodity interests in the BDC, consistent with the trading thresholds in Regulation 4.5(c)(2)(iii)(A)–(B); and (4) the operator files an electronic notice with DSIO staff.[29] Since its issuance, DSIO staff has received 65 filings by operators of BDCs claiming this no-action relief.[30]

For the purpose of providing a regulatory exclusion for CPOs of BDCs, the Commission proposed amending Regulation 4.5 in a manner largely consistent with the legal analysis and conditions of the BDC No-Action

[15] *See* ''Comments for Proposed Rule 83 FR 52902,'' *available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2925* (last retrieved Oct. 15, 2019).

[16] The Commission notes that items 4 and 7 in the Proposal above are further discussed and addressed by the Commission in a separate **Federal Register** release. Concurrent with the adoption of these final rule amendments, the Commission adopted final amendments completing those initiatives. *See* Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs published elsewhere in this issue of the **Federal Register**.

[17] 15 U.S.C. 80b–1, *et seq.*

[18] The Commission notes that neither this proposed amendment nor the final amendment adopted herein are intended to substantively affect the CPO exclusion for RICs in Regulation 4.5.

[19] *See* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252 (Feb. 24, 2012); correction notice published at 77 FR 17328 (Mar. 26, 2012) (CPO CTA Final Rule) (''The Commission agrees that the [RIA] is the most logical entity to serve as the [RIC]'s CPO. To require a member or members of the [RIC]'s board of directors to register would raise operational concerns for the [RIC] as it would result in piercing the limitation on liability for actions undertaken in the capacity of a director. Thus, the Commission concludes that the [RIA] for the [RIC] is the entity required to register as the CPO.'').

[20] CFTC Letter No. 12–40, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/12-40.pdf* (Dec. 4, 2012) (last retrieved Oct. 8, 2019) (BDC No-Action Letter).

[21] Securities Offering Reform for Closed-End Investment Companies, 84 FR 14448, 14449 (Apr. 10, 2019).

[22] BDC No-Action Letter, at 2.

[23] BDC No-Action Letter, at 2. *See also* Use of Derivatives by Registered Investment Companies, U.S. Securities and Exchange Commission, Division of Economic Risk and Analysis, *available at https://www.sec.gov/files/derivatives12-2015.pdf* (Dec. 2015) (last retrieved Oct. 8, 2019) (Use of Derivatives by RICs). The SEC's Division of Economic Risk and Analysis pulled a random sample of RICs, including BDCs, to examine the use of derivatives by such entities. Use of Derivatives by RICs, at 1. Within the sampled BDCs, none had exposure to derivatives, which appears to be consistent with assertions from industry members that BDCs' usage of derivatives is generally very limited. *Id.* at 3.

[24] 15 U.S.C. 80a–1, *et seq.; see, e.g.,* 15 U.S.C. 80a–18 (providing asset coverage requirements among others subject to certain limitations) and 15 U.S.C. 80a–60 (making ICA section 18 applicable to BDCs with certain modifications).

[25] Most BDCs, like RICs, have external investment advisers, which generally must be registered with the SEC under the IA Act. BDCs are also subject to periodic examination by the SEC. 15 U.S.C. 80a–63. Further, BDCs must either have a class of equity securities that is registered under, or have filed a registration statement for a class of equity securities pursuant to, the Securities Exchange Act of 1934, as amended, which, in turn, requires multiple regular filings with the SEC: Annual reports on Form 10–K; quarterly reports on Form 10–Q; current reports on Form 8–K; and proxy solicitation statements in connection with annual stockholder meetings. Additionally, many BDCs are listed for trading on national securities exchanges, and thus, are subject to exchange rules governing listed companies. *See, e.g.,* NYSE Listed Company Manual, *available at https://nyseguide.srorules.com/listed-company-manual* (last retrieved Oct. 8, 2019). Finally, BDCs are also subject to certain regulations and corporate governance guidelines under the Sarbanes-Oxley Act of 2002. Public Law 107–204, 116 Stat. 745 (Jul. 30, 2002) (codified in U.S.C. Titles 15, 18, 28, and 29).

[26] 15 U.S.C. 80a–3.

[27] 15 U.S.C. 80a–53 and 80a–6(f).

[28] *See* 17 CFR 4.5(a)(1) and (b)(1) (excluding from the CPO definition ''an investment company registered as such under the Investment Company act of 1940,'' with respect to ''an investment company registered as such under the Investment Company Act of 1940''). For additional background and history on this regulation, *see* Commodity Pool Operators; Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term ''Commodity Pool Operator''; Other Regulatory Requirements, 50 FR 15868, 15871 (Apr. 23, 1985).

[29] BDC No-Action Letter, at 3–4.

[30] This figure is accurate, as of July 26, 2019.

Letter.[31] The Commission explained, ''because BDCs are subject to oversight by the SEC that is comparable to the regulation of RICs . . . the Commission has determined to exercise its authority to propose to amend § 4.5 to provide IAs of BDCs with comparable exclusionary relief.'' [32] Specifically, the proposed amendments would permit an RIA of a BDC to claim the exclusion provided by Regulations 4.5(a)(1) and (b)(1), with respect to the operation of that BDC. This was proposed to be accomplished by, as discussed above, amending Regulation 4.5(a)(1) to provide an exclusion from the CPO definition to an RIA, with respect to the operation of a ''qualifying entity,'' and amending Regulation 4.5(b)(1) to specifically include BDCs as a ''qualifying entity'' for which an exclusion may be claimed.[33]

ii. Comments Received

The Commission requested comment on all aspects of the Proposal generally and received two comments regarding the proposed amendments to Regulation 4.5. NFA supported the proposed amendments, stating that they, along with the other amendments in the Proposal ''will bring greater transparency to the CPO registration framework by including all registration exemptions (including those currently in staff no-action letters and guidance) in the Commission's regulations.'' [34] Although NFA offered no objections to the amendments as proposed, it sought ''clarification regarding how this change impacts those entities that have previously filed a notice of exclusion in the name of the investment company.'' [35] Furthermore, NFA requested that ''the Commission provide NFA with sufficient time to make changes to its Electronic Filing System,'' reflecting these amendments.[36]

Dechert also provided specific comments on the amendments to Regulation 4.5(a)(1), *i.e.,* the removal of the RIC as an excluded CPO and its replacement with the RIA. Dechert stated that this proposed amendment ''leads to a logical conclusion,'' but nonetheless, Dechert pointed out the ''practical implications involved . . . and the cost of compliance'' with this proposed amendment.[37] Dechert stated that the proposed amendment would require numerous exclusion claims to be transferred from the RIC to the RIA,[38] and according to Dechert, there is no simple or streamlined process within NFA's Electronic Filing System to accomplish this.[39] Additionally, Dechert noted that changing the excluded CPO from the RIC to the RIA could be considered a material change that ''necessitates making an off-cycle amendment to their registration statements,'' the costs of which would be ultimately borne by the RIC and its participants.[40] As a result, Dechert suggested foregoing identifying the RIA as the excluded CPO in Regulation 4.5(a)(1), or alternatively, requested that the Commission work with ''NFA to help affected entities move their exclusion notices . . . in an efficient manner.'' [41]

iii. Responding to Comments and the Final Rules

After considering the public comments, the Commission is adopting the amendments to Regulation 4.5, generally as proposed,[42] and a Commission interpretation designed to address commenters' concerns. Consistent with its prior statements concerning the person that should claim the CPO exclusion in Regulation 4.5 with respect to the operations of a RIC, and with the Commission's conclusion that the RIA is the most appropriate person to register as a CPO of a RIC that exceeds the trading thresholds in Regulation 4.5,[43] the Commission believes it appropriate to specify the RIA as that excluded person, instead of the RIC.

Also, as stated in the Proposal, the Commission believes that because BDCs are subject to SEC oversight comparable to that of RICs, operators of BDCs, *i.e.,* their RIAs, should be subject to the same operational requirements as the operators of RICs.[44] Because of their similarities, the Commission believes further that RIAs of BDCs should also be required to affirm their exclusion claims on an annual basis, which is consistent with the existing requirements under Regulation 4.5(c)(5) applicable to persons excluded from the CPO definition with respect to RICs.[45] The Commission recognizes commenters' concerns about the compliance issues resulting from amending Regulation 4.5(a)(1), especially for the 11,220 RICs that have claimed relief under this exclusion.[46]

To address these initial compliance burdens identified in the comments, the Commission has determined to provide the following interpretation of Regulations 4.5(c) and 4.5(d), with respect to this regulatory transition and future compliance with the notice filing requirement in Regulation 4.5(c). Specifically, if a person other than a RIC's RIA has claimed the CPO exclusion with respect to such RIC through the required notice filing, the Commission interprets Regulations 4.5(d)(1)–(d)(2) not to apply in such a manner that an amended notice within 15 business days would be required to reflect changing the excluded CPO entity to the RIC's RIA.[47] Rather, the Commission interprets Regulation 4.5(c)(5) to require that, when the excluded CPO of such RIC is required to annually reaffirm its notice of exclusion, (*i.e.,* within 60 days of the calendar year-end),[48] the excluded CPO entity will simply allow the existing notice to expire, and the RIA of such RIC will file a new notice pursuant to Regulation 4.5(c), prior to the expiration of the other existing notice. Where an RIA has claimed the exclusion with respect to a RIC through a notice filing, the RIA will simply continue to affirm the notice as usual.

The Commission recognizes that it may be overly burdensome for RIAs of RICs to file the revised annual notices pursuant to Regulation 4.5(c)(5) when

[31] Proposal, 83 FR 52912.

[32] *Id.*

[33] Proposal, 83 FR 52925 (proposing to amend, among others, Regulations 4.5(a)(1) and (b)(1)). The Commission also proposed several conforming or technical changes to Regulation 4.5(c)(2) for the purpose of accommodating this more substantive proposed amendment and improving readability and/or clarity. *Id.*

[34] NFA Letter, at 3.

[35] NFA Letter, at 3.

[36] *Id.*

[37] Dechert Letter, at 15.

[38] Dechert Letter, at 15. Dechert stated additionally that, under existing Regulation 4.5, RICs ''tend to identify the excluded CPO as the multi-series Delaware or Massachusetts business trust or Maryland corporation in which each commodity pool is a series and identify the individual series as the commodity pools for which the CPO was excluded. Where funds are housed in a single-series trust such as for example closed-end mutual funds, the fund is both the excluded CPO and the commodity pool.'' *Id.*

[39] *Id.* at 15. Dechert stated that, currently, each CPO exclusion notice filing ''involves creating a co-CPO relationship with the new CPO, and then emailing the NFA Exemptions Staff to request that the previous relationship be terminated.'' *Id.*

[40] Dechert Letter, at 16.

[41] Dechert Letter, at 17.

[42] The Final Rule amendments remove the phrase ''as such'' in Regulations 4.5(a)(1) and (b)(1).

[43] *See* CPO CTA Final Rule, 77 FR 11259.

[44] Proposal, 83 FR 52912 and 52916.

[45] Under the Final Rules, the person excluded from the definition of CPO with respect to a RIC, or a BDC, will be its RIA.

[46] As discussed above, the Commission further understands from commenters that persons other than the RIC have also claimed the exclusion with respect to a RIC. These include the RIA and, where the RIC is a series, the umbrella entity. Dechert Letter, at 15.

[47] 17 CFR 4.5(d)(1)–(d)(2).

[48] The Commission recognizes that Regulation 4.5(c)(5) has typographical errors that reference the annual affirmation of the notice of exclusion as being a ''notice of exemption,'' rather than a ''notice of exclusion.'' The Commission intends to address this in a future rulemaking, along with other technical changes.

they are due in early 2020. Therefore, the Commission has determined that compliance with Regulation 4.5(c)(5) by RIAs with respect to RICs affected by the amendment to Regulation 4.5(a)(1) shall not be required until within 60 days of the end of the calendar year 2020, *i.e.,* March 1, 2021. The Commission believes this approach will minimize any inconvenience or cost associated with the transition to designating the RIA as the excluded CPO for the RIC.

Finally, the Commission also recognizes Dechert's concern that changing the excluded CPO to the RIA could constitute a material change necessitating an ''off-cycle amendment to [the RIC's] registration statements.'' [49] The Commission is not in a position to make a determination as to whether this is, in fact, a material change; each RIC must make that determination. The Commission notes, however, that despite the change in regulatory text, the intent behind Regulation 4.5(a)(1) remains the same: No person acting as the CPO of a RIC is required to register as a CPO with respect to the operation of such RIC, provided that the requirements and conditions in the applicable provisions of Regulation 4.5 are also satisfied.[50] Therefore, from the Commission's perspective, there is no substantive change with respect to the RIC's legal posture under the Commission's regulations.

iv. The Effect of the Final Amendments on CFTC Staff Letter 12–40: The BDC No-Action Letter

The Commission intends the Final Rules, which are effective 30 days after publication in this **Federal Register** release, and which expand an existing CPO exclusion to also exclude RIAs operating BDCs, to supersede the staff no-action relief provided by the BDC No-Action Letter. Therefore, RIAs of BDCs should file a notice to claim the amended exclusion, pursuant to Regulation 4.5(c), as soon as practicable after these amendments go into effect.

b. Regulation 4.27: Excluding Certain Classes of CPOs and CTAs From the Definition of ''Reporting Person''

The Commission also proposed to revise the definition of ''Reporting Person,'' in Regulation 4.27, which defines what types, classes, or categories of CPOs and CTAs are required to file Forms CPO–PQR and CTA–PR, respectively.[51] The proposed amendments would revise the definition by excluding certain registered CPOs and CTAs from the ''Reporting Person'' definition in Regulation 4.27(b), consistent with exemptive relief provided by DSIO through CFTC Letter Nos. 14–115 and 15–47.[52] The proposed amendments were designed to further expand that relief to additional categories of CTAs, whose Form CTA–PR filings have limited utility for the Commission, as described below.[53]

Specifically, CFTC Letter No. 14–115 provides exemptive relief from the obligation to file Form CPO–PQR to CPOs that operate only pools for which the CPO has claimed either a definitional exclusion under Regulation 4.5, or an exemption from CPO registration under Regulation 4.13.[54] Similarly, CFTC Letter No. 15–47 provides exemptive relief from the obligation to file Form CTA–PR to CTAs that are registered as such, yet do not direct client accounts.[55]

In the Proposal, the Commission sought to also exclude CTAs that comply with the terms of the registration exemptions contained in Regulations 4.14(a)(4) or (a)(5), yet are nevertheless registered as CTAs, from the definition of ''Reporting Person'' in Regulation 4.27(b). Under Regulation 4.14(a)(4), the CTA in question is registered as the CPO of a pool, and therefore, already has an obligation to file a Form CPO–PQR with respect to that pool. As noted in the Proposal, Form CPO–PQR requires the reporting of substantially similar information when compared to Form CTA–PR.[56] As such, the Commission posited that there would be very little value in any data that would be collected by requiring that same Reporting Person to also file a Form CTA–PR, and that any value would be outweighed by the burden to that entity of the extra filing.

Further, Regulation 4.14(a)(5) exempts from CTA registration any person that is exempt from CPO registration, if that person's commodity trading advice is directed solely to the pool for which it is exempt.[57] Consistent with the relief provided in CFTC Staff Letter 14–115, such an exempt CPO would not be required to report on a Form CPO–PQR.[58] The Commission preliminarily concluded in the Proposal that it would therefore be incongruent to require the same person to report on Form CTA–PR, with respect to the operation of a pool for which it is not required to file a Form CPO–PQR.

The Commission received two comments on this aspect of the Proposal. The first was received from NFA, which supported all of the proposed amendments to Regulation 4.27.[59] In the second, Willkie requested confirmation from the Commission that the CPO of an exempt pool or CTA of an exempt account would not be required to report on Forms CPO–PQR and CTA–PR with respect to the exempt pool or the exempt account, in the event the CPO operates a non-exempt pool or the CTA advises a non-exempt account.[60] In support of that request, Willkie states that such a conclusion would be consistent with the operation of other Commission regulations, like Regulations 4.13(e) and 4.14(c).[61]

In response, the Commission notes that these questions have already been addressed by Commission staff in FAQs related to Forms CPO–PQR and CTA–PR.[62] Specifically, FAQ 11 of the CPO Guidance provides that any pools operated pursuant to an exemption under Regulation 4.13(a)(3) be excluded from reporting on Form CPO–PQR.[63] The FAQs also address the Willkie question regarding CTA reporting. Specifically, FAQ 9 of the CTA Guidance provides that a CTA should exclude the assets of the pool operated pursuant to Regulation 4.13(a)(3) when reporting on Form CTA–PR.[64]

[49] Dechert Letter, at 16.

[50] *See* 50 FR 15871.

[51] *See* 17 CFR 4.27(b).

[52] CFTC Letter No. 14–115, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-115.pdf* (last retrieved Oct. 10, 2019); CFTC Letter No. 15–47, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/15-47.pdf* (last retrieved Oct. 10, 2019).

[53] Proposal, 83 FR 52913.

[54] CFTC Letter No. 14–115, at 2.

[55] CFTC Letter No. 15–47, at 2.

[56] *See* 17 CFR part 4, App. A and App. C.

[57] 17 CFR 4.14(a)(5).

[58] *See* CFTC Letter No 14–115, at 2.

[59] NFA Letter, at 4.

[60] Willkie Letter, at 8.

[61] Willkie Letter, at 8.

[62] CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions Regarding Commission Form CPO–PQR (CPO Guidance), *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/faq_cpocta110515.pdf* (last retrieved Oct. 11, 2019).

[63] *Id.* Similarly, Question 19 of the CPO Guidance asks, ''If a CPO operates Pools pursuant to CFTC Regulation 4.7 and operates Pools pursuant to CFTC Regulation 4.13(a)(3), should the CPO count the Regulation 4.13(a)(3) exempt Pools in determining the CPOs 'Total Assets Under Management' [(Total AUM)]? Or should the CPO exclude such Pools from the threshold calculation and only consider the Total AUM of the CPO with respect to all other non-exempt/non-excluded Pools?'' Commission staff responded: ''For purposes of determining the reporting threshold and CPO and Pool reporting, including the CPO's [Total AUM] . . . the CPO must exclude those Pools for which it is not required to be registered (*i.e.,* Pools operated pursuant to an exclusion under CFTC Regulation 4.5 or an exemption under CFTC Regulation 4.13(a)(3)). Under this scenario, the CPO would only be required to count Pools operated pursuant to CFTC Regulation 4.7.'' *Id.* at Question 19.

[64] CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently

Continued

Accordingly, the Commission adopts the amendments to the definition of ''Reporting Person'' in Regulation 4.27(b) as proposed.

III. Related Matters

a. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that Federal agencies, in promulgating regulations, consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities, and if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities.[65] Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking. As noted in the Proposal, the regulations adopted herein affect only persons registered or required to be registered as CPOs and CTAs, persons claiming exemptions from registration as such, and certain persons excluded from the CPO definition. With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, if it meets the criteria for an exemption from registration under Regulation 4.13(a)(2).[66] Because the regulations amended by the Final Rules generally apply to persons registered or required to be registered as CPOs with the Commission, amend and provide an exclusion from the CPO definition to qualifying persons, and extend relief from related compliance burdens, the RFA is not applicable with respect to CPOs impacted by these regulatory amendments.

Regarding CTAs, the Commission has previously considered whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.[67] As certain of these registrants may be small entities for purposes of the RFA, the Commission considered whether this rulemaking would have a significant economic impact on such registrants.[68] The only portion of the Final Rules adopted herein directly impacting CTAs amends the definition of ''Reporting Person,'' in Regulation 4.27(b) to effectively carve out specific classes of CTAs from the Form CTA–PR filing requirement. These amendments will not impose any new burdens on market participants or Commission registrants. Rather, the Commission finds that these amendments will make compliance and operational costs less burdensome than the full costs of CTA registration and compliance for those classes of CTAs. The amendment impacting CTAs not dually registered or exempt as CPOs provides relief for CTAs that are registered, but do not direct commodity interest accounts. As a result, the Commission concludes that, given the limited nature of such Form CTA–PR filings, while there is a reduction in costs, this amendment does not produce a significant economic impact on a substantial number of small entities. Additionally, the Commission received no comments on any aspects of the Proposal's RFA discussion.

Therefore, the Commission concludes that, to the extent the regulations adopted herein affect CTAs, the Final Rules will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted by the Commission in the Final Rules will not have a significant economic impact on a substantial number of small entities.

b. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.[69] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The regulations adopted in the Final Rules would result in a collection of information within the meaning of the PRA, as discussed below. The Commission is therefore submitting the Final Rules to OMB for approval.

As discussed in the Proposal, the Commission's proposed regulations would have impacted or amended two collections of information for which the Commission has previously received control numbers from OMB. The first collection of information the Commission believed could be impacted by the Proposal is, ''Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB control number 3038–0005'' (Collection 3038–0005). Collection 3038–0005 primarily accounts for the burden associated with part 4 of the Commission's regulations that concern compliance obligations generally applicable to CPOs and CTAs, as well as certain enumerated exemptions from registration as such, exclusions from those definitions, and available relief from compliance with certain regulatory requirements. The Commission had proposed to amend this collection to reflect: (1) The notices proposed to be required to claim certain of the CPO registration exemptions and the CPO exclusion proposed therein; and (2) an expected reduction in the number of registered CPOs and CTAs filing Forms CPO–PQR and CTA–PR, pursuant to the proposed revisions to Regulation 4.27.[70]

The Commission also proposed to amend a second collection of information entitled, ''Part 3—Registration, OMB control number 3038–0023'' (Collection 3038–0023), which pertains to the registration of intermediaries generally, to reduce the number of persons registering as CPOs and CTAs as a result of the regulatory amendments in the Proposal. The responses to these collections of information are mandatory.

The collections of information in the Proposal would have made available to eligible persons: (1) An exemption from CPO registration based upon Commission Staff Advisory 18–96; (2) recordkeeping location relief for qualifying, registered CPOs, also based upon Commission Staff Advisory 18–96; (3) exemptions from CPO and CTA registration for qualifying Family Offices; (4) an expanded exclusion under Regulation 4.5 for RIAs of BDCs; and (5) exemptive relief made available through amendments to the definition of ''Reporting Person,'' in Regulation 4.27(b), such that qualifying CPOs and

Asked Questions Regarding Commission Form CTA–PR (CTA Guidance), *Available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/faq_cpocta110515.pdf* (last retrieved Oct. 11, 2019) (stating that ''Pool assets should be included . . . for Pools that the CTA does not operate as a CPO and for which the CPO must be registered''). Therefore, ''[a] CTA should include the assets of [Pools] operated pursuant to CFTC Regulation 4.7, but exclude the assets of [Pools] operated pursuant to Regulation 4.13(a)(3).'' *Id.* at Question 9.

[65] 5 U.S.C. 601, *et seq.*

[66] Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619–20 (Apr. 30, 1982). Regulation 4.13(a)(2) exempts a person from registration as a CPO when: (1) None of the pools operated by that person has more than 15 participants at any time, and (2) when excluding certain sources of funding, the total gross capital contributions the person receives for units of participation in all of the pools it operates or intends to operate do not, in the aggregate, exceed $400,000. *See* 17 CFR 4.13(a)(2).

[67] *See* 47 FR 18620.

[68] Proposal, 83 FR 52917.

[69] *See* 44 U.S.C. 3501, *et seq.*

[70] Proposal, 83 FR 52918–19.

CTAs no longer have to file Forms CPO–PQR or CTA–PR.[71] In the instant **Federal Register** release, the Commission is adopting final amendments expanding the exclusion under Regulation 4.5 to cover RIAs of BDCs, and exempting from the Form CPO–PQR or CTA–PR filing requirements certain classes of CPOs and CTAs, consistent with relief letters previously issued by Commission staff.[72]

i. Revisions to the Collections of Information

1. OMB Control Number 3038–0005

Collection 3038–0005 is currently in force with its control number having been provided by OMB, and it was renewed recently on March 14, 2017.[73] As stated above, Collection 3038–0005 governs responses made pursuant to part 4 of the Commission's regulations, pertaining to the operations of CPOs and CTAs. Generally, under Collection 3038–0005, the estimated average time spent per response will not be altered; however, the Commission has made adjustments, discussed below, to the collection to account for new and/or lessened burdens expected under the Final Rules, due to persons claiming the amended CPO exclusion and the exemptive relief from part 4 filing requirements.[74] For instance, the Commission proposed an increase to the number of respondents under Regulation 4.5, which it thought necessary to account for the number of RIAs of BDCs that would seek to claim that exclusion from the CPO definition expanded here by the Final Rules.[75] With regard to the Regulation 4.27 amendments, the Commission proposed reducing the number of persons filing all schedules of Forms CPO–PQR and CTA–PR to reflect the categories of registered CPOs and CTAs proposed to be excluded from the ''Reporting Person'' definition in Regulation 4.27(b). Because there was no notice filing associated with this compliance relief, the Commission proposed no new burden associated with the actual claiming of the relief provided by the revisions to Regulation 4.27(b).

The currently approved total burden associated with Collection 3038–0005, in the aggregate, is as follows:

Estimated number of responses: 45,270.

Annual responses for all respondents: 129,042.

Estimated average hours per response: 2.83.[76]

Annual reporting burden: 365,764.

The Commission now estimates that the exclusion for RIAs of BDCs under Regulation 4.5 will result in 65 additional notice filings under Regulation 4.5.[77] Therefore, the Commission is increasing the burden associated with Regulation 4.5 to be as follows:

Estimated number of respondents: 7,955.

Annual responses by each respondent: 1.

Estimated average hours per response: 0.5.

Annual reporting burden: 3,978.

In the Proposal, the Commission also sought to update the number of respondents to this collection, in accordance with the proposed amendments to Regulation 4.27. Specifically, the Commission proposed to modify the number of respondents to better reflect the average number of CPOs registered with the Commission, less those CPOs that will be eligible for the relief provided by the amendments to the ''Reporting Person'' definition in Regulation 4.27(b). The Commission estimated that it has historically averaged 1,800 registered CPOs. Based on the number of claims filed by CPOs pursuant to Regulations 4.5 and 4.13, the Commission estimated further that approximately 100 of those CPOs would be eligible for relief from filing Form CPO–PQR under the proposed amendments. Therefore, the Commission proposed setting the number of respondents filing Schedule A of Form CPO–PQR at 1,700. The total respondents for this revised collection were further broken out into two categories, based on the size of the CPO and whether the CPO files Form PF: 1,450 respondents on Schedule A of Form CPO–PQR for non-large CPOs and Large CPOs filing Form PF, and 250 respondents on Schedule A of Form CPO–PQR for Large CPOs not filing Form PF. Given that the proposed amendments to Regulation 4.27 are being adopted as proposed, the Commission continues to believe these adjustments are accurate and necessary.

The Commission similarly considered the number of registered CTAs with respect to the filing of Form CTA–PR, and then reduced the number of filers by the number of CTAs the Commission anticipated would be eligible for the proposed relief.[78] Specifically, the Commission estimated that it has historically averaged approximately 1,600 registered CTAs. Based on the information collected on Form CTA–PR, the Commission estimated that 720 registered CTAs would be eligible for relief made available by the proposed amendments, resulting in a difference of 880 CTAs still being required to file Form CTA–PR. Given that the proposed amendments to Regulation 4.27 are being adopted as proposed, the Commission continues to believe these adjustments are accurate and necessary.

Therefore, the Commission estimates that the total burden associated with the amendments to Regulation 4.27 adopted by the Final Rules, reflecting the revised average number of CPOs and CTAs registered with the Commission, to be as follows:

For Schedule A of Form CPO–PQR for non-Large CPOs and Large CPOs filing Form PF:

Estimated number of respondents: 1,450.

Annual responses by each respondent: 1.

Estimated average hours per response: 6.

Annual reporting burden: 8,700.

For Schedule A of Form CPO–PQR for Large CPOs not filing Form PF:

[71] The Proposal also included amendments to Regulations 4.7(b) and 4.13(a)(3), expanding the availability of relief under those provisions to include registered and exempt CPOs issuing, offering, selling, or reselling securities with general solicitation, pursuant to the JOBS Act. Those amendments, adopted in a companion **Federal Register** release published elsewhere in this issue of the **Federal Register**, do not impact or change the number of CPOs registered or exempt from such registration, but rather affect their ability to broadly solicit the public for investment.

[72] The Commission also considered in the Proposal the impact that an exemption based on Commission Staff Advisory 18–96, as well as related proposed amendments to Regulation 4.23, might have on these collections and the number of persons responding thereunder. Proposal, 83 FR 52918. Because the Commission is not pursuing or finalizing those proposed amendments, the Commission no longer believes any modifications to these collections on those bases are necessary.

[73] *See* Notice of Office of Management and Budget Action, OMB Control No 3038–0005, *available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3038-005* (last retrieved Oct. 11, 2019).

[74] The Proposal further discussed modifications to Collection 3038–0005 based on the proposed amendments to Regulations 4.7 and 4.13. *Id.* Each of those amendments is being finalized and adopted by the Commission in a **Federal Register** release, published elsewhere in this issue of the **Federal Register**, containing the pertinent Preamble and administrative law discussions, as well as those final amendments.

[75] The Commission believes there is no increase in burden resulting from transitioning the claiming entity under Regulation 4.5(a) to the RIA with respect to RICs, because this change does not result in any filing requirement, beyond that which is already required to operate pursuant to Regulation 4.5.

[76] The Commission rounded the average hours per response to the second decimal place to reflect the lack of significant digits.

[77] At the time of the Proposal, the Commission had estimated 50 additional notice filings. Proposal, 83 FR 52919. It is hereby increasing the number of BDCs expected to file a claim of exclusion to reflect the number of BDC No-Action Letter claims DSIO staff has received, as of July 26, 2019.

[78] Proposal, 83 FR 52919.

Estimated number of respondents: 250.

Annual responses by each respondent: 4.

Estimated average hours per response: 6.

Annual reporting burden: 6,000.

For Schedule B of Form CPO–PQR for Mid-size CPOs:

Estimated number of respondents: 400.

Annual responses by each respondent: 1.

Estimated average hours per response: 4.

Estimated average hours per response: 4.

Annual reporting burden: 1,600.

For Schedule B of Form CPO–PQR for Large CPOs not filing Form PF:

Estimated number of respondents: 250.

Annual responses by each respondent: 4.

Estimated average hours per response: 4.

Annual reporting burden: 4,000.

For Schedule C of Form CPO–PQR for Large CPOs not filing Form PF:

Estimated number of respondents: 250.

Annual responses by each respondent: 4.

Estimated average hours per response: 18.

Annual reporting burden: 18,000.

For Form CTA–PR:

Estimated number of respondents: 880.

Annual responses by each respondent: 1.

Estimated average hours per response: 0.5.

Annual reporting burden: 440.

The total new burden associated with Collection 3038–0005, in the aggregate, reflecting the regulatory amendments adopted herein,[79] is as follows:

Estimated number of respondents: 43,397.

Annual responses for all respondents: 112,024.

Estimated average hours per response: 3.16.

Annual reporting burden: 354,367.

2. OMB Control Number 3038–0023

In the Proposal, the Commission explained further its expectation that persons that are currently counted among the estimates for Collection 3038–0023 with respect to CPO and CTA registration will deregister as such, due to the future availability of the proposed registration exemptions and the proposed expansion of the CPO exclusion. Therefore, the Commission proposed to deduct the expected claimants of that relief from the total number of persons required to register with the Commission as CPOs and CTAs.

The currently approved total burden associated with Collection 3038–0023, in the aggregate, excluding the burden associated with Regulation 3.21(3), is as follows:

Respondents/Affected Entities: 77,857.

Estimated number of responses: 78,109.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 7,029.8.

Frequency of collection: Periodically.

The currently approved total burden associated with Regulation 3.21(e) under Collection 3038–0023, which remains unchanged under the Proposal and the amendments adopted herein, is as follows:

Respondents/Affected Entities: 396.

Estimated number of responses: 396.

Estimated average hours per response: 1.25.

Estimated total annual burden on respondents: 495.

Frequency of collection: Annually.

The Commission proposed to reduce the number of registrants by the estimated number of claimants with respect to each of the proposed CPO and CTA registration exemptions, as well as the proposed expansion of the CPO exclusion for RICs to include BDCs. The amendments adopted by the Commission in the Final Rules include clarification that the RIA of a RIC is the appropriate entity to claim the CPO exclusion, expansion of that exclusion to also provide relief for RIAs of BDCs, and the adoption of multiple carve-outs from the ''Reporting Person'' definition in Regulation 4.27(b).[80] Given the amendments being adopted by the Final Rules,[81] the Commission continues to believe that an adjustment to Collection 3038–0023, *i.e.,* a reduction in the amount of registrants, will be necessary to account for the 65 claims under the BDC No-Action Letter that the Commission, through DSIO, has received to date, each of which represents to the Commission a person likely to claim the expanded CPO exclusion for RIAs of BDCs. Therefore, the Commission is reducing the burden associated with Collection 3038–0023, such that the total burden associated with the collection, excluding the burden associated with Regulation 3.21(e), will be as follows:

Respondents/Affected Entities: 77,492.

Estimated number of responses: 77,492.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 6,974.

ii. Comments on the PRA Analysis

In the Proposal, the Commission invited the public and other Federal agencies to comment on any aspect of the information collection requirements discussed therein.[82] The Commission did not receive any such comments.

c. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA.[83] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) considerations.

i. General Costs and Benefits

The baseline for the Commission's consideration of the costs and benefits

[79] These burden totals include adjustments made to Collection 3038–0005 to reflect the Final Rule amendments contained in this **Federal Register** release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Regulations and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs published elsewhere in this issue of the **Federal Register**.

[80] In a companion **Federal Register** release published elsewhere in this issue of the **Federal Register**, the Commission also considered and adopted amendments to 17 CFR part 4 that add CPO and CTA exemptions for family offices, permit the use of general solicitation in certain pools by CPOs exempt under Regulations 4.7 or 4.13(a)(3), and explicitly permit non-U.S. person participants in pools exempt under Regulation 4.13(a)(3). The Commission performed and discussed the appropriate RFA, PRA, and cost-benefit considerations for those amendments in that release.

[81] As discussed above, these burden totals include adjustments made to Collection 3038–0023 to reflect the Final Rule amendments contained in this **Federal Register** release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Amendments to Regulations and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs published elsewhere in this issue of the **Federal Register**.

[82] Proposal, 83 FR 52920.

[83] 7 U.S.C. 19(a).

of the Final Rules is the regulatory status quo, as determined by the CEA and the Commission's existing regulations in 17 CFR part 4. The Commission recognizes, however, that to the extent that market participants have relied upon relevant Commission staff action, the actual costs and benefits of the Final Rules, as realized in the market, may not be as significant. Because each amendment addresses a discrete issue, which impacts a unique subgroup within the universe of entities captured by the CPO and CTA statutory definitions, the Commission has determined to analyze the costs and benefits associated with each amendment separately, as presented below. The Commission has endeavored to assess the costs and benefits of the amendments adopted by the Final Rules in quantitative terms wherever possible. Where estimation or quantification is not feasible, however, the Commission has provided its assessment in qualitative terms.

The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the Final Rules on all activity subject to the amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under CEA section 2(i). In particular, the Commission notes that some entities affected by the Final Rules are located outside of the United States.

ii. Summary of the Amendments

As discussed in greater detail below, and in the foregoing preamble, the Commission believes that the amendments adopted by the Final Rules enable the Commission to perform its regulatory oversight function with respect to the commodity interest markets and particularly, with respect to CPOs and CTAs, while reducing the potential burden on persons whose commodity interest activities may subject them to the Commission's jurisdiction for CPOs and CTAs. The Commission is adopting regulatory amendments consistent with the BDC No-Action Letter, through certain revisions to the exclusion from the CPO definition for RIAs of RICs in Regulation 4.5. Additionally, the Commission is incorporating relief provided by CFTC Letter Nos. 14–115 and 15–47 through amendments to the ''Reporting Person'' definition in Regulation 4.27(b) that exclude: (1) CPOs that only operate pools in accordance with Regulations 4.5 or 4.13, and (2) CTAs that do not direct trading in any commodity interest accounts. The Commission has further determined to extend this relief to registered CTAs that only advise commodity pools, for which the CTA is also the commodity pool's CPO.

iii. Benefits

1. Benefits Related To Expanding the CPO Exclusion To Cover RIAs of BDCs

The Commission believes that there will be several benefits arising from the amendments creating an exclusion from the CPO definition for RIAs of BDCs in Regulation 4.5.[84] First, the exclusion would enable RIAs of BDCs to continue to use commodity interests, consistent with the BDC No-Action Letter, as an economical option for reducing the risks related to BDCs' investments in eligible portfolio companies. The exclusion will permit this activity without subjecting BDCs to the costs associated with having its RIA registered as a CPO, and without requiring BDCs and their RIAs to comply with applicable provisions of part 4 of the Commission's regulations. This should enable BDCs and their RIAs to deploy more of their resources in furtherance of their statutory purpose, investing in and providing managerial assistance to small- and mid-sized U.S. companies, which would thereby also further a statutory goal of the ICA.

As discussed more fully above, BDCs are subject to oversight by the SEC that is comparable to that agency's oversight and regulation of RICs. Because of this similarity to a type of investment vehicle that is already listed in the universe of ''qualifying entities,'' under Regulation 4.5, the amendments adopted by the Final Rules treat substantively comparable entities in a consistent manner, thereby enabling members of the public and industry to better predict their regulatory obligations when establishing new investment vehicles. Absent these amendments, RIAs of BDCs wishing to avail themselves of the BDC No-Action Letter are required to prepare a notice filing containing specific representations and to submit the document electronically to a specific email inbox. The Commission anticipates that RIAs operating and advising BDCs will claim the expanded exclusion under Regulation 4.5 through NFA's Online Registration System without having to create their own document to claim that relief.

The Commission further believes that the amendment requiring the RIA of the RIC to be the entity claiming the exclusion under Regulation 4.5(a) will provide an important benefit by aligning the terms of the CPO exclusion with the Commission's understanding and public statements, as to which entity is most appropriate to register as a CPO with the Commission with respect to the operation of RICs.[85] This will enable the Commission to more easily determine which entity should bear the registration and compliance obligations with respect to a RIC, if the excluded CPO fails to reaffirm the claim of exclusion, or if the RIC otherwise no longer satisfies the terms of Regulation 4.5.

2. Benefits Related to the Relief Under Regulation 4.27 for Certain CPOs and CTAs

The Commission believes that there will be several benefits associated with providing relief from the Form CPO–PQR and CTA–PR filings required by Regulation 4.27 to: (1) Registered CPOs only operating pools pursuant to claims under Regulations 4.5 or 4.13; and (2) registered CTAs that, during the Reporting Period, either only advised pools for which they are also the registered or exempt CPO, or did not direct the trading of any commodity interest accounts whatsoever. Removing the reporting requirement for these registrants will eliminate the costs associated with the preparation and filing of Forms CPO–PQR and CTA–PR. The Commission believes that this will provide a significant cost savings for these persons, and ultimately, for their pool participants or advisory clients.

iv. Costs

1. Cost Related To Expanding the CPO Exclusion To Cover RIAs of BDCs

The Commission believes that there will be some costs associated with the

[84] As discussed above, the Commission has previously determined that a RIC's RIA is the appropriate person to serve as the CPO of a RIC for regulatory purposes, and consequently, the Commission is also amending Regulation 4.5(a)(1) to designate the RIA as the person excluded from the CPO definition. *See* CPO CTA Final Rule, 77 FR 11259. Due to the similarities between BDCs and RICs, the Commission believes that the RIA is also an appropriate selection as the excluded entity in the BDC context. *See supra* pt. II.a.iii for additional discussion.

[85] As stated above, the Commission has long understood this to be a RIC's RIA, based on the RIA's typical operational, solicitation, and trading responsibilities with respect to a RIC.

expansion of the CPO exclusion to cover RIAs of BDCs. Generally, CPOs and CTAs are subject to comprehensive regulation under the Commission's part 4 regulations, including disclosure, reporting, and recordkeeping requirements. Although RIAs of BDCs are subject to SEC oversight (as are RIAs of RICs), BDCs are not identical to RICs, and they could differ in respects that are relevant to the CPO regulatory scheme. For example, a required CPO disclosure might be more important when made by an RIA of a BDC, as compared to the RIA of a RIC. In this way, the expansion of the CPO exclusion to cover RIAs of BDCs could conceivably be detrimental to persons who relied on CPO regulation of such RIAs for some purpose. However, the Commission notes that, as explained above, BDCs are very similar to RICs (for which RIAs may be excluded from the CPO definition, and thus, not subject to registration), and their use of commodity interests is generally very limited and designed typically to manage the investment and commercial risks of a BDC's underlying operating companies. Therefore, any detriment resulting from the expansion of the CPO exclusion to cover RIAs of BDCs is expected to be small.

Persons claiming the new exclusion from the CPO definition with respect to the operation of BDCs under Regulation 4.5 will be required to file an annual notice affirming eligibility, consistent with that required of the RIAs of RICs. For purposes of calculating costs of the amendment, the Commission estimates that a person may require 0.5 hours per pool to complete and electronically file the notice with NFA at an average cost of $57 per hour.[86] The Commission further estimates that at least 65 persons will be affected by this amendment,[87] each with an average of 1 BDC subject to the notice requirement, based on the number of claims the Commission has received for relief provided by the BDC No-Action Letter. On this basis, the Commission anticipates an annual cost per entity of approximately $29.[88] Across all affected entities, the Commission therefore estimates a total annual cost of approximately $1,885.[89] Because the Commission received 65 claims under the BDC No-Action Letter since its issuance in 2012, averaging nearly ten claims annually, the Commission predicts that it may expect to receive up to ten claims each year going forward from RIAs of BDCs seeking to claim the expanded CPO exclusion; the Commission estimates that, consequently, future claims of the exclusion for RIAs of BDCs could cost up to an additional $290 annually.[90]

In addition to the costs associated with completing and filing the notice, RIAs of BDCs that claim the exclusion will also have to expend resources to monitor compliance with the applicable trading thresholds in Regulation 4.5(c)(2)(iii). The Commission believes that the initial year of compliance with those thresholds will likely be the most costly, as the RIAs may need to increase compliance staff and/or provide training for existing compliance staff to ensure effective monitoring of ongoing compliance with the exclusion's terms. The Commission anticipates that certain aspects of the compliance program might be automated to lower substantially the annual costs in subsequent years.[91] The Commission continues to believe the costs of the filing and threshold monitoring discussed above are generally substantially lower than the costs an RIA of a BDC would incur, as a result of registering as a CPO and complying with all of the Commission's regulations.

The Commission also believes that there may be some costs associated with the amendment to Regulation 4.5(a)(1) establishing the RIA as the claiming entity for the CPO exclusion for RICs. For instance, the Commission believes that complex fund structures involving multiple related RICs and multiple RIAs, or series structures with multiple RICs under an umbrella entity, may incur some costs associated with determining which exclusion claims need to be corrected. As discussed in the Preamble above, the Commission is issuing an interpretation designed to streamline this transition to the RIA as the excluded CPO in an effort to reduce costs to RICs and their participants.[92] Also, to clarify that RICs and their RIAs will not be expected to make this transition immediately, the compliance date for this change will not be until within 60 days of the 2020 calendar year-end, or by March 1, 2021. Thus, affected RICs and their excluded CPOs will have more than one filing cycle to prepare for this change.

The Commission considered whether RIAs of BDCs would incur any costs in determining whether or how to claim the exclusion for a BDC. The Commission believes that such costs would be minimal at most. The RIA of a BDC has, by definition, already settled the regulatory status of the BDC entity, and the Commission understands that BDCs use commodity interests rarely, and for very limited purposes. In the case where an RIA decides that a BDC should use commodity interests, the ensuing determination to claim the exclusion should not represent any significant additional cost.

2. Costs Related to the Relief Under Regulation 4.27 for Certain CPOs and CTAs

The Form CPO–PQR and CTA–PR filings that will no longer be required by virtue of the Final Rules may have had minimal utility in limited situations. However, the Commission believes that, when viewed in the context of all applicable regulatory requirements, these filings become duplicative or unnecessary. Therefore, the Commission does not anticipate any significant costs associated with the Final Rule amendments to the ''Reporting Person'' definition in Regulation 4.27(b), which exempt CPOs and CTAs from the requirement to file those forms in certain situations. CPOs and CTAs qualifying for the exemptive relief added by the Final Rule will not have to take any action to claim an exemption

[86] The Commission notes that the salary estimates are based upon the May 2017 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics at the Department of Labor. *See* Occupational Employment Statistics, Bureau of Labor Statistics, *available at https://www.bls.gov/oes/2017/may/oes_nat.htm* (last retrieved Nov. 25, 2019). The Commission's estimate incorporates the mean hourly wage of persons employed in the ''Securities, Commodity Contracts and Other Financial Investments and Related Activities'' Industry, under the following occupation codes: Compliance Officers (13–1041) at $43.27, Lawyers (23–2011) at $94.20, and Paralegals and Legal Assistants (23–2011) at $33.53. The Commission chose these occupational categories in recognition of the types of staff the Commission believes would most commonly be responsible for evaluating eligibility and filing claims for this CPO exclusion. The $57 per hour wage estimate is derived from a weighted average, rounded to the nearest dollar, with the salaries attributable to each of the three occupation codes given equal weight.

[87] This figure is based on the number of claims DSIO has received pursuant to the BDC No-Action Letter, as of July 29, 2019, and constitutes an increase from the cost estimates in the Proposal, which were based on 50 previously received claims. *See* Proposal, 83 FR 52919.

[88] The Commission calculates this amount as follows: (1 pool/BDC per CPO/RIA) × (0.5 hours per pool/BDC) × ($57 per hour) = $29.

[89] The Commission calculates this amount as follows: ($29 per CPO/RIA) × (65 CPOs/RIAs) = $1,885.

[90] The Commission calculates this amount as follows: ($29 per CPO/RIA) × (10 CPOs/RIAs) = $290.

[91] Costs to BDCs in monitoring compliance with these thresholds may also be lower, given the Commission's understanding of their limited use of commodity interests for hedging purposes. *See also supra* pt. II.a.i.

[92] Where the RIA is already the claiming excluded CPO for a RIC, no change in filing or status is necessary. Where an entity other than the RIA claims the exclusion for a RIC, the Commission is interpreting the regulation to require that such RIC have its RIA file a new claim and to let the prior claim expire, pursuant to the annual affirmation requirements of Regulation 4.5(c)(5).

from these filings, and therefore, will not experience costs as a result of claiming that relief.

v. Section 15(a) Considerations

1. Protection of Market Participants and the Public

The Commission considered whether the amendments adopted in the Final Rule will have any detrimental effect on the customer protections of the Commission's regulatory regime. The Commission believes that the expanded exclusion for RIAs of BDCs will not negatively impact the protection of market participants or the public. BDCs, as well as their RIAs, continue to be regulated by the SEC under the ICA, and pursuant to the terms of the exclusion, BDCs operated thereunder will continue to be limited in the extent to which they can use commodity interests by the trading thresholds described above. Similarly, the Commission does not believe that the transition of a RIC's excluded CPO from the RIC to the RIA will negatively impact the protection of market participants or the public. Such vehicles are already, and will continue to be after this transition, operated by excluded CPOs, and RICs and their RIAs will remain subject to oversight by the SEC under the ICA and the IAA. As noted above, the relevant entities will continue to operate and be regulated in substantially the same manner. Regarding the relief provided to certain CPOs and CTAs by the Final Rule amendments to Regulation 4.27, the Commission does not believe that eliminating reporting from those persons would have a deleterious impact on the Commission's protection of market participants and the public because of such persons' extremely limited activity in the commodity interest markets.

2. Efficiency, Competitiveness, and Financial Integrity of Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of efficiency, competitiveness, and financial integrity considerations. As noted above, the Final Rules provide a CPO exclusion for a relatively small number of BDCs, change the entity designated as the CPO for an excluded RIC to its RIA, and relieve certain filing requirements for certain classes of CPOs and CTAs. The Commission believes that these amendments constitute minor changes to regulatory processes and filings that will not have a significant impact on the efficiency, competitiveness, and financial integrity of markets.

3. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of price discovery considerations. For the reasons noted above, the Commission believes that the Final Rules generally consist of minor changes to regulatory processes and filings that will not have a significant impact on price discovery.

4. Sound Risk Management

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate a regulation in light of sound risk management practices. The Commission believes that the Final Rules will not have a significant impact on the practice of sound risk management because the manner in which various funds, operators, and advisors organize, register, or claim exclusion from such regulation has only a small influence on how market participants manage their risks overall.

5. Other Public Interest Considerations

Section 15(a)(2)(E) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of other public interest considerations. The Final Rules adopted herein reflect the Commission's determination that such amendments harmonize Commission regulations with other federal laws, where appropriate, to reduce the regulatory burden on certain entities. Additionally, the exclusion from the CPO definition for RIAs of BDCs in Regulation 4.5 will not subject BDCs to the costs associated with having its RIA registered as a CPO, and the corresponding costs of complying with applicable provisions of the Commission's part 4 regulations. This amendment should enable BDCs and their RIAs to deploy more of their resources in furtherance of their statutory purpose, investing in and providing managerial assistance to small- and mid-sized U.S. companies, and thereby also furthering a statutory goal of the ICA.

d. Anti-Trust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under CEA section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.[93] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested comment on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments addressing this issue.

The Commission has considered the Final Rules to determine whether they are anticompetitive and has identified no anticompetitive effects. Because the Commission has determined the Final Rules are not anticompetitive and have no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 4 as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

Authority: 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a, and 23.

■ 2. In § 4.5, revise paragraphs (a)(1), (b)(1), (c)(2) introductory text, (c)(2)(i) and (ii), and (c)(2)(iii) introductory text to read as follows:

§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term "commodity pool operator."

(a) * * *

(1) An investment adviser registered under the Investment Advisers Act of 1940, as amended;

* * * * *

(b) * * *

(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered under the Investment Company Act of 1940, as amended, or a business development company that elected an exemption from registration as an investment company under the Investment Company Act of 1940;

* * * * *

(c) * * *

[93] 7 U.S.C. 19(b).

(2) The notice of eligibility must contain representations that such person will operate the qualifying entity specified therein in the following ways, as applicable:

(i) The person will disclose in writing to each participant, whether existing or prospective, that the qualifying entity is operated by a person who has claimed an exclusion from the definition of the term ''commodity pool operator'' under the Act and, therefore, is not subject to registration or regulation as a pool operator under the Act; Provided, that such disclosure is made in accordance with the requirements of any other federal or state regulatory authority to which the qualifying entity is subject. The qualifying entity may make such disclosure by including the information in any document that its other Federal or State regulator requires to be furnished routinely to participants or, if no such document is furnished routinely, the information may be disclosed in any instrument establishing the entity's investment policies and objectives that the other regulator requires to be made available to the entity's participants; and

(ii) The person will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provisions of this paragraph (c); Provided, however, that the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject; and

(iii) If the person is an investment adviser claiming an exclusion with respect to the operation of a qualifying entity under paragraph (b)(1) of this section, then the notice of eligibility must also contain representations that such person will operate that qualifying entity in a manner such that the qualifying entity:

* * * * *

■ 3. Amend § 4.27 by revising the section heading and paragraph (b) to read as follows:

§ 4.27 Additional reporting by commodity pool operators and commodity trading advisors.

* * * * *

(b) *Persons required to report.* (1) Except as provided in paragraph (b)(2) of this section, a reporting person is:

(i) Any commodity pool operator that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder; or

(ii) Any commodity trading advisor that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder.

(2) The following categories of persons shall not be considered reporting persons, as that term is defined in paragraph (b)(1) of this section:

(i) A commodity pool operator that is registered, but operates only pools for which it maintains an exclusion from the definition of the term ''commodity pool operator'' in § 4.5 and/or an exemption from registration as a commodity pool operator in § 4.13;

(ii) A commodity trading advisor that is registered, but does not direct, as that term is defined in § 4.10(f), the trading of any commodity interest accounts;

(iii) A commodity trading advisor that is registered, but directs only the accounts of commodity pools for which it is registered as a commodity pool operator and, though registered, complies with § 4.14(a)(4); and

(iv) A commodity trading advisor that is registered, but directs only the accounts of commodity pools for which it is exempt from registration as a commodity pool operator, and though registered, complies with § 4.14(a)(5).

* * * * *

Issued in Washington, DC, on November 27, 2019, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

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

Appendices to Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person—Commission Voting Summary and Commissioner's Statement

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Commissioner Dan M. Berkovitz

I am voting in favor of today's rule adopting three amendments to Regulations 4.5 and 4.27, addressing certain exemptions for commodity pool operators (CPOs) and filing requirements for CPOs and commodity trading advisors (CTAs). These three amendments are in largely identical form to those proposed last fall, which I voted for because they codify no-action and exemptive letters and simplify our registration framework, without compromising customer protection or the integrity of our derivatives markets.

The first amendment is to Regulation 4.5(a)(1), which currently excludes an investment company (RIC) registered under the Investment Company Act of 1940 (1940 Act) from the definition of a CPO. Today's amendment confirms the Commission's understanding that an investment adviser registered under the Investment Advisers Act of 1940 is the entity that operates the RIC and therefore is the appropriate person to claim the CPO exclusion for the RIC. I note that this revision neither broadens the category of persons currently claiming the RIC exclusion, nor changes the current requirements that qualifying entities claiming the exclusion must file annual notices with the CFTC and make disclosures to pool participants.

Today's final rule also amends Regulation 4.5(b)(1) to include business development companies (BDCs), defined in the 1940 Act, as persons excluded from the CPO definition.[1] BDCs are a type of closed-end investment company, but are exempt from registering as a RIC under the securities laws. A BDC therefore is not a ''qualified entity'' under 4.5(a)(1). On this basis, in 2012 CFTC staff provided no action relief to BDCs that meet the conditions of Regulation 4.5(c), which include significant caps on the BDC's use of derivatives and require notice to the CFTC and disclosures to investors.[2] To date, 65 entities have claimed this relief. By codifying the exclusion through this amendment, we also harmonize our regulations relating to BDCs with those of the Securities and Exchange Commission (SEC).

Finally, today's rule amends the definition of ''Reporting Person'' in Regulation 4.27 to exempt certain classes of CPOs and CTAs, consistent with exemptive relief currently provided at the request of the National Futures Association (NFA).[3] Under these amendments, certain CPOs and CTAs are not required to file Forms CPO–PQR and CTA–PR, respectively, where such filing would provide limited additional information about the reporting person beyond what is already available to the Commission. Notice and filing requirements are critical to performing effective market oversight, but where the information received by the Commission is largely duplicative, these requirements do not materially advance the interests of the Commission or its registrants and are therefore unnecessary.

It is good government to periodically asses our regulations and make improvements where appropriate. In this context, improving the clarity and transparency of our rules and harmonizing them with those of the SEC are

[1] CFTC Letter No. 12–40 (Dec. 4, 2012), available at *https://www.cftc.gov/csl/12-40/download* (''BDC No-Action Letter'').

[2] BDC No-Action Letter at 3.

[3] CFTC Letter No. 14–115 (Sept. 8, 2014), available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-115.pdf*; CFTC Letter No. 15–47 (July 21, 2015), available at *https://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-47.pdf*.

worthy objectives, but without more, do not justify a change.[4] The primary objective in evaluating and considering amendments to our regulations is whether and how they will improve the Commission's ability to protect customers and police our markets.

Here, the NFA—the front-line self-regulatory organization responsible for member registration—has noted that these amendments will bring transparency to the CPO registration framework by incorporating CPO and CTA no-action and exemptive relief into the Commission's regulations. I agree with the NFA that today's proposed amendments will benefit both the Commission and its registrants, and in my view, they will not impact our mission to safeguard the markets and its participants. I therefore support these narrow revisions to Regulations 4.5 and 4.27 and thank the staff of the Division of Swap Dealer and Intermediary Oversight for their work on this rule.

[FR Doc. 2019–26161 Filed 12–9–19; 8:45 am]

BILLING CODE 6351–01–P

[4] *See, e.g., Am. Equity Inv. Life Ins. Co.* v. *SEC,* 613 F.3d 166, 177–78 (DC Cir. 2010) (''The SEC cannot justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of any rule.'')

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AE76

Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is adopting certain amendments to its regulations applicable to commodity pool operators (CPOs) and commodity trading advisors (CTAs). The amendments (Final Rules) are consistent with no-action and exemptive letters issued by the Commission's Division of Swap Dealer and Intermediary Oversight (DSIO). The amendments provide an exemption from registration for CPOs and CTAs of family offices; adopt exemptive relief consistent with the Jumpstart Our Business Startups Act of 2012 by permitting general solicitation under applicable Commission regulations; and clarify that non-U.S. persons, regardless of financial sophistication, are permitted participants in pools exempt under the applicable Commission regulation.

DATES: This rule is effective January 9, 2020.

FOR FURTHER INFORMATION CONTACT: Joshua Sterling, Director, at 202–418–6056 or *jsterling@cftc.gov;* Amanda Olear, Associate Director, at 202–418–5283 or *aolear@cftc.gov;* Elizabeth Groover, Special Counsel, at 202–418–5985 or *egroover@cftc.gov;* Chang Jung, Special Counsel, at 202–418–5202 or *cjung@cftc.gov;* and Michael Ehrstein, Special Counsel, at 202–418–5957 or *mehrstein@cftc.gov,* Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

a. Statutory and Regulatory Background

i. Existing Statutory and Regulatory Authorities

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by regulating the swaps market. As amended by the Dodd-Frank Act, section 1a(11) of the Commodity Exchange Act (CEA or the Act) defines the term ''commodity pool operator,'' as any person [2] engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, with respect to that commodity pool, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests.[3] CEA section 1a(12) defines a ''commodity trading advisor,'' as any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in commodity interests.[4] CEA section 4m(1) generally requires each person who satisfies the CPO or CTA definitions to register as such with the Commission.[5] With respect to CPOs, the CEA also authorizes the Commission, acting by rule or regulation, to include within or exclude from the term ''commodity pool operator,'' any person engaged in the business of operating a commodity pool, if the Commission determines that the rule or regulation

[1] Public Law 111–203, 124 Stat. 1376 (2010), *available at: https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf* (last retrieved Jul. 17, 2019).

[2] Regulation 1.3 defines ''person'' as including individuals, associations, partnerships, corporations, and trusts. 17 CFR 1.3. The Commission's regulations are found at 17 CFR Chapter I (2019).

[3] 7 U.S.C. 1a(11). The CEA is found at 7 U.S.C. 1, *et seq.* (2019). Both the Act and the Commission's regulations are accessible through the Commission's website, *https://www.cftc.gov.*

[4] 7 U.S.C. 1a(12)(A)(i). The CTA definition also includes any person who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning the value of or advisability of trading in commodity interests, and any person that is registered with the Commission as a CTA. 7 U.S.C. 1a(12)(A)(ii)–(iii).

[5] 7 U.S.C. 6m(1).

will effectuate the purposes of the Act.[6] CEA section 1a(12)(B) provides multiple exclusions from the CTA definition, and similarly affords the Commission the authority to exclude such other persons not within the intent of that provision, as the Commission may specify by rule, regulation, or order.[7]

Part 4 of the Commission's regulations governs the operations and activities of CPOs and CTAs.[8] Those regulations implement the statutory authority provided to the Commission by the CEA and establish multiple registration exemptions and exclusions for CPOs and CTAs.[9] Part 4 also contains regulations that establish the ongoing compliance obligations applicable to CPOs and CTAs registered or required to be registered. These requirements relate to the commodity pools and separate accounts that the CPOs and CTAs operate and advise, and among other things, provide customer protection, disclosure and reporting of certain information to a registrant's commodity pool participants or advisory clients.

ii. The October 2018 Proposal

In response to information received from members of the public, as well as CFTC staff's own internal review of the Commission's regulatory regime, the Commission published for public comment in the **Federal Register** on October 18, 2018, a Notice of Proposed Rulemaking (NPRM, or the Proposal), proposing several amendments to the regulations applicable to CPOs and CTAs.[10] Specifically, the Commission proposed regulatory amendments that would add to 17 CFR part 4:

(1) An exemption from registration in Regulation 4.13(a)(4) that is generally consistent with the terms of Staff Advisory 18–96; [11]

(2) A requirement in Regulation 4.13 that any person claiming or affirming an exemption from CPO registration pursuant to Regulations 4.13(a)(1)–(a)(5) certify that neither the claimant nor its principals are statutorily disqualified pursuant to CEA sections 8a(2) or 8a(3);

(3) An exemption from the recordkeeping requirements in Regulation 4.23 for U.S.-based CPOs of offshore commodity pools that permits the CPO to maintain the pool's original books and records in the pool's offshore location;

(4) An exemption from registration in Regulations 4.13 and 4.14 for persons acting as CPOs or CTAs for family offices and/or their family clients, as those terms are defined in regulations adopted by the Securities and Exchange Commission (SEC);

(5) A clarification that the exclusion from the CPO definition currently provided by Regulation 4.5(a)(1) for a registered investment company (RIC) should be claimed by the entity most commonly understood to solicit for or ''operate'' the RIC, *i.e.,* the RIC's investment adviser;

(6) An exclusion in Regulation 4.5 from the CPO definition for the investment advisers of business development companies (BDCs);

(7) Relief permitting general solicitation in commodity pools offered by CPOs pursuant to exemptions in Regulations 4.7 and 4.13(a)(3), consistent with the Jumpstart Our Business Start-ups Act of 2012 (JOBS Act); and

(8) Amendments to the ''Reporting Person'' definition in Regulation 4.27 that would eliminate the filing requirements for Forms CPO–PQR and CTA–PR for certain classes of CPOs and CTAs.[12]

Several of the proposed amendments are consistent with, or expansions of relief that is currently available through a staff advisory or through no-action and exemptive letters issued over the years by staff of the Commission's DSIO and its predecessors. The Commission proposed these amendments intending to simplify the regulatory landscape for CPOs and CTAs without reducing the protections or benefits provided by those regulations, to increase public awareness about available relief by incorporating commonly relied upon no-action or exemptive relief in Commission regulations, and to generally reduce the regulatory burden without sacrificing the Commission's customer protection and other regulatory interests.

b. Public Comments and Ex Parte Meetings

The Commission requested comment generally on all aspects of the Proposal, and also solicited comment through targeted questions about each of the proposed amendments. Overall, the Commission received 28 individual comment letters responsive to the NPRM: Six from legal and market professional groups; 13 from law firms; seven from individual family offices; one from a government-sponsored enterprise (GSE) actively involved in the domestic housing market; and one from the National Futures Association (NFA), a registered futures association,[13] who through delegation by the Commission, assists the Commission staff in administering the CPO and CTA regulatory program.[14] Additionally, Commission staff participated in multiple ex parte meetings concerning the Proposal.[15]

c. Scope of the Final Rules

As noted above, the Commission proposed to add to Regulation 4.13 an exemption for qualifying CPOs

[6] 7 U.S.C. 1a(11)(B).

[7] 7 U.S.C. 1a(12)(B)(vii). The Commission most recently relied on the authority in this provision in issuing an Order excluding Farm Credit System institutions from that definition, due to their similarities to banks, a type of entity that is already excluded by CEA section 1a(12)(B)(i). *See* Order Excluding Farm Credit System Institutions From the Commodity Exchange Act's Definition of ''Commodity Trading Advisor,'' 81 FR 89447 (Dec. 12, 2016). CEA section 1a(12)(C) requires that the exclusions in CEA section 1a(12)(B) only apply if the furnishing of such excluded CTA services by such persons is solely incidental to the conduct of their business or profession. 7 U.S.C. 1a(12)(C).

[8] *See generally* 17 CFR part 4.

[9] *See, e.g.,* 17 CFR 4.13 and 4.14 (providing multiple registration exemptions to qualifying persons meeting the CPO and CTA definitions, respectively).

[10] *See* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR 52902 (Oct. 18, 2018) (Proposal).

[11] Offshore Commodity Pools Relief for Certain Registered CPOs from Rules 4.21, 4.22, and 4.23(a)(10) and (a)(11) and From the Books and Records Requirement of Rule 4.23, Commodity Futures Trading Commission, Division of Trading & Markets (Apr. 11, 1996), *available at: https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm* (last retrieved Oct. 10, 2019) (Staff Advisory 18–96).

[12] Proposal, 83 FR 52903–52904.

[13] *See* CEA section 17, 7 U.S.C. 21.

[14] Comments were submitted by the following entities: Alscott, Inc.* (Dec. 7, 2018); Alternative Investment Management Association (AIMA) (Letter 1: Dec. 17, 2018, and Letter 2: Oct. 7, 2019); Buchanan, Ingersoll, and Rooney, PC* (Dec. 12, 2018); Commodore Management Company* (Dec. 12, 2018); Dechert, LLP (Dechert) (Dec. 17, 2018); Freddie Mac (Dec. 17, 2018); Fried, Frank, Harris, Shriver, & Jacobson, LLP (Fried Frank) (Dec. 17, 2018); Investment Adviser Association (IAA) (Dec. 17, 2018); Kramer, Levin, Naftalis, & Frankel, LLP* (Dec. 17, 2018); LBCW Investments* (Dec. 5, 2018); Managed Funds Association (MFA) (Dec. 14, 2018); Marshall Street Capital* (Dec. 13, 2018); McDermott, Will, & Emery, LLP* (Dec. 17, 2018); McLaughlin & Stern, LLP* (Dec. 5, 2018); Moreland Management Company* (Dec. 13, 2018); Morgan, Lewis, & Bockius, LLP* (Dec. 18, 2018); NFA (Dec. 17, 2018); New York City Bar Association, the Committee on Futures and Derivatives (NYC Bar Derivatives Committee) (Jan. 4, 2019); Norton, Rose, Fulbright US, LLP* (Dec. 17, 2018); Perkins Coie, LLP* (Dec. 17, 2018); the Private Investor Coalition, Inc. (PIC) (Nov. 28, 2018); Ridama Capital* (Dec. 13, 2018); Schiff Hardin, LLP (two offices)* (Dec. 13 and 17, 2018); the Securities Industry and Financial Management Association Asset Management Group (SIFMA AMG) (Letter 1: Dec. 17, 2018, and Letter 2: Sept. 13, 2019); Vorpal, LLC* (Dec. 17, 2018); Willkie, Farr, and Gallagher, LLP (Willkie) (Dec. 11, 2018); and Wilmer Hale, LLP (Wilmer Hale) (Dec. 7, 2018). Those entities marked with an ''*'' submitted substantively identical, brief comments, specifically supporting the detailed comments and suggested edits submitted to the Commission by PIC.

[15] Comments for Proposed Rule 83 FR 52902, *available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2925* (last retrieved Oct. 15, 2019).

operating commodity pools outside of the U.S. consistent with Commission Staff Advisory 18–96, known in the Proposal as the ''18–96 Exemption.'' In conjunction with that amendment, the Commission also proposed to add a prohibition against statutory disqualifications listed in CEA sections 8a(2) and 8a(3) that would apply generally to CPOs claiming a registration exemption under Regulation 4.13, as well as a number of technical and substantive changes to Regulation 4.23 intended to preserve recordkeeping relief also provided by that advisory, and enhance the regulation's readability. The Commission received many comments regarding the proposed relief based on Staff Advisory 18–96 and the proposed prohibition on statutory disqualifications for certain exempt CPOs.

Based on the comments received and the recommendations of Commission staff, the Commission is not finalizing or adopting these amendments at this time. Commenters noted the 18–96 Exemption, if adopted as proposed, could have a significant impact on the compliance burdens of CPOs operating outside of the United States. In consideration of the comments, the Commission is withdrawing that aspect of the Proposal, but may undertake a more comprehensive review of the extraterritorial application of Commission regulations in the CPO–CTA space in the future. Commenters also addressed the statutory disqualification prohibition in great detail,[16] and the Commission believes those comments likewise require further consideration. Therefore, the Commission intends to reconsider these amendments in a future rulemaking.

II. Final Rules

a. Family Offices

i. The Proposed Exemptions

The Commission proposed amendments to Regulations 4.13 and 4.14 that would establish CPO and CTA registration exemptions for persons meeting the definition of ''family office,'' (the Family Offices) consistent with the regulatory exclusion from the definition of ''investment adviser,'' for Family Offices adopted by the SEC in 2012.[17] The proposed exemptions, which the Commission intends to adopt with certain modifications, are substantively similar to no-action relief from CPO and CTA registration currently provided through CFTC Letter Nos. 12–37 and 14–143.[18] Through the Proposal, the Commission intended that the exemptions would provide Family Offices regulatory certainty and make unnecessary the no-action relief program for Family Office CPOs and CTAs, administered by Commission staff since 2012 and 2014, respectively.[19] Thus, the Commission proposed to incorporate by reference the definitions of ''family office'' and ''family client'' from § 275.202(a)(11)(G)–1, as adopted by the SEC, into each of the proposed exemptions.[20]

Proposed Regulation 4.13(a)(8) would provide an exemption from CPO registration to a person with respect to a qualifying commodity pool, if: (a) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are sold only to ''family clients;'' (b) the commodity pool qualifies as a ''family office;'' and (c) the person reasonably believes, at the time of investment, or at the time of conversion for an existing pool, that each person who participates in the pool is a ''family client'' of the ''family office.''[21] The Commission proposed to require that Family Offices claiming the CPO exemption submit an initial notice filing, to be affirmed on an annual basis, pursuant to Regulation 4.13(b).[22] The Commission proposed this requirement to ''ensure at least an annual assessment of whether the CPO of the Family Office remains eligible to rely upon the proposed exemption.''[23]

Proposed Regulation 4.14(a)(11) would provide an exemption from CTA registration to a person who directs commodity trading advice solely to, and for the sole use of, ''family clients.''[24] Like most of the other exemptions contained in Regulation 4.14, the Commission proposed to make this exemption self-executing, requiring no filing with the Commission or NFA prior to its efficacy. The Commission further explained in the Proposal that it thought certain CTA services provided to the exempt commodity pools of Family Offices would be covered by Regulation 4.14(a)(5), which currently provides an exemption from CTA registration to a person who: (a) Is also exempt from CPO registration; and (b) only advises pool(s) for which that person is so exempt.[25] Therefore, the Commission limited the proposed CTA exemption for Family Offices to the commodity trading advice provided to ''individual Family Clients.''[26]

In addition to the general solicitation of comments, the Commission also posed several specific questions in the Proposal regarding the Family Office exemptions. The Commission solicited comment on the following issues:

(1) Whether persons claiming the CPO exemption in Proposed Regulation 4.13(a)(8) should be required to annually recertify their ongoing eligibility for that exemption and what the costs of such a requirement would be;

(2) Whether the identifying information submitted by Family Offices in order to claim the proposed CPO exemption should be included in NFA's Background Affiliation Status Information Center (''BASIC'') database, consistent with the treatment of other registered and exempt persons, or whether the limitation of their prospective and actual clients to non-public, ''family clients,'' warranted different treatment;

(3) Whether the proposed bifurcation of relief for CTAs of Family Offices between existing Regulation 4.14(a)(5) for pools for which the CTA is also the exempt CPO and Proposed Regulation 4.14(a)(11) for other non-pool, individual ''family clients'' made sense, or whether a more efficient or effective approach was available; and

(4) Whether the Commission should require persons claiming the exemption from CTA registration in Proposed Regulation 4.14(a)(11) to file any notice, initial, annual, or otherwise, and what

[16] The Commission received several comments raising logistical and scoping issues with respect to this particular proposed amendment. *See, e.g.,* Dechert Letter, at 8; AIMA Letter, at 10; MFA Letter, at 4; SIFMA AMG Letter, at 19.

[17] *See* Proposal, 83 FR 52927 (proposing new CPO and CTA exemptions for qualifying Family Offices at Regulations 4.13(a)(8) and 4.14(a)(11), respectively).

[18] CFTC Letter No. 12–37 (Nov. 29, 2012), *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/12-37.pdf* (last retrieved Oct. 10, 2019) (CPO Family Office No-Action Letter); CFTC Letter No. 14–143 (Nov. 5, 2014), *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-143.pdf* (last retrieved Oct. 10, 2019) (CTA Family Office No-Action Letter).

[19] Proposal, 83 FR 52909 (citing Commission staff's experience ''gained through the continued availability of the CPO Family Office No-Action Letter and the subsequent issuance and utilization by industry of the CTA Family Office No-Action Letter'').

[20] *Id.* at 52907–09, *citing* CPO Family Office No-Action Letter and CTA Family Office No-Action Letter (defining ''family offices'' and explaining the SEC exclusion for Family Offices and the available no-action relief).

[21] *Id.* at 52927.

[22] *Id.* (proposing to amend Regulation 4.13(b)(1)(ii) to add Proposed Regulation 4.13(a)(8), the CPO exemption for Family Offices); and 17 CFR 4.13(b)(1) and (b)(4).

[23] Proposal, 83 FR at 52915.

[24] *Id.* at 52927.

[25] *Id.* at 52915 (citing 17 CFR 4.14(a)(5)).

[26] *Id.* (explaining the Commission's preliminary belief that ''Family Offices that are also claiming relief under proposed § 4.13(a)(8) would already be eligible for relief from CTA registration by virtue of the existing exemption in § 4.14(a)(5)'').

the costs of such a requirement would be.[27]

The Commission received multiple comments in response to the proposed CPO and CTA exemptions for Family Offices. For instance, a detailed comment letter addressing each of the Commission's questions, as well as multiple other issues, was submitted by the Private Investor Coalition (PIC), an individual Family Office professional group, and was specifically supported by 13 other comment letters submitted by a variety of Family Offices and their counsel.[28] Additionally, several other groups and national law firms representing Family Offices commented on this aspect of the Proposal.[29] Overall, the Commission received generally favorable comments regarding its effort to add CPO and CTA registration exemptions for Family Offices to 17 CFR part 4.

For the reasons discussed in the Proposal, the Commission is adding the CPO and CTA exemptions for Family Offices, with procedural modifications in light of comments received, as Regulations 4.13(a)(6) and 4.14(a)(11). The Commission continues to believe that familial relationships inherent in Family Offices provide a reasonable mechanism for protecting the interests of family clients and resolving disputes amongst them, and that the regulatory interest is lower than in typical, arms-length transactions where the CPO and the pool participants, or the CTA and its advisory clients, do not have close relationships and/or long-standing family history between them. The Commission also understands that Family Offices are not operations of the type and nature that warrant regulatory oversight by the Commission, because, by definition, a Family Office is not a vehicle in which non-family clients would be solicited or permitted to invest.[30] The Commission continues to believe that these unique characteristics reduce the need for and utility of the benefits and protections generally afforded by the Commission's regulatory regime for CPOs and CTAs and further justify providing Family Offices relief from that regime. The Commission further addresses significant comments on this aspect of the Proposal and details the exemptions below.

ii. No Notice Required for the Family Office CPO Exemption

The Commission received multiple comments in response to its question regarding the notice requirement for Family Offices claiming the proposed CPO exemption. The commenters generally opposed requiring Family Offices to file any notice to claim and/or maintain eligibility for the proposed CPO exemption, citing multiple reasons. Those included the resulting lack of regulatory harmonization between the SEC's exclusion and the proposed CTA exemption, the asserted limited utility of such notices to the Commission, and the generally stable nature of Family Offices. Conversely, one commenter supported a one-time, initial notice filing with no ongoing annual requirement,[31] and another stated that any mandatory notice should require information from the Family Office claiming the exemption only, omitting any collection of information regarding a Family Office's exempt pools (or, as the commenter referred to them, ''investment entities'').[32]

The commenters emphasized that neither the SEC's exclusion for Family Offices from the definition of ''investment adviser,'' nor the Commission's own proposed CTA exemption would require a notice filing of any kind.[33] Commenters further cited the Commission's historic and consistent recognition that its consumer protection concerns are much lower in the context of Family Offices and their family clients.[34] For uniformity across regulatory regimes, several commenters argued in favor of making the CPO exemption for Family Offices self-executing.[35] Though the Commission inquired, commenters did not offer any estimates as to how much an initial or annual notice filing for the CPO exemption would cost a Family Office.

The Commission understands, both from the comments and from its regulatory experience with Family Offices, that Family Offices typically exist to manage the assets solely of persons within a single family, frequently involving multiple generations of family members, as well as the investment entities, trusts, or accounts formed to benefit those family members. It is also not uncommon for Family Offices to continue their operations for extended periods of time with little to no change in their legal or financial structures or arrangements. With that in mind, the Commission has carefully considered the comments received on the Proposal and has determined to eliminate the filing requirement in its entirety with respect to the CPO Exemption for Family Offices.

As a result, the Commission has determined not to adopt several of the proposed amendments to Regulation 4.13(b). The Commission is, however, adding language to Regulation 4.13(b)(1) to clarify that an exemption notice is not required to be filed by persons claiming the new CPO exemption for Family Offices. Upon its adoption as Regulation 4.13(a)(6), the Commission intends the CPO registration relief provided by this exemption to be available on a self-executing basis for qualifying Family Offices. Exempt Family Offices will still be subject to the same recordkeeping requirements and special call authority as all other exempt CPOs.[36] Therefore, the Commission is also amending the introductory language to Regulation 4.13(c), such that the provisions in subparagraph (c)(1) will apply to all persons claiming an exemption from CPO registration under that regulation, regardless of whether a notice of exemption is required to claim such relief.

This approach harmonizes the filing requirements for the regulatory exclusions and exemptions available to Family Offices, including the relief previously adopted by the SEC. It also ensures that Family Offices can rely on these exemptions without needing to determine whether an initial filing was completed, and without tracking annual updates or claims to maintain the

[27] Proposal, 83 FR 52916–52917, questions 7–10.

[28] PIC Letter; *see, e.g.,* Marshall Street Capital Letter, Alscott, Inc. Letter, Commodore Management Co. Letter (all supporting ''the adoption of the Proposed Rule for the reasons set forth and with the modifications proposed in the comment letter submitted by [PIC] on November 28, 2018'').

[29] *See, e.g.,* Wilmer Hale Letter, Fried Frank Letter, Willkie Letter.

[30] Proposal, 83 FR 52909–10 (citing prior claims by Family Office representatives that ''a Family Office is comprised of participants with close relationships, and there is a direct relationship between the clients and the CPO or advisor, . . . [and] such relationships greatly reduce the need for the customer protections available pursuant to . . . 17 CFR part 4''); *Id.* at 52915.

[31] AIMA Letter, at 10.

[32] Willkie Letter, at 3.

[33] PIC Letter, at 4–6 (stating that uniform treatment across exemptions would ''facilitate compliance with and lower the regulatory burdens of each separate regime''); Willkie Letter, at 3; Fried Frank Letter, at 2 (stating that the Commission should not refer to the adoption of this exemption as ''harmonization'' with the SEC's requirements because requiring a notice for this exemption would make it fundamentally different from the SEC's exclusion for Family Offices).

[34] PIC Letter, at 4–5; Willkie Letter, at 2 (summarizing Commission's staff's historic position regarding Family Offices as, ''no substantial public interest is served in regulating investment entities whose primary purpose is investing family assets'').

[35] PIC Letter, at 4–6; Fried Frank Letter, at 2–3; Willkie Letter, at 3; Wilmer Hale Letter, at 2–3 and 6.

[36] *See* 17 CFR 4.13(c)(1) (generally requiring CPOs exempt under Regulation 4.13 to make and keep books and records related to their CPO activities for five years, and to submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria of the claimed exemption).

exemption. Family Office CPOs do not broadly solicit the public for investment in commodity pools, as they are limited, by common understanding and by the regulations adopted herein, to providing services to their ''family clients.'' Therefore, as the Commission has historically stated, these intermediaries do not pose the same regulatory concerns as those of other CPOs that routinely engage in wider solicitation, whether registered or exempt from such registration, and from whom the Commission would generally require either a registration application or a notice filing for such exemption. Because of their unique characteristics, and for the myriad reasons cited by commenters,[37] the Commission has determined not to adopt a notice filing requirement for exempt Family Office CPOs in the Final Rule.

The Commission also solicited comment on whether any information collected through the notices submitted by Family Offices claiming the proposed CPO exemption should be submitted for inclusion in NFA's BASIC database. That issue is mooted by the Commission's decision not to require any notice for the CPO exemption; nonetheless, the Commission notes that commenters overwhelmingly argued against including in the BASIC database any data or information collected from notices filed by Family Offices.[38] By determining *not* to collect this information in the first place, the Commission will also avoid the resolution of potentially complex and novel legal issues involving intermediary privacy, information confidentiality, and data storage and management. In the interest of harmonizing Family Office relief across multiple financial regulatory areas, while also wishing to protect the privacy of Family Offices and their family clients, the Commission has determined it appropriate not to require a filing to claim the CPO exemption, as discussed above.

iii. The CTA Exemption: No Bifurcation Needed and No Notices Required

Regarding the proposed CTA exemption for qualifying Family Offices, the Commission also received largely favorable comments. Commenters responded directly to the two remaining questions of whether CTA relief should be bifurcated between two exemptions and whether the Commission should require a notice filing for the relief. Regarding the former, PIC commented that it disagreed with the concept of bifurcating relief for Family Office CTAs between exemptions in Regulation 4.14(a)(5) and Proposed Regulation 4.14(a)(11), based on whether they are advising a pooled vehicle or individual family client. Instead, PIC stated that the exemptive relief for CTAs of all types of family client should ideally be housed in one exemption, to the extent possible.[39] One law firm suggested editing the proposed exemption to provide additional coverage for ''any collective investment vehicle, the operator of which would be subject to Part 4, absent exemption.''[40] PIC disagreed, arguing that the language in Proposed Regulation 4.14(a)(11) would, in fact, already cover CTAs of all family clients, regardless of type or structure.[41]

The Commission agrees with PIC's comments: Because the exemption, which is adopted as proposed, is limited to ''commodity trading advice . . . solely directed to family clients,'' the exemption would cover CTA activities on behalf of both individual family clients and pools comprised of family client assets.[42] This approach greatly simplifies the compliance analysis for Family Offices and provides them a single CTA registration exemption to cover their advisory activities on behalf of all persons and entities meeting the SEC's ''family client'' definition.

Additionally, the Commission agrees with comments received suggesting that no notice be required for the CTA exemption for Family Offices to claim that relief. Almost all of the other exemptions under Regulation 4.14 operate on a self-executing basis and have done so since its inception.[43] Further, the Commission has not found a unique characteristic about Family Offices that would justify their disparate treatment under the Commission's existing part 4 regulations. The Commission believes that harmonizing the requirements across the SEC's ''investment adviser'' exclusion and the CPO and CTA exemptions adopted herein is a significant benefit to Family Offices navigating the federal regulatory regimes applicable to them without negatively affecting the Commission's interests in regulating CPOs and CTAs more generally. Therefore, for the reasons stated in the Proposal[44] and pursuant to the analysis above, the Commission has determined to adopt the CTA exemption for Family Offices with no notice requirement and with the intent that this exemption be relied upon for CTA services provided to all types of ''family client.''

iv. Responses to Miscellaneous Comments

Several commenters also requested a specific correction to the proposed CPO Family Office exemption. For instance, multiple commenters pointed out that a correction should be made to the proposed CPO exemption's requirement that the *commodity pool* subject to the exemption meet the SEC's ''family office'' definition. PIC suggested that this proposed requirement be changed to instead require the covered pool meet the SEC's ''family client'' definition,[45] whereas Willkie suggested that the requirement be changed, such that it would instead require the person claiming the CPO exemption, rather than the pool, to meet the SEC's ''family office'' definition.[46] In the Proposal, the Commission intended to draft an exemption from CPO registration with substantive conditions applicable to

[37] Those reasons discussed above include the benefit of harmonization of regulatory requirements across SEC and CFTC regimes with respect to Family Offices, the CFTC's lowered regulatory interest in Family Offices limited to serving family clients, and the typical historic stability in the operations of Family Offices, generally. *See* PIC Letter, at 4–6; Willkie Letter, at 2–3; Fried Frank Letter, at 2–3; Wilmer Hale Letter, at 2–3 and 6.

[38] PIC Letter, at 7–9 (strongly objecting to any requirement that Family Offices post their claims for exemption or any other identifying information on BASIC or any other public forum or database); Fried Frank Letter, at 2–3; Willkie Letter, at 3; *cf.* AIMA Letter, at 10 (stating that adding exempt Family Offices to the BASIC database would make Bylaw 1101 due diligence easier for other NFA Members). With respect to determining compliance with Bylaw 1101, Wilmer Hale argues that, ''there are other equally as effective means of ascertaining that information on family offices.'' Wilmer Hale Letter, at 4. PIC further urged the Commission to consider that Family Offices and their family clients are individual market participants, rather than commercial market participants, and as a result of their private status, they have very different, additional privacy concerns. PIC Letter, at 9.

[39] PIC Letter, at 9–10.

[40] Wilmer Hale Letter, at 7 (stating that this edit would cover situations where, ''there is a slim chance where a commodity pool might not be a 'family client' '').

[41] PIC Letter, at 10.

[42] PIC Letter, at 10 (adding that, consequently, a CTA to a Family Office would need to claim only the exemption in Regulation 4.14(a)(11) for complete exemptive relief coverage of its advisory activities, without having to consider its status under the exemption in Regulation 4.14(a)(5)).

[43] *See, e.g.,* 17 CFR 4.14(a)(1)–(a)(7) and (a)(9)–(a)(10). Conversely, Regulation 4.13 generally requires a notice filing to claim the exemptions therein, with the exception of the exemption added by this Final Rule for qualifying Family Offices. The Commission justifies this approach for Family Offices, different from other exempt CPOs required to file a notice, based primarily on their distinctly limited clientele, *i.e.,* ''family clients.'' *See supra* section II.A.ii for further discussion.

[44] *See* Proposal, 83 FR 52909 and 52915.

[45] PIC Letter, at 2–3. This suggested edit was also specifically supported in comments submitted by Fried Frank, McDermott, Will & Emery, and Perkins Coie. Fried Frank Letter, at 3, n.6; McDermott, Will & Emery Letter, at 1; and Perkins Coie Letter, at 1.

[46] AIMA suggested a similar edit, stating that the proposed requirement should read, ''the operator of the pool qualifies,'' not ''the pool qualifies.'' AIMA Letter, at 10.

both the exempt CPO and the exempt pool(s) operated on behalf of family clients. Because conditions applicable to the exempt commodity pool are already found in the first paragraph of the exemption,[47] the Commission is adopting the CPO exemption with that provision corrected to require that the CPO, *i.e.,* the person claiming the exemption, meets the SEC's ''family office'' definition.

Finally, the Commission also received several comments that, although not directly responding to specific questions posed, did nonetheless raise issues relevant to continued Family Office operations in the Commission's jurisdiction. For instance, several commenters requested that the Commission confirm the ongoing validity of historic Commission staff letters, which continue to provide interpretative relief to any Family Office choosing to rely upon them, as permitted by Regulation 140.99,[48] notwithstanding the adoption herein of CPO and CTA exemptions in 17 CFR part 4 for Family Offices.[49] In response to those commenters, the Commission confirms that the Final Rules do not supersede prior staff letters providing that a particular entity is ''not a pool,'' provided that a Family Office has determined its own situation to be substantively identical to the outlined facts and circumstances precipitating the letter relief.

v. The Effect of the Final Amendments on CFTC Staff Letters 12–37 and 14–143: The CPO and CTA Family Office No-Action Letters

The Commission does intend the adoption of the CPO and CTA exemptions for Family Offices at Regulations 4.13(a)(6) and 4.14(a)(8), respectively (which are effective 30 days after publication in this **Federal Register** release), however, to supersede the staff no-action relief previously provided by the CPO and CTA Family Office No-Action Letters. Therefore, Family Offices qualifying for those exemptions should instead, as soon as practicable after these amendments go into effect, create and maintain an internal record documenting the relevant exemption they wish to claim, as well as their qualifications for that exemption, similar to the requirements to claim other self-executing exemptions in 17 CFR part 4.

b. JOBS Act Amendments: Expanding Marketing and Advertising for Qualifying Exempt CPOs and Certain Exempt Pools

i. Background of the JOBS Act and the Proposed Amendments

The JOBS Act amended various sections of the Securities Act of 1933 (33 Act) and required, among other things, that the SEC revise its regulations to implement the new JOBS Act provisions, including the loosening of marketing restrictions generally applicable to securities that are privately offered, or resold pursuant to Rule 144A.[50] To that end, the SEC adopted amendments to Regulation D and Rule 144A that were consistent with those congressional directives.[51] Specifically, the SEC amended Regulation D by adding § 230.506(c), which permits issuers to engage in general solicitation or general advertising in the offer and sale of securities under that regulation, subject to certain conditions. These include that the issuer meets the terms and conditions of 17 CFR 230.501 and 230.502(a) and (d), that all purchasers of the offered securities are accredited investors, and that the issuer takes reasonable steps to verify the accredited investor status of each purchaser.[52] The SEC also adopted substantively similar amendments to its Rule 144A, which is a non-exclusive safe harbor exemption from the registration and prospectus delivery requirements under the 33 Act for resales of certain securities to qualified institutional buyers (QIBs), as defined in § 230.144A(a)(1), provided that certain conditions are met.[53] Through the JOBS Act Adopting Release, the SEC also eliminated offering and marketing restrictions in the resale of certain securities to QIBs.[54]

Prior to these amendments, commodity pools offered and sold pursuant to § 506 of Regulation D, or resold pursuant to Rule 144A, were able to be operated pursuant to exemptive relief provided under Regulations 4.7(b) and 4.13(a)(3). After these regulatory amendments prompted by the JOBS Act, persons marketing, selling, or reselling securities pursuant to § 230.506(c) of Regulation D and/or Rule 144A could not necessarily qualify for an exemption from CPO registration provided by Regulation 4.13(a)(3), or for exemptive relief from certain CPO compliance obligations, as provided by Regulation 4.7, each of which has historically been subject to offering and marketing restrictions. Specifically, with respect to Regulation 4.7(b), such pools may not be able to satisfy the requirement that participation units are offered solely to qualified eligible persons (QEPs), if their CPOs and resellers wish to engage in the general solicitation and advertising now permitted under §§ 230.506(c) and 230.144A, respectively.[55] With respect to Regulation 4.13(a)(3), those exempt pools may not be able to meet the exemption's condition that its interests be ''offered and sold without marketing to the public in the United States.'' [56] In response to the concerns of market participants, DSIO issued CFTC Letter No. 14–116,[57] which provided relief so that CPOs of commodity pools, the securities of which are either offered and sold pursuant to § 230.506(c) of

[47] Proposed Regulation 4.13(a)(8)(i) would require that interests in the exempt pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold only to ''family clients,'' as defined in § 275.202(a)(11)(G)–1 of CFR title 17. *See* Proposal, 83 FR 52927. The Commission intends to adopt this requirement, though the internal numbering in the final amendments has changed due to other edits made to the Proposal.

[48] 17 CFR 140.99(a)(3) (stating that an interpretative letter may be relied upon by persons other than the Beneficiary).

[49] Fried Frank Letter, at 3; Willkie Letter, at 2. In the Proposal, the Commission stated, ''Family Offices unable to meet the requirements of the exemptions proposed herein today may still avail themselves of the relief provided in § 4.13(a)(3), if they so qualify, or they may continue to seek relief on an individual firm-by-firm basis through requests submitted to Commission staff.'' Proposal, 83 FR 52909.

[50] Public Law 112–206, 126 Stat. 306 (Apr. 5, 2012). The 33 Act may be found at 15 U.S.C. 77a, *et seq.*

[51] *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 77 FR 54464 (Sept. 5, 2012) and 78 FR 44771 (Jul. 24, 2013) (''JOBS Act Adopting Release'') (amending Regulation D, 17 CFR 230.500–230.508, and Rule 144A, 17 CFR 230.144A).

[52] 17 CFR 230.506(c)(1)–(2). In adopting this alternative to traditional Regulation D offerings, the SEC stated that, ''because the issuer has the burden of demonstrating that its offering is entitled to an exemption from the registration requirements of the [33 Act], it will be important for issuers and their verification service providers to retain adequate records regarding the steps taken to verify that a purchaser was an accredited investor.'' JOBS Act Adopting Release, 78 FR 44779.

[53] *See* Rule 144A, 17 CFR 230.144A.

[54] The SEC stated, ''[a]s amended, Rule 144A(d)(1) will require only that the securities be *sold* to a QIB or to a purchaser the seller and any person acting on behalf of the seller reasonably believes is a QIB.'' JOBS Act Adopting Release, 78 FR 44786 (emphasis added).

[55] Additionally, certain market participants questioned whether CPOs of commodity pools relying on § 230.506(c) would be able to meet the condition in Regulation 4.7(b) that requires that the offering ''qualifies for exemption from the registration requirements of the [33] Act pursuant to section 4[(a)](2) of that Act.'' Although § 230.506, including § 230.506(c), ''continue[s] to be treated as a regulation issued under section 4[(a)](2) of the [33 Act],'' 78 FR 44774, there was nonetheless uncertainty expressed by certain market participants about whether § 230.506(c) constituted an ''exemption from the registration requirements of the [33] Act pursuant to section 4[(a)](2) of that Act,'' in accordance with Regulation 4.7(b).

[56] 17 CFR 4.13(a)(3)(i).

[57] CFTC Letter No. 14–116 (Sept. 9, 2014) (''JOBS Act Relief Letter''), *available at: https://www.cftc.gov/sites/default/files/csl/pdfs/14/14-116.pdf* (last retrieved Oct. 3, 2019).

Regulation D, or resold to QIBs under Rule 144A, were able to operate them pursuant to Regulations 4.7 and 4.13, even if they or their resellers engage in general solicitation and marketing, as contemplated by the JOBS Act.

In the Proposal, the Commission proposed amending Regulations 4.7(b) and 4.13(a)(3) in a manner consistent with the JOBS Act, and informed in large part by the exemptive relief provided by the JOBS Act Relief Letter. The Commission also proposed making several technical amendments to Regulation 4.7(b) to improve the readability and clarity of that provision. With respect to Regulation 4.7(b), the Proposal: (1) Allowed the offerings to be exempt from registration under section 4(a)(2) of the 33 Act, and/or offered and sold pursuant to Regulation D, including § 230.506(c); (2) allowed the offerings to be resold pursuant to Rule 144A; (3) deleted the restrictive text, ''without marketing to the public;'' and (4) removed the reference to the act of ''offering'' by the registered CPO of a pool exempt under Regulation 4.7. As a result of the Proposal, the operative requirements of ''non-bank'' CPOs [58] claiming relief under Regulation 4.7(b) would become: (1) The CPO must be registered with respect to the exempt pool; (2) the participation units must be exempt from registration under section 4(a)(2) of the 33 Act and/or offered and sold pursuant to Regulation D, or resold pursuant to Rule 144A, or offered and sold pursuant to Regulation S; [59] (3) the participation units must be *sold* solely to QEPs, with no marketing or solicitation restriction on the offering; and (4) the registered CPO must file the notice required by Regulation 4.7(b), and otherwise comply with the requirements in Regulation 4.7(d) in operating the exempt pool.

With respect to the exemption in Regulation 4.13(a)(3), the Commission proposed to amend the regulation by deleting the language, ''such interests are offered and sold without marketing to the public in the United States,'' and replacing it with a conditional statement requiring that ''the interests [be] marketed and advertised to the public in the United States solely, if at all, in compliance with Regulation D, §§ 230.500 through 230.508 of this title, or with Rule 144A, § 230.144A of this title.'' [60] Consequently, Regulation 4.13(a)(3) would require, in relevant part, that: (1) Such commodity pool interests be exempt from registration under the 33 Act; and (2) if such interests are marketed and advertised in the U.S., they can only be marketed or advertised in compliance with the provisions of Regulation D or of Rule 144A, as amended by the JOBS Act.

ii. Comments Received and Final Amendments

The Commission received two comments specifically addressing the JOBS Act aspect of the Proposal. Fried Frank stated that it supported all of the proposed amendments related to the JOBS Act in Regulations 4.7 and 4.13(a)(3), including the Commission's decision not to require an additional notice beyond that which is already required to claim relief under Regulations 4.7 or 4.13(a)(3).[61] MFA similarly offered its strong support and commended the Commission's efforts to harmonize its 17 CFR part 4 regulations with securities regulations impacted by the JOBS Act, stating its appreciation for the Commission's desire to ''provide legal certainty with respect to transactions engaged in by dually-regulated CFTC and SEC entities.'' [62]

For the reasons described in the Proposal,[63] the Commission is adopting the amendments to Regulations 4.7(b) and 4.13(a)(3) relating to the JOBS Act. Specifically, the Commission continues to believe that harmonizing the impact of the JOBS Act on dually-regulated entities eliminates incompatibilities between comparable SEC and CFTC regulatory regimes, and generally provides legal certainty regarding these transactions in a manner that allows these entities to benefit from the new offering process under the JOBS Act. The Commission further believes that the amendments achieve the goal of permitting commodity pools operated by CPOs claiming relief under Regulations 4.7(b) or 4.13(a)(3) to avail themselves of the JOBS Act relief adopted by Congress, while still retaining the other requirements currently set forth in those regulations.

However, the Commission is further reorganizing and revising Regulation 4.7(b)(1) and adopting a minor amendment to Regulation 4.13(a)(3)(i) to clarify which exempt CPOs are eligible for relief from the offering restrictions in those regulations pursuant to the JOBS Act amendments, and to further improve readability and clarity. First, Regulation 4.7(b)(1), as amended, will separate the three different types of commodity pools for which a registered CPO may claim relief under that regulation: (1) A commodity pool that is exempt from registration under section 4(a)(2) of the 33 Act, which includes certain Regulation D offerings; (2) a commodity pool that is offered and sold pursuant to Regulation S; and (3) a commodity pool that is a collective trust fund, the securities of which are exempt under section 3(a)(2) of the 33 Act.[64] Second, consistent with the JOBS Act Relief Letter, Regulation 4.7(b)(1)(i)(A) clarifies that the general solicitation ban currently in Regulation 4.7(b) remains in effect for all offerings of the three types of commodity pools listed in Regulations 4.7(b)(1)(i)(A)–(C), except for those that are offered pursuant to § 230.506(c). Third, also consistent with the JOBS Act Relief Letter, the Commission is creating Regulation 4.7(b)(1)(ii) to clarify that the relief in Regulation 4.7(b) is available with respect to the three types of commodity pools listed in Regulations 4.7(b)(1)(i)(A)–(C), even if participations in such pools are resold pursuant Rule 144A. Finally, with respect to Regulation 4.13(a)(3), the Commission is amending that subparagraph's reference to ''Regulation D, §§ 230.500 through 230.508'' to say ''§ 230.506(c).''

iii. The Effect of the Final Amendments on CFTC Letter 14–116: The JOBS Act Relief Letter

The Commission intends the adoption of the amendments to Regulations 4.7 and 4.13(a)(3) detailed above, which are effective 30 days after publication in this **Federal Register** release, to supersede the staff exemptive relief previously provided by the JOBS Act Relief Letter. Because CPOs currently relying on that exemptive letter are already required to file notices claiming an exemption under Regulation 4.7 or 4.13(a)(3) to fully utilize that relief, the Commission expects that such exempt CPOs wishing to use general solicitation in their existing qualifying exempt pools may do so without further action. CPOs interested in using general solicitation with respect to qualifying exempt pools formed in the future may do so in accordance with the amendments adopted herein, following their effective date, by filing a notice of exemption for such pools, as required by Regulations 4.7(d) and 4.13(b)(1).

[58] The Proposal's technical amendments also sought to break out the eligible claimants of the relief in Regulation 4.7(b) into two separate subparagraphs: Regulation 4.7(b)(1)(i) for ''non-bank'' CPOs whose offerings are subject to Regulation D or Regulation S, and Regulation 4.7(b)(1)(ii) for banks registered as CPOs offering pools in the form of a collective trust fund exempt under section 3(a)(2) of the 33 Act. *See* Proposal, 83 FR 52926.

[59] 17 CFR 230.901–230.905.

[60] Proposal, 83 FR 52926.

[61] Fried Frank Letter, at 2.

[62] MFA Letter, at 8.

[63] Proposal, 83 FR 52911 and 52915.

[64] *See infra* new Regulations 4.7(b)(1)(i) and (ii).

c. Permitting Non-U.S. Person Investors in De Minimis Exempt Pools

In the context of proposing other amendments to Regulation 4.13, the Commission also proposed to amend Regulation 4.13(a)(3), which, as noted above, provides a CPO registration exemption to persons who operate pools trading a de minimis amount of commodity interests, subject to the conditions enumerated in that regulation.[65] Specifically, the Commission proposed to amend Regulation 4.13(a)(3)(iii), the condition which governs the permissible investors in those exempt pools, by deleting, at Regulation 4.13(a)(3)(iii)(E), a provision referencing persons eligible to participate in pools relying upon Regulation 4.13(a)(4),[66] and replacing it with ''[a] non-U.S. person,'' as a new category of permissible investors.[67]

Generally, the Commission received comments in favor of its efforts to amend Regulation 4.13(a)(3), such that non-U.S. person participants, regardless of financial sophistication, would be explicitly permitted in de minimis commodity pools, although several commenters offered suggested edits and raised questions.[68] For instance, several commenters inquired whether the Commission intended this proposed amendment to mean, ''non-U.S. persons,'' as that term is defined in Regulation 4.7(a)(1)(iv),[69] and others requested the Commission consider expanding its definition of ''non-U.S. person,'' to include the definition of that term in Regulation S.[70] Commenters also provided helpful background information to the Commission. Two commenters requested that the Commission confirm the ongoing validity of staff guidance regarding the categories of participants eligible to invest in de minimis commodity pools, *i.e.,* DSIO's CPO–CTA Frequently Asked Questions (CPO–CTA FAQs).[71]

In the CPO–CTA FAQs, DSIO stated its intent to continue permitting non-U.S. persons to participate in de minimis commodity pools, notwithstanding the rescission of Regulation 4.13(a)(4), as well as its plan to specifically amend Regulation 4.13(a)(3) in the future to permit such participants, as a typographical or technical amendment, as opposed to one that is designed to affect the substance of the de minimis exemption.[72] One commenter also offered an alternative change to the proposed amendment: Willkie suggested instead that the Commission delete the outdated provision and simultaneously amend the immediately preceding paragraph to state, ''A 'qualified eligible person,' as that term is defined in § 4.7 of this chapter,'' which this commenter thought would effectively add non-U.S. persons as permitted participants in this type of pool.[73]

The Commission agrees with the approach of deleting the outdated provision in Regulation 4.13(a)(3)(iii)(E) and also amending Regulation 4.13(a)(3)(iii)(D) to permit as participants in de minimis pools, ''[a] 'qualified eligible person,' as that term is defined in § 4.7 of this chapter.'' The Commission believes that this amendment provides an important update to this exemption, which reflects the general market understanding and practice of permitting non-U.S. persons to invest in de minimis pools in a manner consistent with prior Commission statements and staff guidance. This amendment also responds to the question raised by several commenters of which ''non-U.S. person'' definition the Commission intended to use—the final amendment incorporates by reference the definition of that term in Regulation 4.7(a)(1)(iv). In particular, this amendment is consistent with CFTC Letter 04–13,[74] which, as discussed above, relied heavily on the rescinded Regulation 4.13(a)(4), and with the guidance provided by DSIO staff in the CPO CTA FAQs.[75] Moreover, because the legal analysis of CFTC Letter 04–13 is primarily based on a CPO registration exemption repealed in 2012, the Commission believes it appropriate, and in fact, the Commission intends, for this amendment to supersede that staff letter. Finally, through the use of a cross-reference, this amendment ensures that any future amendments to the QEP definition are also consistently reflected in the de minimis exemption, simplifying future Commission rulemaking endeavors.

III. Related Matters

a. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that Federal agencies, in promulgating regulations, consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities, and if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities.[76] Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking. As noted in the Proposal, the regulations adopted herein affect only persons registered or required to be registered as CPOs or CTAs and persons claiming exemptions from registration as such. With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, if it meets the criteria for an exemption from registration under Regulation 4.13(a)(2).[77] Because the regulations adopted herein generally apply to persons registered or required to be registered as CPOs with the Commission, and/or provide relief to

[65] 17 CFR 4.13(a)(3).

[66] The Commission noted in the Proposal its understanding that ''relying on CFTC Staff Letter 04–13, for purposes of determining whether a person qualifies for exemption from CPO registration under § 4.13(a)(3), market participants are generally not considering whether non-U.S. person participants meet one of the investor sophistication criteria listed in § 4.13(a)(3).'' Proposal, 83 FR 52907 (internal footnotes omitted). In 2012, the Commission rescinded the exemption originally provided in Regulation 4.13(a)(4), the features of which comprised the legal underpinnings for the analysis in CFTC Staff Letter 04–13. *See* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252 (Feb. 24, 2012); correction notice published at 77 FR 17328 (Mar. 26, 2012).

[67] Proposal, 83 FR 52907, 52914, 52926. The Commission also expressed its view that de minimis pools ''do not trigger the same level of regulatory interest . . . as commodity pools requiring CPO registration and compliance with all or part of the requirements in 17 CFR part 4,'' and that such an amendment would be consistent with other part 4 regulations: ''Additionally, § 4.7 already permits non-U.S. persons, regardless of their [QEP] status, to participate in commodity pools thereunder, which are not subject to de minimis commodity interest trading thresholds.'' *Id.*

[68] *See, e.g.,* Dechert Letter, at 12; Fried Frank Letter, at 2; Freddie Mac Letter, at 2; IAA Letter, at 12.

[69] Dechert Letter, at 12; IAA Letter, at 12; AIMA Letter, at 8; Fried Frank Letter, at 2.

[70] AIMA Letter, at 8; Freddie Mac Letter, at 2.

[71] Dechert Letter, at 12, and Willkie Letter, at 8, citing ''[DSIO] Responds to Frequently Asked Questions—CPO/CTA: Amendments to Compliance Obligations,'' at 3, *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/faq_cpocta.pdf* (last retrieved Oct. 7, 2019) (CPO CTA FAQs).

[72] CPO CTA FAQs, at 3.

[73] Willkie Letter, at 8.

[74] CFTC Staff Letter 04–13 (Apr. 14, 2004), *available at: https://www.cftc.gov/sites/default/files/tm/letters/04letters/tm04-13.htm* (last retrieved Oct. 10, 2019).

[75] CPO CTA FAQs, at 3.

[76] 5 U.S.C. 601, *et seq.*

[77] Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619–20. Regulation 4.13(a)(2) exempts a person from registration as a CPO when: (1) None of the pools operated by that person has more than 15 participants at any time, and (2) when excluding certain sources of funding, the total gross capital contributions the person receives for units of participation in all of the pools it operates or intends to operate do not, in the aggregate, exceed $400,000. *See* 17 CFR 4.13(a)(2).

qualifying persons from registration as such, as well as from related compliance burdens, the RFA is not applicable with respect to CPOs impacted by this release's regulatory amendments.

Regarding CTAs, the Commission has previously considered whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.[78] As certain of these registrants may be small entities for purposes of the RFA, the Commission considered whether this rulemaking would have a significant economic impact on such registrants.[79] The only portion of the Final Rules directly impacting CTAs adds a self-executing registration exemption consistent with the CTA Family Office No-Action Letter, which provides no-action relief from CTA registration to Family Offices providing CTA services to their family clients. This new exemption will not impose any new burdens on market participants or Commission registrants. Rather, because the Commission is adopting an exemption from the requirement to register as a CTA for qualifying Family Offices, the Commission finds that such exemption would be less burdensome to those persons than the full costs of CTA registration and compliance. Affected Family Office CTAs will be transitioning from the CTA registration relief provided through the CTA Family Office No-Action Letter to a self-executing CTA exemption for Family Offices in Regulation 4.14, and there is consequently no significant economic impact on these entities by virtue of this particular regulatory amendment. The Commission's decision not to require an associated notice or filing further supports the Commission's preliminary and final RFA findings. Additionally, the Commission received no comments on the Proposal's RFA discussion.

Therefore, the Commission concludes that, to the extent the regulations adopted herein affect CTAs, it will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted by the Commission will not have a significant economic impact on a substantial number of small entities.

b. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.[80] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The regulations adopted in this release would result in a collection of information within the meaning of the PRA, as discussed below. The Commission is therefore submitting the Final Rules to OMB for approval.

As discussed in the Proposal, the Commission's proposed regulations would have impacted or amended two collections of information for which the Commission has previously received control numbers from OMB. The first collection of information the Commission believed could be impacted by the Proposal is, ''Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB control number 3038–0005'' (Collection 3038–0005). Collection 3038–0005 primarily accounts for the burden associated with part 4 of the Commission's regulations that concern compliance obligations generally applicable to CPOs and CTAs, as well as certain enumerated exemptions from registration as such, exclusions from those definitions, and available relief from compliance with certain regulatory requirements. The Commission had proposed to amend this collection to reflect (1) the notices proposed to be required to claim certain of the CPO registration exemptions and the CPO exclusion proposed therein; and (2) an expected reduction in the number of registered CPOs and CTAs filing Forms CPO–PQR and CTA–PR, pursuant to proposed revisions to Regulation 4.27.[81]

The Commission also proposed to amend a second collection of information entitled, ''Part 3—Registration, OMB control number 3038–0023'' (Collection 3038–0023), which pertains to the registration of intermediaries generally, to reduce the number of persons registering as CPOs and CTAs as a result of the regulatory amendments in the Proposal. The responses to these collections of information are mandatory.

The collections of information in the Proposal would have made available to eligible persons: (1) An exemption from CPO registration based upon Commission Staff Advisory 18–96; (2) recordkeeping location relief for qualifying, registered CPOs, also based upon Commission Staff Advisory 18–96; (3) exemptions from CPO and CTA registration for qualifying Family Offices; (4) an expanded exclusion under Regulation 4.5 for investment advisers of BDCs; and (5) exemptive relief made available through amendments to the definition of ''Reporting Person'' in Regulation 4.27(b), such that qualifying CPOs and CTAs no longer have to file Forms CPO–PQR or CTA–PR.[82] In the instant **Federal Register** release, the Commission is adopting final amendments, effectively adding exemptions from CPO and CTA registration for qualifying Family Offices at Regulations 4.13(a)(6) and 4.14(a)(11), respectively, and finalizing other amendments consistent with the JOBS Act Relief Letter issued by Commission staff.

As noted in the Proposal, eligible persons have the option to elect the registration exemptions adopted and/or amended, if they are so qualified, but have no obligation to do so. For this reason, the Commission proposed to amend Collection 3038–0005 for PRA purposes to reflect these alternatives, and Collection 3038–0023 to reduce the number of persons registering as CPOs or CTAs; the Commission further stated its expectation that the Proposal would not impose any significant new burdens on CPOs or CTAs.[83] The Commission emphasized then, ''to the extent that the proposed amendments provide registration exemptions or definitional exclusions, and/or alternatives to comprehensive compliance with Commission regulations, through the adoption of amendments consistent with existing exemptive and no-action letter relief, it is reasonable . . . to infer that the proposed amendments will generally prove to be less burdensome

[78] *See* 47 FR 18620.

[79] Proposal, 83 FR 52917.

[80] *See* 44 U.S.C. 3501, *et seq.*

[81] Proposal, 83 FR 52918–19.

[82] The Proposal also included proposed amendments to Regulations 4.7(b) and 4.13(a)(3), expanding the availability of relief under those provisions to include registered and exempt CPOs issuing, offering, selling, or reselling securities with general solicitation, pursuant to the JOBS Act. Those amendments do not impact or change the number of CPOs registered or exempt from such registration, but rather affect their ability to broadly solicit the public for investment. *See infra* section II.b. for discussion of that aspect of the Final Rules.

[83] The Commission also considered in the Proposal the impact that the proposed 18–96 Exemption, as well as related proposed amendments to Regulation 4.23, might have on these collections and the number of persons responding thereunder. Proposal, 83 FR 52918. Because the Commission is not pursuing or finalizing those proposed amendments at this time, the Commission no longer believes any modifications to these collections on those bases are necessary.

for persons eligible to claim the proposed alternative relief.'' [84]

i. Revisions to the Collections of Information

(a) OMB Control Number 3038–0005

Collection 3038–0005 is currently in force with its control number having been provided by OMB, and it was renewed recently on March 14, 2017.[85] As stated above, Collection 3038–0005 governs responses made pursuant to part 4 of the Commission's regulations, governing the operations of CPOs and CTAs. Generally, under Collection 3038–0005, the estimated average time spent per response will not be significantly altered; however, the Commission is making minor adjustments, discussed further below, to Collection 3038–0005 to account for new and/or lessened burdens expected from the regulatory amendments adopted in this release.

In this release, the Commission is adopting new CPO and CTA exemptions for qualifying Family Offices, as well as finalizing amendments to Regulations 4.7(b) and 4.13(a)(3), consistent with to the JOBS Act. In the Proposal, the Commission estimated an increase in the number of persons responding to the portion of Collection 3038–0005 associated with Regulation 4.13(b)(1) (the requirement to file a claim for an exemption under that section) by at least the number of persons claiming the CPO Family Office No-Action Letter, which has provided no-action relief from CPO registration for Family Offices, *i.e.,* 200 CPOs. This estimate was based on the Commission's decision in the Proposal to require a notice filing from Family Offices wishing to claim the proposed CPO exemption.

Given the Commission's adoption today of the CPO exemption for Family Offices with no notice filing requirement, the Commission no longer believes such an increase in the number of persons filing notices under Regulation 4.13(b)(1) is necessary. Regarding the JOBS Act amendments also adopted in this release, the Commission stated in the Proposal that ''no adjustments need to be made to Collection 3038–0005 to account for [those] amendments because persons relying on the exemptive relief therein are, as a condition of relief, currently required to claim an exemption under Regulations 4.7(b) or 4.13(a)(3), as applicable to them, and therefore, are already counted in this collection;'' [86] the Commission continues to believe this aspect of its PRA analysis to be accurate.

The currently approved total burden associated with Collection 3038–0005, in the aggregate, is as follows:

Estimated number of respondents: 45,270.

Annual responses for all respondents: 129,042.

Estimated average hours per response: 2.83.[87]

Annual burden: 365,764.

Additionally, the currently approved total recordkeeping burden associated with Collection 3038–0005 is as follows:

Estimated number of respondents: 9,838.

Annual responses for respondents: 13,672.

Estimated average hours per response: 5.01.

Annual recordkeeping burden: 68,497.

In the Proposal, the Commission estimated that the proposed CPO registration exemptions, based on Commission Staff Advisory 18–96 and to provide relief for Family Offices, would result in an additional 250 notice filings under Regulation 4.13(b)(1). Because these notice filings will not be required by the final amendments, the Commission no longer believes that such an increase is necessary. As a result of these Final Rules, the Commission believes that the reporting burden associated with Regulation 4.13(b)(1) under Collection 3038–0005 should remain unchanged, as follows:

Estimated number of respondents: 3,622.

Annual responses by each respondent: 3.

Estimated average hours per response: 0.5.

Total annual reporting burden hours: 1,811.

The Commission has taken the position in this release that Family Offices, though eligible for exemption from registration as CPOs under Regulation 4.13 by virtue of the Final Rules, will still be subject to the same recordkeeping requirements in Regulations 4.13(c)(1)(i)–(ii) as all other exempt CPOs. Therefore, the Commission believes an adjustment to account for the recordkeeping burden of approximately 200 newly exempt Family Offices is necessary. As a result, the Commission is amending the recordkeeping burden associated with Regulations 4.13(c)(1)(i)–(ii) as follows:

Estimated number of respondents: 3,812.

Annual responses by each respondent: 1.

Estimated average hours per response: 11.4.

Total annual recordkeeping burden hours: 43,457.

As a result, the total new recordkeeping burden associated with Collection 3038–0005 will be as follows:

Estimated number of respondents: 10,038.

Annual responses for all respondents: 13,872.

Estimated average hours per response: 5.10.

Annual recordkeeping burden: 70,777.

The total new burden associated with Collection 3038–0005, in the aggregate, reflecting the regulatory amendments adopted herein,[88] is as follows:

Estimated number of respondents: 43,397.

Annual responses for all respondents: 112,024.

Estimated average hours per response: 3.16.

Annual reporting burden: 354,367.

(b) OMB Control Number 3038–0023

Based on the contents of the Proposal, the Commission expected that ''persons that are currently counted among the estimates for Collection 3038–0023 with respect to CPO and CTA registration with the Commission will deregister as such, due to the availability of the additional registration exemptions and exclusion proposed herein.'' [89] On that basis, the Commission proposed, ''to deduct the expected claimants of that relief from the total number of persons required to register with the Commission as CPOs and CTAs.'' [90] As discussed above, the Commission is

[84] Proposal, 83 FR 52918.

[85] *See* Notice of Office of Management and Budget Action, OMB Control No. 3038–0005, *available at: https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3038-005* (last retrieved Oct. 3, 2019).

[86] Proposal, 83 FR 52918. The Proposal further discussed modifications to Collection 3038–0005 based on the proposed amendments to Regulation 4.5 and 4.27. *Id.* Each of those amendments is being finalized and adopted by the Commission in a concurrently published **Federal Register** release containing the pertinent Preamble and administrative law discussions as well as those final rule amendments.

[87] The Commission has rounded the average hours per response to the second decimal place for ease of presentation.

[88] These burden totals include adjustments made to Collection 3038–0005 to reflect the Final Rule amendments contained in this **Federal Register** release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, published elsewhere in this issue of the **Federal Register**.

[89] Proposal, 83 FR 52919.

[90] *Id.*

adopting herein CPO and CTA exemptions for Family Offices, with no notice filing requirement, and finalizing amendments to Regulations 4.7(b) and 4.13(a)(3) based upon the JOBS Act. As noted above, the conditions of relief related to the JOBS Act provisions already require that the person be registered as a CPO or exempt from such registration, meaning those amendments will have no impact on the number of respondents in this collection.

The currently approved total burden associated with Collection 3038–0023, in the aggregate, excluding the burden associated with Regulation 3.21(e), is as follows:

Estimated number of respondents: 77,857.

Estimated number of responses: 78,109.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 7,029.8.

Frequency of collection: Periodically.

The currently approved total burden associated with Regulation 3.21(e) under Collection 3038–0023, which remains unchanged under the Final Rules, is as follows:

Estimated number of respondents: 396.

Estimated number of responses: 396.

Estimated average hours per response: 1.25.

Estimated total annual burden on respondents: 495.

Frequency of collection: Annually.

The Commission proposed to reduce the number of registrants by the estimated number of claimants with respect to each of the registration exemptions and exclusion in the Proposal. Given the amendments being adopted herein,[91] the Commission continues to estimate that 200 persons will claim relief from registration as the CPO of a qualifying Family Office and that 100 persons will claim relief from registration as the CTA of a qualifying Family Office or of family clients.[92] Therefore, the Commission believes that the burden associated with Collection 3038–0023 should be reduced, such that the total burden associated with the collection, excluding the burden associated with Regulation 3.21(e), will be as follows:

Estimated number of respondents: 77,492.

Estimated number of responses: 77,492.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 6,974.

ii. Information Collection Comments

In the Proposal, the Commission invited the public and other Federal agencies to comment on any aspect of the information collection requirements discussed therein.[93] The Commission did not receive any such comments.

c. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA.[94] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) considerations.

i. General Costs and Benefits

The baseline for the Commission's consideration of the costs and benefits of the Final Rules is the regulatory status quo, as determined by the CEA and the Commission's existing regulations in 17 CFR part 4. The Commission recognizes, however, that to the extent that market participants have relied on relevant Commission staff action, the actual costs and benefits of the Final Rules, as realized in the market, may not be as significant. Because each amendment addresses a discrete issue, which impacts a unique subgroup within the universe of entities captured by the CPO and CTA statutory definitions, the Commission has determined to analyze the costs and benefits associated with each amendment separately, as presented below. The Commission has endeavored to assess the costs and benefits of the amendments adopted herein in quantitative terms wherever possible. Where estimation or quantification is not feasible, however, the Commission has provided its assessment in qualitative terms.

The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the Final Rule on all activity subject to the amended regulations, whether by virtue of the activity's physical location in the United States, or by virtue of the activity's connection with or effect on U.S. commerce under section 2(i) of the CEA.[95] In particular, the Commission notes that some entities affected by this rulemaking are located outside of the United States.

(a) Summary of the Final Rule

As discussed in greater detail below, and in the foregoing preamble, the Commission believes that the amendments adopted by the Final Rules enable the Commission to discharge its regulatory oversight function with respect to the commodity interest markets. The Commission also believes that the Final Rules will reduce the potential burden on persons whose commodity interest activities are subject to the Commission's regulations applicable to CPOs and CTAs without reducing the overall regulatory benefits of those provisions. The Commission is amending existing 17 CFR part 4 regulations in a manner consistent with DSIO's CPO and CTA Family Office No-Action Letters by adopting new CPO and CTA registration exemptions under Regulations 4.13 and 4.14. Additionally, the Commission is adopting amendments to Regulations 4.7 and 4.13 to permit general solicitation under those provisions, consistent with the JOBS Act.

(b) Benefits of the Final Rule Amendments

The Commission expects that the addition of CPO and CTA registration

[91] As discussed above, these burden totals include adjustments made to Collection 3038–0023 to reflect the Final Rule amendments contained in this **Federal Register** release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, published elsewhere in this issue of the **Federal Register**.

[92] As noted above, any modifications necessary to the collections of information related to the proposed amendments to Regulation 4.5 or 4.27 are discussed in a separate **Federal Register** release.

[93] Proposal, 83 FR 52920.

[94] 7 U.S.C. 19(a).

[95] 7 U.S.C. 2(i).

exemptions for qualifying Family Offices will result in two main benefits. First, qualifying Family Offices will not be subject to the costs associated with registration, NFA membership, or compliance with part 4 of the Commission's regulations. The elimination of these costs should result in a reduction of the costs associated with the establishment and operation of a Family Office, which should ultimately benefit their family clients. Second, because the exemptions harmonize the Commission's treatment of Family Offices with that of the SEC, Family Offices will generally only be required to comply with one standard to determine their registration and compliance obligations with respect to both their securities and commodity interest transactions. Although DSIO had previously issued no-action relief letters for both CPO and CTA registration, Family Offices wishing to avail themselves of this relief were required to prepare a notice making specific representations and to submit the document electronically to a specific email inbox. Through this **Federal Register** release, the Commission is finalizing the CPO exemption for Family Offices without requiring any notice filing. Moreover, for Family Offices claiming relief from CTA registration, the Commission is adopting that exemption, as proposed, also without a notice filing requirement, consistent with the majority of the existing exemptions available to CTAs under Regulation 4.14.

The Commission believes also that the alignment of Regulations 4.7(b) and 4.13(a)(3) with the SEC's JOBS Act amendments to Regulation D and Rule 144A will result in several benefits. By harmonizing Commission regulations that specifically reference the statutory and regulatory provisions governing unregistered, exempt securities offerings, the amendments will facilitate full implementation of the JOBS Act by making the relief from the prohibition on general solicitation more widely available. Moreover, the amendments eliminate the distinction between private offerings of commodity pools and other privately offered collective investment vehicles that do not transact in commodity interests, thereby treating similarly situated offerors in a consistent manner. Thus, the Commission finds that there is a substantial benefit in aligning its regulations with those of its sister regulator, in the interest of fostering cooperation and comity, especially where there is limited customer protection risk for the retail public.

(c) Costs of the Final Rule Amendments

The Commission believes there are some costs associated with the Final Rules. Generally, CPOs and CTAs are subject to comprehensive regulation under the Commission's part 4 regulations, including disclosure, reporting, and recordkeeping requirements. Although the Commission continues to find that its regulatory concerns with respect to Family Offices are fundamentally different from those respective of CPOs and CTAs soliciting and serving the general public, the CPO and CTA exemptions adopted for Family Offices could conceivably be detrimental to persons who relied on CPO and CTA regulation with respect to Family Offices for some purpose. The Commission is adopting registration exemptions based on the requirements of the CPO and CTA Family Office No-Action Letters, upon which many Family Offices rely in place of CPO and CTA registration and regulation. As discussed above, the Commission continues to believe that Family Offices and their inherent characteristics present distinctions from the typical CPO-participant or CTA-client relationships that 17 CFR part 4 is designed to regulate, which justify the adoption of these exemptions. In particular, Family Offices eligible for these exemptions will be restricted to soliciting or providing advice to persons that are ''family clients,'' thereby limiting their contact or interaction with the public. The Commission further believes that these characteristics and limitations are a reasonable substitute for the benefits and protections afforded by the Commission's regulatory regime for CPOs and CTAs. Therefore, any detriment resulting from the CPO and CTA exemptions for Family Offices is expected to be minimal at most.

The Commission has determined to alter certain of its cost estimates from the Proposal, based on specific changes incorporated in the Final Rules. Regarding the CPO and CTA exemptions for Family Offices, the Commission no longer believes that CPOs claiming this relief will incur any expense related to a notice filing because it is adopting that exemption without such a requirement. Family Offices will, however, still be required to incur expenses associated with the initial determination as to their eligibility for the new exemptions. With respect to the CTA exemption for Family Offices, the Commission continues to believe that the costs associated with it will be limited to the expenses associated with making the determination as to the person's initial and ongoing eligibility for the exemption. The Commission does not have the necessary data to estimate the amount of these expenses, and though it requested comment as to the amount of these costs and how they compare to the costs of registration under 17 CFR part 4, no comments addressed this issue or provided any data.

Additionally, the Commission believes there may be some costs associated with the amendments to Regulations 4.7 and 4.13 based on the JOBS Act. By removing the restrictions on solicitation and marketing from those regulations, the Commission will be permitting general solicitation by those exempt operators in vehicles considered to be commodity pools. In considering the costs of similar regulatory amendments, the SEC noted that eliminating the prohibition on general solicitation could result in heightened fraudulent activity in offerings made pursuant to § 506(c) of Regulation D (17 CFR 230.506(c)) because promoters of fraudulent schemes could more easily reach potential investors through general solicitation; this, the SEC emphasized, could negatively impact capital formation and raising by legitimate issuers, which the JOBS Act was designed to promote.[96] After discussing historical data indicating that ''hedge funds'' are not disproportionately involved in fraudulent activity, when compared to other types of funds and advisers, the SEC stated further that such costs of general solicitation could be mitigated by the fact that such issuers would continue to be subject to antifraud provisions under the federal securities laws, and importantly, to restrictions on the sale of these securities to accredited investors, as well as verification requirements.[97]

The Commission also believes that permitting general solicitation in offerings subject to an exemption under Regulations 4.7(b) and 4.13(a)(3), consistent with the JOBS Act, could theoretically increase the instance of fraudulent activity or solicitation in those markets. The Commission notes that, consistent with the SEC amendments discussed above, persons complying with the terms of § 506(c) of Regulation D and Rule 144A and claiming relief under Regulations 4.7 or 4.13(a)(3) would still be required to limit participants in the offered pool to

[96] JOBS Act Adopting Release, 78 FR 44798–44800.

[97] 78 FR 44799 (noting further that ''the public nature of these solicitations may also facilitate detection of fraudulent activity in that the fraudulent nature of some offerings may be inferred from particular statements in solicitation materials'').

the permitted investors listed in those regulations. Maintaining this restriction on the participants in pools subject to these exemptions meets the Commission's goal of permitting such exempt CPOs to rely on JOBS Act relief, without sacrificing the remaining substantive requirements of those exemptions, and while minimizing any impact on or risk to non-permitted investors. Additionally, persons claiming exemptive relief under Regulation 4.7(b) are required to register with the Commission as a CPO, while persons claiming the exemption in Regulation 4.13(a)(3) would be exempt from such registration, and both types of CPO would still subject to antifraud provisions in the CEA. Accordingly, the Commission believes that adopting these amendments will neither result in an erosion of the customer protections provided to non-sophisticated, retail pool participants under 17 CFR part 4, nor will they cause an expansion of the relief available under Regulations 4.7 or 4.13(a)(3), beyond the discrete issue of permitted solicitation with respect to exempt securities offerings and their resales.

ii. Section 15(a)

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors:

(a) Factor 1: Protection of Market Participants and the Public

The Commission considered whether the amendments adopted in this release would have any detrimental effect on the customer protections of the Commission's regulatory regime. The Commission believes that the CPO and CTA exemptions for Family Offices will have a limited impact on the protection provided to market participants and the public. Because Family Offices, by definition, are not offered to persons other than family clients, the general public would generally not be negatively affected by the failure of Family Offices to register as CPOs and CTAs with the Commission. Moreover, as discussed above, the Commission finds that familial relationships inherent in Family Offices would provide a reasonable alternative mechanism to protect the interests of family clients. The Commission believes its regulatory interest in Family Offices is distinct from and much lower than in the case of arms-length transactions between CPOs and pool participants, or CTAs and advisory clients.

With respect to the JOBS Act amendments to Regulations 4.7 and 4.13, the Commission does not believe that these amendments will alter the protections currently available to market participants and the public. Pools offered pursuant to claims of relief under either Regulation 4.7 or 4.13(a)(3) will still be limited in their permitted participants to the persons listed in those regulations, and the relief provided will otherwise remain unchanged. As such, the general American public will not be able to purchase interests in pools that would not be subject to the full panoply of the compliance obligations under 17 CFR part 4. Therefore, there will be no reductions to the protections currently in place, by virtue of the JOBS Act amendments in the Final Rules.

(b) Factor 2: Efficiency, Competitiveness, and Financial Integrity of Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of efficiency, competitiveness, and financial integrity considerations. Inasmuch as the Final Rules do not directly impact how futures contracts or other derivatives are actually traded, the Commission believes that they will not have a significant impact on the efficiency, competitiveness, and financial integrity of markets.

(c) Factor 3: Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of price discovery considerations. Similarly, because the Final Rules do not directly impact how futures contracts or other derivatives are actually traded, the Commission believes that the amendments will not have a significant impact on price discovery.

(d) Factor 4: Sound Risk Management

Section 15(a)(2)(D) requires the Commission to evaluate the costs and benefits of a regulation in light of sound risk management practices. The Commission believes that the Final Rules will not have a significant impact on the practice of sound risk management because the manner in which various funds, operators, and advisors organize, register, or claim exemption from such registration, has only a small influence on how market participants manage their risks overall.

(e) Factor 5: Other Public Interest Considerations

Section 15(a)(2)(e) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of other public interest considerations. The Final Rules reflect the Commission's determination that such amendments harmonize Commission regulations with other federal laws, where appropriate, to exempt and reduce the regulatory burden on certain entities.

d. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under CEA section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.[98] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested comment on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments addressing this issue.

The Commission has considered the Final Rules to determine whether they are anticompetitive and has identified no anticompetitive effects. Because the Commission has determined the Final Rules are not anticompetitive and have no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 4 as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

Authority: 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a, and 23.

■ 2. In § 4.7:

■ a. Revise paragraph (b) introductory text;

[98] 7 U.S.C. 19(b).

■ b. Redesignate paragraphs (b)(1) through (5) as paragraphs (b)(2) through (6);

■ c. Add a new paragraph (b)(1); and

■ d. Revise newly redesignated paragraph (b)(3).

The revisions and addition read as follows:

§ 4.7 Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.

* * * * *

(b) *Relief available to commodity pool operators*—(1) *Eligibility.* Relief from specific compliance obligations is available to certain registered commodity pool operators with respect to the pool(s) they operate, *provided that* the registered commodity pool operator files the required notice under paragraph (d) of this section and otherwise complies with the conditions of paragraph (d) of this section in operating the exempt pool(s).

(i) *Types of commodity pools.* (A) Regarding an offering that is exempt from registration under section 4(a)(2) of the Securities Act of 1933, any registered commodity pool operator who offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool; *Provided,* that the prohibition on marketing to the public shall not apply to a registered commodity pool operator who offers or sells participations in a pool offered pursuant to § 230.506(c) of this title.

(B) Regarding an offering that is offered and sold pursuant to Regulation S, §§ 230.901 through 230.905 of this title, any registered commodity pool operator who offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool.

(C) Regarding a pool that is a collective trust fund, the securities of which are exempt from registration pursuant to section 3(a)(2) of the Securities Act of 1933, any bank registered as a commodity pool operator that offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool.

(ii) *Resales.* A registered commodity pool operator may claim any or all of the relief described in this paragraph (b) with respect to the pools described in paragraphs (b)(1)(i)(A) through (C) of this section, if participations in such pools are resold pursuant to Rule 144A (§ 230.144A of this title).

* * * * *

(3) *Periodic reporting relief.* (i) Exemption from the specific requirements of § 4.22(a) and (b), *provided,* that a statement signed and affirmed in accordance with § 4.22(h) is prepared and distributed to pool participants no less frequently than quarterly within 30 calendar days after the end of the reporting period. This statement must be presented and computed in accordance with generally accepted accounting principles and indicate:

(A) The net asset value of the exempt pool as of the end of the reporting period;

(B) The change in net asset value from the end of the previous reporting period; and

(C) Either the net asset value per outstanding participation unit in the exempt pool as of the end of the reporting period, or the total value of the participant's interest or share in the exempt pool as of the end of the reporting period.

(ii) Where the pool is comprised of more than one ownership class or series, the net asset value of the series or class on which the account statement is reporting, and the net asset value per unit or value of the participant's share, also must be included in the statement required by this paragraph (b)(3); except that, for a pool that is a series fund structured with limitation on liability among the different series, the account statement required by this paragraph (b)(3) is not required to include the consolidated net asset value of all series of the pool.

(iii) A commodity pool operator that meets the conditions specified in § 4.22(d)(2)(i) to present and compute the pool's financial statements contained in the Annual Report other than in accordance with generally accepted accounting principles, and has filed notice pursuant to § 4.22(d)(2)(iii), may also use the alternative accounting principles, standards or practices identified in that notice with respect to the computation and presentation of the account statement.

* * * * *

■ 3. Amend § 4.13 as follows:

■ a. Revise paragraphs (a)(3)(i) and (a)(3)(iii)(C) and (D);

■ b. Remove paragraph (a)(3)(iii)(E);

■ c. Redesignate paragraph (a)(6) as paragraph (a)(7);

■ d. Add a new paragraph (a)(6); and

■ e. Revise paragraphs (b)(1) introductory text and (c)(1) introductory text.

The revisions and addition read as follows:

§ 4.13 Exemption from registration as a commodity pool operator.

* * * * *

(a) * * *

(3) * * *

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and the interests are marketed and advertised to the public in the United States solely, if at all, in compliance with § 230.506(c) of this title, or with Rule 144A, § 230.144A of this title, as applicable;

* * * * *

(iii) * * *

(C) A ''knowledgeable employee,'' as that term is defined in § 270.3c–5 of this title; or

(D) A ''qualified eligible person,'' as that term is defined in § 4.7; and

* * * * *

(6) For each pool for which the person claims exemption under this paragraph (a)(6):

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold only to ''family clients,'' as defined in § 275.202(a)(11)(G)–1 of this title;

(ii) The person qualifies as a ''family office,'' as defined in § 275.202(a)(11)(G)–1 of this title; and

(iii) The person reasonably believes, at the time of investment, or in the case of an existing pool, at the time of conversion to a pool meeting the criteria of this paragraph (a)(6) of this section, that each person who participates in the pool is a ''family client'' of the ''family office,'' as defined in § 275.202(a)(11)(G)–1 of this title.

* * * * *

(b)(1) Any person who desires to claim the relief from registration provided by this section, except for any person claiming the exemption for family offices in paragraph (a)(6) of this section, must file electronically a notice of exemption from commodity pool operator registration with the National Futures Association through its electronic exemption filing system. The notice must:

* * * * *

(c)(1) Each person who has claimed an exemption from registration under this section must:

* * * * *

■ 4. In § 4.14, add paragraph (a)(11) to read as follows:

§ 4.14 Exemption from registration as a commodity trading advisor.

* * * * *

(a) * * *

(11) The person's commodity trading advice is solely directed to, and is for the sole use of, ''family clients,'' as defined in § 275.202(a)(11)(G)–1 of this title.

* * * * *

Issued in Washington, DC, on November 27, 2019, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs—Commission Voting Summary and Commissioner's Statement

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, and Stump voted in the affirmative. Commissioner Berkovitz voted in the negative.

Appendix 2—Dissenting Statement of Commissioner Dan M. Berkovitz

Rulemaking To Provide Exemptive Relief for Family Office CPOs: Customer Protection Should be More Important Than Relief for Billionaires

I dissent from today's final rule to provide registration exemptions for operators of commodity pools in large investment management structures euphemistically called ''family offices.'' These investment management structures typically manage hundreds of millions, sometimes billions, of dollars, in private wealth. The regulations that we proposed last year (Proposal) balanced the family office exemption with an annual notice filing requirement and a prohibition on persons who were statutorily disqualified from operating commodity pools from claiming the exemption.[1] Today's final rule provides a blanket exemption for the operators of commodity pools (CPOs) in family offices without either of these minimal checks and balances. It is absurd that the Commission is excusing billionaires from the notice-filing requirement that generally applies to other persons—who have a fraction of that immense wealth—who claim exemptions from CPO registration.[2] And persons that are statutorily disqualified from registering should not be permitted to operate under an exemption from registration. Disqualified persons should be disqualified.

Family Office Registration Exemption

The final rule exempts CPOs and commodity trading advisors (CTAs) from registration requirements in connection with commodity pools that are solely for the use of entities that are called ''family offices.''

''Family Offices'' Are Very Large Enterprises

According to the Securities and Exchange Commission (''SEC''), whose definition of ''family office'' is used in today's rulemaking, '''Family offices' are entities established by wealthy families to manage their wealth and provide other services to family members, such as tax and estate planning services.''[3] Family offices, however, are not and have never been used by ordinary families who may have a modest degree of wealth, but rather by the extraordinarily wealthy—including royalty, aristocrats, and wealthy entrepreneurs, bankers and hedge fund operators—who create these organizations to preserve, grow, and pass on their wealth to their descendants.[4] Under the SEC's definition, family offices are not limited to managing the wealth of the related members of a family, but may also include ''family clients,'' which includes key employees of the family office, any non-profit or charitable organization funded exclusively by family members, certain family client trusts, and any company wholly-owned by and operated for the sole benefit of family clients.[5]

By any measure, family offices today manage extremely large amounts of wealth. According to the Global Family Office Report 2019, ''[t]he average family wealth of those surveyed for this report stands at USD 1.2 billion, while the average family office has USD 917 million in [assets under management].''[6] Another source reports that, as of 2014, ''of the 34 family offices surveyed, the financial size of the office ranged from $42 million to well over $1.5 billion, with a median of $275 million assets under supervision and a mean of $516 million.''[7] Although there remain family offices with tens of millions of dollars in assets under management, over the past decade the costs of running a family office have increased significantly. It is now estimated ''that the operating costs to build out a fully functioning family office typically require a minimum in the range of $500 million to $1 billion.''[8]

The aggregate amount of wealth managed by family offices is staggering. By one estimate, the total assets under management by family offices is over $4 trillion, and the number of family offices has grown ten-fold in the last decade.[9] A recent Forbes article noted that ''[f]amily offices are now capable of making transactions that were traditionally reserved for big companies or private-equity firms and therefore are becoming a *disruptive force in the market-place*.''[10]

The Family Office Exemption

As explained in both the Proposal and today's final rule, family offices typically have been exempt from CPO registration. When the previous regulation that family offices relied upon for an exemption was repealed in 2012, the Commission provided no-action relief to enable family offices to continue to be exempt from registration. Family offices are currently operating on an exempt basis under this no-action relief.

The rationale for providing registration relief to pools investing the money of family members has merit. The commodity pool regulatory regime is in significant part directed at those who solicit funds for the pools and preventing investor fraud and misuse of customer funds. Presumably, these concerns are less likely to arise if a pool is an investment vehicle for investors who are related to each other and do not solicit funds from the general public.[11] I voted for the Proposal to seek comments on making permanent the no-action relief from registration currently available to family office pool operators.

Family Offices Are Currently Required To Provide Notice for a CPO Exemption

But whereas the Proposal included sensible initial and annual notice filing requirements for an exempt CPO that would notify the Commission that it is electing the exemption, the final rule eliminates that

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[1] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, Notice of proposed rulemaking, 83 FR 52902 (Oct. 18, 2018).

[2] *See* 17 CFR 4.13(b).

[3] SEC, *SEC Adopts Rule Under Dodd-Frank Defining ''Family Offices''* (June 22, 2011), available at: *sec.gov/news/press/2011-134.htm*.

[4] According to one guide to family offices:

Family offices have their roots in the sixth century, when a king's steward was responsible for managing royal wealth. Later on, the aristocracy also called on this service from the steward, creating the concept of stewardship that still exists today. But the modern concept of the family office developed in the 19th century. In 1838, the family of financier and art collector J.P. Morgan founded the House of Morgan to manage the family assets. In 1882, the Rockefellers founded their own family office, which is still in existence and provides services to other families.

EY Family Office Guide, *Pathway to successful family and wealth management,* at 4, available at: *https://www.ey.com/en_us/tax/family-office-advisory-services*.

[5] 17 CFR 275.202(a)(11)(G)–1. Under the SEC's definition, the term ''family member'' is quite broad, meaning all lineal descendants of a common ancestor (who may be living or deceased), and such lineal descendants' spouses or spousal equivalents; provided that the common ancestor is no more than 10 generations removed from the youngest generation of family members. 17 CFR 275.202(a)(11)(G)–1(d)(6).

[6] Campden Research and UBS, *The Global Family Office Report 2019,* at 10, available at: *https://www.ey.com/en_us/tax/family-office-advisory-services*.

[7] Kirby Rosplock, The Complete Family Office Handbook, A Guide for Affluent Families and the Advisors Who Serve Them, at 8 (Wiley, Bloomberg Press, 2014).

[8] *Id.*

[9] Francois Botha, *The Rise of the Family Office: Where Do They Go Beyond 2019?,* Forbes (Dec. 17, 2018), available at: *https://www.forbes.com/sites/francoisbotha/2018/12/17/the-rise-of-the-family-office-where-do-they-go-beyond-2019/#426044f55795*.

[10] *Id* (emphasis added).

[11] However, affinity fraud, including defrauding relatives, is not unheard of. *See, e.g.,* Consent Order, *CFTC* v. *Carter,* No. 18–cv–242, 2018 WL 7140335 (N. D. Ill. Nov. 13, 2018) and Complaint, *CFTC* v. *Williams,* No. 2:17–cv–01325, 2017 WL 1755463 (D. Ariz. May 3, 2017).

requirement. To date, family office CPOs claiming an exemption from registration has been required to provide notice to the CFTC of their claim for exemption. The current no-action relief imposes a notice requirement,[12] as did the previous regulatory exemption that was relied upon by family office CPOs prior to its repeal in 2012.[13] Neither of these notice requirements placed any significant burdens or costs upon family office CPOs.[14]

The Proposal would have subjected persons claiming an exemption from CPO registration to the same notice requirements that apply to other types of CPOs claiming an exemption from registration under Regulation 4.13. Under Regulation 4.13, a person claiming any of the enumerated exemptions from CPO registration is required to provide his or her name, address, telephone number, fax number, and email address, and the name of the pool for which it is claiming the exemption.[15] In the Proposal the Commission estimated that the notice filing would cost approximately $28.50 per pool annually.[16]

The estimated $28.50 annual cost of filing a notice of claim of exemption is trivial compared to the hundreds of millions of dollars managed by the average family office CPO. All other types of CPOs claiming an exemption under Regulation 4.13, such as operators of single pools without compensation, or operators of small pools with less than $400,000 in capital, are required to file the same notice of a claim of exemption. There is no rational justification for exempting large family office pools with hundreds of millions of dollars, or in many cases billions of dollars, under management from the minimal notice requirements that apply to other, less wealthy persons claiming exemptions from CPO registration.

The CFTC's interest in commodity pool operators is not limited to the protection of investors in the pool. The Commission has a significant interest in how the activities of these pool operators may affect the commodity markets. Congress has declared in section 4l of the Commodity Exchange Act (CEA) that the activities of commodity trading advisors and commodity pool operators are affected with a national public interest in that, among other things their operations are directed toward and cause the purchase and sale of commodities for future delivery and the foregoing transactions occur in such volume as to affect substantially transactions on contract markets.[17] The Commission has a significant interest in knowing the identity of the persons that operate these pools, including those that are exempt from registration. This significant interest is manifested in the Commission's requirement that all other exempt CPOs provide the Commission with annual notices claiming or affirming their exemption from registration. The Commission's interest in the activities of large, multimillion dollar family pool CPOs is certainly no less than the Commission's interest in the activities of smaller CPOs, all of which are required to provide annual notice when they claim an exemption from registration.

The Commission eliminates the notice requirement largely on the basis that this will harmonize the Commission's regulations with those of the SEC. Harmonization for harmonization's sake is not a rational basis for agency action. The question for the CFTC is not whether the SEC has determined whether a notice requirement is appropriate, but rather whether the CFTC would benefit from a notice requirement under the CFTC's system of regulations. To the extent that the Commission believes it has no regulatory interest in the operation of commodity pools beyond the protection of investors in the pool, such a belief is manifestly wrong and inconsistent with Congress's finding in CEA section 4l. The Commission has a significant regulatory interest in knowing the identity of CPOs that may be ''a disruptive force in the market-place.'' [18] The Commission's mission would be better served by harmonizing the family pool CPO exemption process with its own regulations for exempt CPOs rather than the SEC's regulations.

Disqualification of Disqualified Persons

The Proposal would have prohibited any person who was subject to a statutory disqualification from registration from claiming an exemption from registration. The logic underlying this provision is simple: a person who is disqualified from operating a commodity pool in a registered capacity should also be disqualified from operating a pool in an unregistered capacity. Disqualified persons should be disqualified. In the Proposal the Commission stated:

The Commission is concerned that it poses undue risk from a customer protection standpoint for its regulations in their current form to permit statutorily disqualified persons or entities to legally operate exempt commodity pools, especially when those same persons would not be permitted to register with the Commission. The Commission preliminarily believes that preserving the prohibition on statutory disqualifications from Advisory 18–96 and applying it to exemptions under § 4.13 would provide a substantial customer protection benefit by prohibiting statutorily disqualified persons from operating and soliciting participants for investment in exempt commodity pools.[19]

The National Futures Association (NFA) submitted a comment letter ''fully support[ing]'' the disqualification of disqualified persons. NFA stated:

[T]he Commission aptly states in the **Federal Register** release that the proposed prohibition would provide a substantial customer protection benefit. In particular, the proposed change addresses a significant regulatory gap in the Commission's exemption framework and will certainly strengthen customer protection by ensuring that a person who may be prohibited from registering as a CPO is not able to operate an exempt fund outside of the Commission's and NFA's regulatory oversight.[20]

In today's final rule the Commission states that commenters raised a number of issues regarding the statutory disqualification proposal that require further consideration. I agree that the Commission should address these comments. But it should have done so prior to granting today's exemptions from registration. Customer protection should be our first priority, and not deferred indefinitely. The Commission should have addressed these comments and finalized the disqualification rule prior to granting today's exemption for family offices. Customer protection should not take a back seat to exemptions from regulations for billionaires.

The approval of this rule without any checks and balances on exempt family office CPOs will increase risks to our markets and market participants. I therefore dissent.

[FR Doc. 2019–26162 Filed 12–9–19; 8:45 am]

BILLING CODE 6351–01–P

[12] CFTC Letter No. 12–37, at 2–3 (Nov. 29, 2012), available at: *https://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-37.pdf.*

[13] 17 CFR 4.13(b) (2011).

[14] Under the current no-action relief, a person claiming the exemption must provide the claimant's name, business address, and telephone number, state the capacity (*i.e.,* CPO) and name of the pool for which the claim is being filed, and be electronically signed by the CPO. CFTC Letter No. 12–37, at 2–3.

[15] 17 CFR 4.13(b)(1) (2019).

[16] Proposal, at 52923. Based on the notices filed under the CFTC No Action Letter 12–37, the Commission estimated that approximately 200 CPOs would be affected, with an average of 3 pools each that would be subject to the notice requirement. *Id.*

[17] 7 U.S.C. 6l.

[18] *See supra* note 10.

[19] Proposal, 83 FR 52906.

[20] Letter from Carol Wooding, Vice President, General Counsel and Secretary, National Futures Association, to Christopher J. Kirkpatrick, Secretary of the Commission, Re: RIN 3038–AE76: Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors (Dec. 17, 2018).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9886]

RIN 1545–BJ92

Calculation of UBTI for Certain Exempt Organizations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation and removal of temporary regulation.

SUMMARY: This document contains a final regulation providing guidance on how certain organizations that provide employee benefits must calculate unrelated business taxable income (UBTI).

DATES:

Effective Date: This regulation is effective December 10, 2019.

Applicability Date: This regulation applies to taxable years beginning on or after December 10, 2019. For rules that apply to earlier periods, see § 1.512(a)–

5T as contained in 26 CFR part 1, revised April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Jennifer Solomon or Janet Laufer at (202) 317–5500 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final Income Tax Regulations (26 CFR part 1) under section 512(a) of the Code. Organizations that are otherwise exempt from tax under section 501(a) are subject to tax on their unrelated business taxable income (UBTI) under section 511(a). Section 512(a) of the Code generally defines UBTI of exempt organizations and provides special rules for calculating UBTI for organizations described in section 501(c)(7) (social and recreational clubs), voluntary employees' beneficiary associations described in section 501(c)(9) (VEBAs), and supplemental unemployment benefit trusts described in section 501(c)(17) (SUBs).

Section 512(a)(1) provides a general rule that UBTI is the gross income from any unrelated trade or business regularly carried on by the organization, less certain deductions. Under section 512(a)(3)(A), in the case of social and recreational clubs, VEBAs, and SUBs, UBTI is defined as gross income, less directly connected expenses, but excluding ''exempt function income.''

Exempt function income is defined in section 512(a)(3)(B) as gross income from two sources. The first type of exempt function income is amounts paid by members as consideration for providing the members or their dependents or guests with goods, facilities, or services in furtherance of the organization's exempt purposes. The second type of exempt function income is all income (other than an amount equal to the gross income derived from any unrelated trade or business regularly carried on by the organization computed as if the organization were subject to section 512(a)(1)) that is set aside: (1) For a charitable purpose specified in section 170(c)(4); (2) in the case of a VEBA or SUB, to provide for the payment of life, sick, accident, or other benefits; or (3) for reasonable costs of administration directly connected with a purpose described in (1) or (2).

As described in greater detail below, section 512(a)(3)(E) generally limits the amount that a VEBA or SUB may set aside as exempt function income to an amount that does not result in an amount of total assets in the VEBA or SUB at the end of the taxable year that exceeds the section 419A account limit for the taxable year. As specified in section 512(a)(3)(E)(i), for this purpose, the account limit does not take into account any reserve under section 419A(c)(2)(A) for post-retirement medical benefits.

Section 512(a)(3)(E) was added to the Code under the Tax Reform Act of 1984, Public Law 98–369 (98 Stat. 598 (1984)). Congress enacted section 512(a)(3)(E) to limit the extent to which a VEBA's or SUB's income is exempt from tax, noting that ''[p]resent law does not specifically limit the amount of income that can be set aside'' by a VEBA or SUB on a tax-free basis. H.R. Rep. No. 98–432, pt. 2, at 1275.

To implement section 512(a)(3)(E), § 1.512(a)–5T was published in the **Federal Register** as TD 8073 on February 4, 1986 (51 FR 4312), with an immediate effective date. A cross-referencing Notice of Proposed Rulemaking (the 1986 proposed regulation) was issued contemporaneously with the temporary regulation. Written comments were received on the 1986 proposed regulation, and a public hearing was held on June 26, 1986. The 1986 proposed regulation was withdrawn and replaced by a new proposed regulation (the 2014 proposed regulation) that was published in the **Federal Register** on February 6, 2014 (79 FR 7110). The Treasury Department and the IRS received two comments on the 2014 proposed regulation. No public hearing was held.

The Treasury Department and the IRS have considered the comments received in response to the 2014 proposed regulation. This final regulation adopts the provisions of the 2014 proposed regulation with no modifications other than the following changes: (1) A change in the applicability date to taxable years beginning on or after the date of publication of this final regulation; (2) the addition of a clause modifying the definition of covered entity to include certain corporations described in section 501(c)(2), as provided in section 512(a)(3)(C); (3) the addition of a clause which refers to the provision in section 512(a)(3)(D) addressing nonrecognition of gain in the case of sales of certain property; and (4) updates to the examples, formatting changes, and other minor changes in wording, which are nonsubstantive. The modifications to the definition of covered entity and the addition of the clause addressing nonrecognition of gain are described under the heading ''Summary of Comments and Explanation of Provisions.'' The temporary regulation is removed.

Summary of Comments and Explanation of Provisions

Covered Entity

Consistent with the 2014 proposed regulation, this final regulation uses the uniform term ''Covered Entity'' to describe VEBAs and SUBs subject to the UBTI computation rules of section 512(a)(3).[1] For taxable years beginning after June 30, 1992, group legal services organizations (GLSOs) are no longer exempt as section 501(c)(20) organizations.[2] *See* section 120(e). Therefore, a GLSO is no longer a Covered Entity.

The 2014 proposed regulation did not reflect the provision of section 512(a)(3)(C), which provides that section 512(a)(3)(A) applies to a corporation described in section 501(c)(2), the income of which is payable to an organization described in section 501(c)(7), (9), or (17), as if the corporation were the organization to which the income is payable. For this purpose, the corporation is treated as having exempt function income for a taxable year only if it files a consolidated return with the organization described in section 501(c)(7), (9), or (17). In this final regulation, a clause has been added to clarify that the term ''Covered Entity'' includes a corporation described in section 501(c)(2) to the extent provided in section 512(a)(3)(C).

Nonrecognition of Gain

The 2014 proposed regulation did not reflect the provision of section 512(a)(3)(D) regarding nonrecognition of gain with respect to the sale of certain property. In this final regulation, a clause has been added to refer to that provision. Section 512(a)(3)(D) provides that, if property used directly in the performance of the exempt function of a Covered Entity is sold by the Covered Entity, and other property is purchased and used by the Covered Entity directly in the performance of its exempt function within a four-year period beginning one year before the date of the sale, and ending three years after the date of sale, gain (if any) from the sale is recognized only to the extent that the sales price of the old property exceeds the Covered Entity's cost of purchasing the other property.

[1] While section 501(c)(7) organizations are also subject to the UBTI computation rules of section 512(a)(3), this regulation addresses only computations for VEBAs and SUBs.

[2] The preamble of the 2014 proposed regulation referred to GLSOs. However, on December 19, 2014, the Tax Increase Prevention Act of 2014, Public Law 113–295 (128 Stat. 4010) repealed sections 120 and 501(c)(20) regarding GLSOs as ''deadwood'' provisions.

Limitation on Amounts Set Aside for Exempt Purposes

Section 512(a)(3)(E)(i) limits the amount of investment income a Covered Entity may treat as nontaxable exempt function income in any given year to the extent such income ''result[s] in'' a year-end account balance ''in excess of'' the modified section 419A account limit. An account overage can be considered the result of, or essentially caused by, investment income only by considering all investment income earned during the year. Thus, in order to give an appropriate meaning to the term ''result in'', the total amount of investment income earned during the year should be considered when calculating whether an excess exists at the end of the year.

Certain taxpayers have taken a contrary position and asserted that investment income may be set aside and used separately before the end of a taxable year for current benefit payments and related administrative costs (collectively, ''benefit expenditures'') and thereby avoid the limit imposed by section 512(a)(3)(E)(i) on exempt function income. In *Sherwin-Williams Co. Employee Health Plan Trust* v. *Comm'r,* 330 F.3d 449 (6th Cir. 2003), *rev'g,* 115 T.C. 440 (2000), the Sixth Circuit Court of Appeals held that investment income that the VEBA earmarked and claimed was spent before year-end on reasonable costs of administration was not subject to the section 512(a)(3)(E)(i) limit on exempt function income. In contrast, in *CNG Transmission Mgmt. VEBA* v. *U.S.,* 588 F.3d 1376 (Fed. Cir. 2009), *aff'g,* 84 Fed. Cl. 327 (2008), the Federal Circuit Court of Appeals rejected this argument. The Court stated that the ''language of section 512(a)(3)(E) is clear and unambiguous,'' and upheld the Court of Federal Claims' conclusion that a VEBA ''may not avoid the limitation on exempt function income in [section] 512(a)(3)(E)(i) merely by allocating investment income toward the payment of welfare benefits during the course of the tax year.'' *CNG,* 558 F.3d at 1379, 1377–78; *accord Northrop Corp. Employee Insurance Benefit Plans Master Trust* v. *U.S.,* 99 Fed. Cl. 1 (2011), *aff'd,* 467 Fed. Appx. 886 (Fed. Cir. April 10, 2012), *cert. denied,* (Dec. 3, 2012).

The Treasury Department and the IRS have concluded that the decision in *Sherwin-Williams* is contrary to the statute, the legislative history of section 512(a)(3)(E), § 1.512(a)–5T, and the 1986 and 2014 proposed regulations, and have determined that it is appropriate to issue this final regulation clarifying the proper calculation method.[3] Specifically, the Treasury Department and the IRS disagree with the Sixth Circuit's conclusion that investment income may be set aside and used separately before the end of a taxable year to pay the reasonable costs of administering health care benefits and thereby avoid the limit imposed by section 512(a)(3)(E)(i) on exempt function income.[4]

The fungible nature of money means that there is necessarily a connection between investment income that a Covered Entity earns during the year and the total amount of funds in the entity at year-end, even if the Covered Entity purports to apply all of that income to benefit expenditures. For example, a VEBA with a beginning balance of $1,000, investment income of $100, benefit expenditures of $3,000, and employer contributions of $3,000, will have a year-end balance of $1,100. This will be true regardless of whether the VEBA allocates the investment income to the benefit expenditures. Assume that the VEBA's year-end account limit under section 512(a)(3)(E)(i) is $1,010, so that there is an account overage of $90. Absent $90 of the investment income, the VEBA would have had a year-end account balance of $1,010 and no account overage. Thus, $90 of the investment income in the example ''result[s] in'' a year-end account balance ''in excess of'' the VEBA's year-end account limit and may not be set aside and excluded as exempt function income.

The analysis that all investment income earned during a year should be considered in determining whether there is an account overage is consistent with the Joint Committee on Taxation's report with respect to the legislation that enacted section 512(a)(3)(E). This report indicated that investment income is subject to UBTI in ''an amount equal to the lesser of the income of the fund or the amount by which the assets in the fund exceed a specific limit on amounts set aside for exempt purposes.'' *See* Staff of the Joint Comm. on Taxation, 98th Cong., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984,* at 790 (Comm. Print 1984) (JCS–41–84). Accordingly, the Treasury Department and the IRS continue to interpret section 512(a)(3)(E)(i) to mean that whether a VEBA or SUB allocated its investment income (rather than other funds) to current year expenditures is irrelevant to the application of the set aside limitation.

As discussed above, the statutory provisions are not dependent upon a determination as to whether particular sources of income were used for benefit expenditures in any particular year. Rather, the ''result in'' language of section 512(a)(3)(E)(i) means that amounts set aside for benefit expenditures are treated as exempt function income only to the extent the total amount set aside for such purposes as of the end of the year is equal to or less than ''the account limit determined under section 419A . . . for the taxable year (not taking into account any reserve described in section 419A(c)(2)(A) for post-retirement medical benefits).'' Accordingly, the final regulations reflect this rule, and, for taxable years to which these regulations apply, the IRS will apply this final regulation to cases arising in the Sixth Circuit.

This final regulation retains the formula, description, and examples set forth in the 2014 proposed regulation. The 2014 proposed regulation retained the formula set forth in the 1986 proposed regulation and § 1.512(a)–5T, but modified and clarified the description and added examples. Thus, consistent with the 2014 proposed regulation, this final regulation specifically states that any investment income a Covered Entity earns during the taxable year is subject to unrelated business income tax (UBIT) to the extent the Covered Entity's year-end assets exceed the account limit, and clarifies that this rule applies regardless of how that income is used.

The IRS received two comments on the 2014 proposed regulation. One of the commenters asked that the proposed regulation be withdrawn on the basis that it is inconsistent with the statute, while the other commenter indicated his view that the position taken in the proposed regulation is a fair interpretation of the statute. With respect to the request that the 2014 proposed regulation be withdrawn, the Treasury Department and the IRS have concluded that the position in the 2014 proposed regulation, and adopted in this final regulation, is not only consistent with the statute, but is correct

[3] The IRS's interpretation is set forth in its non-acquiescence to the *Sherwin-Williams* decision (AOD 2005–02, 2005–35 I.R.B. 422). In AOD 2005–02, the IRS recognized the precedential effect of the decision to cases appealable to the Sixth Circuit and indicated that it would follow the decision in *Sherwin-Williams* with respect to cases within that circuit if the opinion could not be meaningfully distinguished.

[4] Notably, the Sixth Circuit opinion in *Sherwin-Williams* concluded that section 512(a)(3)(E)(i) supported the interpretation adopted by the court, not that the interpretation was based on the unambiguous terms of the statute or even the best reading of the statute. The Sixth Circuit also erroneously considered the 1986 temporary regulation as consistent with that interpretation.

for the reasons set forth in this preamble.

Both of the commenters expressed concern over the proposed applicability date in the 2014 proposed regulation because of its potential impact on VEBAs within the Sixth Circuit's jurisdiction. The 2014 proposed regulation proposes that it will apply to taxable years ending on or after the date of publication of the final regulation. One commenter argued that the proposed applicability date would be unfair to VEBAs that are within the Sixth Circuit's jurisdiction because these VEBAs and their sponsors have been operating in good faith under a tax regime that a federal court of appeals held is the law. The commenter suggested that if the 2014 proposed regulation were finalized as proposed, the regulation should apply only with respect to taxable years beginning six months after the date the final regulation is published in the **Federal Register**, at least for VEBAs within the Sixth Circuit's jurisdiction.

The other commenter stated that VEBAs that account for investment income in the manner approved by the Sixth Circuit have been operating in good faith and in accordance with a reasonable interpretation of the relevant Code provisions. The commenter expressed concern that if the regulation were finalized in the manner in which it was proposed, the investment income of those VEBAs would be retroactively taxed. The commenter therefore requested that the proposed applicability date be changed in the final regulation to the first taxable year beginning on or after the date of publication of the final regulation.

Taking into account these comments, the Treasury Department and the IRS have decided to modify the applicability date, so that this final regulation applies to taxable years beginning on or after the date of publication of the final regulation (and so for VEBAs within the Sixth Circuit's jurisdiction, the position reflected in AOD 2005–02 would apply through the end of the VEBA's taxable year in which the final regulation is issued).

Effective/Applicability Date

This regulation is effective on December 10, 2019. The regulation applies to taxable years beginning on or after December 10, 2019. For rules that apply to earlier periods, see § 1.512(a)–5T as contained in 26 CFR part 1, revised April 1, 2019.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Because this regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply). Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of this regulation are Jennifer Solomon and Janet Laufer, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of this regulation.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805, unless otherwise noted.

* * * * *

■ **Par. 2.** Section 1.512(a)–55 is added to read as follows:

§ 1.512(a)–5 Questions and answers relating to the unrelated business taxable income of organizations described in paragraphs (9) or (17) of section 501(c).

(a)(1) *Q–1.* What does section 512(a)(3) provide with respect to organizations described in paragraphs (9) or (17) of section 501(c)?

(2) *A–1.* (i) In general, section 512(a)(3) provides rules for determining the unrelated business income tax of voluntary employees' beneficiary associations (VEBAs) and supplemental unemployment benefit trusts (SUBs). Under section 512(a)(3)(A), a Covered Entity's ''unrelated business taxable income'' (UBTI) means all income except exempt function income. Under section 512(a)(3)(B), exempt function income includes income that is set aside for exempt purposes, as described in paragraph (b) of this section, subject to certain limits, as described in paragraph (c) of this section.

(ii) For purposes of this section, a ''Covered Entity'' means a VEBA or a SUB, and, to the extent provided in section 512(a)(3)(C), a corporation described in section 501(c)(2).

(b)(1) *Q–2.* What is exempt function income?

(2) *A–2.* (i) Under section 512(a)(3)(B), the exempt function income of a Covered Entity for a taxable year means the sum of—

(A) Amounts referred to in the first sentence of section 512(a)(3)(B) that are paid by members of the Covered Entity and employer contributions to the Covered Entity (collectively ''member contributions'');

(B) Other income of the Covered Entity (including earnings on member contributions) that is set aside for a purpose specified in section 170(c)(4) and reasonable costs of administration directly connected with such purpose; and

(C) Other income of the Covered Entity (including earnings on member contributions) that, subject to the limitation of section 512(a)(3)(E) (as described in paragraph (c) of this section), is set aside for the payment of life, sick, accident, or other benefits and reasonable costs of administration directly connected with such purpose.

(ii) The other income described in paragraphs (b)(2)(i)(B) and (C) of this section does not include the gross income derived from any unrelated trade or business (as defined in section 513) regularly carried on by the Covered Entity, computed as if the organization were subject to section 512(a)(1).

(c)(1) *Q–3.* What are the limits on the amount that may be set aside?

(2) *A–3.* (i) Pursuant to section 512(a)(3)(E)(i), and except as provided in paragraph (c)(2)(ii) of this section, the amount of investment income (as defined in paragraph (c)(2)(iii) of this section) set aside by a Covered Entity as of the close of a taxable year of such Covered Entity to provide for the payment of life, sick, accident, or other benefits (and administrative costs associated with the provision of such benefits) is not taken into account for purposes of determining the amount of that income that constitutes ''exempt function income'' to the extent that the total amount of the assets of the Covered Entity at the end of the taxable year set aside to provide for the payment of life, sick, accident, or other benefits (and related administrative costs) exceeds the applicable account limit for such taxable year of the Covered Entity (as described in paragraph (c)(2)(iv) of this

section). Accordingly, any investment income a Covered Entity earns during the taxable year is subject to unrelated business income tax to the extent the Covered Entity's year-end assets exceed the applicable account limit. The rule in this paragraph (c)(2) applies regardless of whether the Covered Entity spends or retains (or is deemed to spend or deemed to retain) that investment income during the course of the year. Thus, in addition to the unrelated business taxable income derived by a Covered Entity from any unrelated trade or business (as defined in section 513) regularly carried on by it, computed as if the organization were subject to section 512(a)(1), the unrelated business taxable income of a Covered Entity for a taxable year of such an organization includes the lesser of—

(A) The investment income of the Covered Entity for the taxable year; and

(B) The excess (if any) of—

(*1*) The total amount of the assets of the Covered Entity (excluding amounts set aside for a purpose described in section 170(c)(4)) as of the close of the taxable year; over

(*2*) The applicable account limit for the taxable year.

(ii) In accordance with section 512(a)(3)(E)(iii), a Covered Entity is not subject to the limits described in this paragraph (c) if substantially all of the contributions to the Covered Entity are made by employers who were tax exempt throughout the five year taxable period ending with the taxable year in which the contributions are made.

(iii) For purposes of this section, a Covered Entity's ''investment income''—

(A) Means all income except—

(*1*) Member contributions described in paragraph (b)(2)(i)(A) of this section;

(*2*) Income set aside as described in paragraph (b)(2)(i)(B) of this section; or

(*3*) Income from any unrelated trade or business described in paragraph (b)(2)(ii) of this section; and

(B) Includes gain realized by the Covered Entity on the sale or disposition of any asset during such year (other than gain on the sale or disposition of assets of an unrelated trade or business described in paragraph (b)(2)(ii) of this section), except to the extent provided in section 512(a)(3)(D).

(C) For purposes of paragraph (c)(2)(iii)(B) of this section, the gain realized by a Covered Entity on the sale or disposition of an asset is equal to the amount realized by the organization over the basis of such asset in the hands of the organization reduced by any qualified direct costs attributable to such asset (under paragraphs (b), (c), and (d) of Q&A–6 of § 1.419A–1T).

(iv) In calculating the total amount of the assets of a Covered Entity as of the close of the taxable year, certain assets with useful lives extending substantially beyond the end of the taxable year (for example, buildings and licenses) are not to be taken into account to the extent they are used in the provision of life, sick, accident, or other benefits. By contrast, cash and securities (and other similar investments) held by a Covered Entity are taken into account in calculating the total amount of the assets of a Covered Entity as of the close of the taxable year because they may be used to pay welfare benefits, rather than merely used in the provision of such benefits.

(v) The determination of the applicable account limit for purposes of this paragraph (c) is made under the rules of sections 419A(c) and 419A(f)(7), except that a reserve for post-retirement medical benefits under section 419A(c)(2)(A) is not to be taken into account. See § 1.419A–2T for special rules relating to collectively bargained welfare benefit funds.

(vi) The limits of this paragraph (c) apply to a Covered Entity that is part of a 10 or more employer plan, as defined in section 419A(f)(6). For purposes of this paragraph (c), the account limit is determined as if the plan is not subject to the exception under section 419A(f)(6).

(vii) The following examples illustrate the calculation of a VEBA's UBTI.

(A) *Example 1.* (*1*) Employer *X* establishes a VEBA as of January 1, 2015, through which it provides health benefits to active employees. The plan year is the calendar year. The VEBA has no employee contributions or member dues, receives no income from an unrelated trade or business regularly carried on by the VEBA, and has no income set aside for a purpose specified in section 170(c)(4). The VEBA's investment income in 2020 is $1,000. As of December 31, 2020, the applicable account limit under section 512(a)(3)(E)(i) is $5,000 and the total amount of assets of the VEBA is $7,000.

(*2*) The VEBA's UBTI for 2020 is $1,000. This is because the UBTI is the lesser of the investment income for the year ($1,000) and the excess of the VEBA assets over the account limit at the end of the year ($7,000 over $5,000, or $2,000).

(B) *Example 2.* (*1*) The facts are the same as in the example in paragraph (c)(2)(vii)(A) of this section (*Example 1*), except that the VEBA's applicable account limit under section 512(a)(3)(E)(i) as of December 31, 2020, is $6,500.

(*2*) The VEBA's UBTI for 2020 is $500. This is because the UBTI for 2020 is the lesser of the investment income for the year ($1,000) and the excess of the VEBA assets over the account limit at the end of the year ($7,000 over $6,500, or $500).

(C) *Example 3.* (*1*) Employer *Y* contributes to a VEBA through which *Y* provides health benefits to active and retired employees. The plan year is the calendar year. At the end of 2020, there was no carryover of excess contributions within the meaning of section 419(d), the balance in the VEBA was $25,000, the Incurred but Unpaid (IBU) claims reserve was $6,000, the reserve for post-retirement medical benefits (PRMB) (computed in accordance with section 419A(c)(2)) was $19,000, and there were no existing reserves within the meaning of section 512(a)(3)(E)(ii). During 2021, the VEBA receives $70,000 in employer contributions and $5,000 in investment income, pays $72,000 in benefit payments and $7,000 in administrative expenses, and receives no income from an unrelated trade or business regularly carried on by the VEBA. All the 2021 benefit payments are with respect to active employees and the IBU claims reserve (that is, the account limit under section 419A(c)(1)) at the end of 2021 was $7,200. The reserve for PRMB at the end of 2021 is $20,000. All amounts designated as ''administrative expenses'' are expenses incurred in connection with the administration of the employee health benefits. ''Investment income'' is net of administrative costs incurred in the production of the investment income (for example, investment management and/or brokerage fees). Only employers contributed to the VEBA (that is, there were no employee contributions or member dues/fees). The VEBA does not set aside any income for the purpose specified in section 170(c)(4).

(*2*) The total amount of assets of the VEBA at the end of 2021 is $21,000 (that is, $25,000 beginning of year balance + $70,000 contributions + $5,000 investment income − ($72,000 in benefit payments + $7,000 in administrative expenses)).

(*3*) The applicable account limit under section 512(a)(3)(E)(i) (that is, the account limit under section 419A(c), excluding the reserve for post-retirement medical benefits) is the IBU claims reserve ($7,200).

(*4*) The total amount of assets of the VEBA as of the close of the year ($21,000) exceeds the applicable account limit ($7,200) by $13,800.

(*5*) The unrelated business taxable income of the VEBA is $5,000 (that is, the lesser of investment income ($5,000) and the excess of the amount of assets of the VEBA as of the close of the taxable year over the applicable account limit ($13,800)).

(D) *Example 4.* (*1*) The facts are the same as in the example in paragraph (c)(2)(vii)(C) of this section (*Example 3*) except that the 2020 year-end balance was $15,000.

(*2*) The total amount of assets in the VEBA at the end of 2021 is $11,000 (that is, $15,000 beginning of year balance + $70,000 contributions + $5,000 investment income − ($72,000 in benefit payments + $7,000 in administrative expenses)).

(*3*) The applicable account limit under section 512(a)(3)(E)(i) remains $7,200.

(*4*) The total amount of assets of the VEBA as of the close of the year ($11,000) exceeds the applicable account limit ($7,200) by $3,800.

(*5*) The VEBA's unrelated business taxable income is $3,800 (that is, the lesser of investment income ($5,000) and the excess of the total amount of assets of the VEBA at the close of the taxable year over the applicable account limit ($3,800)).

(d)(1) *Q–4.* What is the effective date of the amendments to section 512(a)(3) and what transition rules apply to ''existing reserves for post-retirement medical or life insurance benefits''?

(2) *A–4.* (i) The amendments to section 512(a)(3), made by the Tax Reform Act of 1984, apply to income earned by a Covered Entity after December 31, 1985, in the taxable years of such an organization ending after such date.

(ii) Section 512(a)(3)(E)(ii)(I) provides that income that is attributable to ''existing reserves for post-retirement medical or life insurance benefits'' will not be treated as unrelated business taxable income. This includes income that is either directly or indirectly attributable to existing reserves. An ''existing reserve for post-retirement medical or life insurance benefits'' (as defined in section 512(a)(3)(E)(ii)(II)) is the total amount of assets actually set aside by a Covered Entity on July 18, 1984 (calculated in the manner set forth in paragraph (c) of this section, and adjusted under paragraph (c) of Q&A–11 of § 1.419–1T), reduced by employer contributions to the fund on or before such date to the extent such contributions are not deductible for the taxable year of the employer including July 18, 1984, and for any prior taxable year of the employer, for purposes of providing such post-retirement benefits. For purposes of the preceding sentence only, an amount that was not actually set aside on July 18, 1984, will be treated as having been actually set aside on such date if the amount was—

(A) Incurred by the employer (without regard to section 461(h)) as of the close of the last taxable year of the Covered Entity ending before July 18, 1984; and

(B) Actually contributed to the Covered Entity within 8 ½ months following the close of such taxable year.

(iii) In addition, section 512(a)(3)(E)(ii)(I) applies to existing reserves for such post-retirement benefits only to the extent that such ''existing reserves'' do not exceed the amount that could be accumulated under the principles set forth in Revenue Rulings 69–382, 1969–2 CB 28; 69–478, 1969–2 CB 29; and 73–599, 1973–2 CB 40. Thus, amounts attributable to any such excess ''existing reserves'' are not within the transition rule of section 512(a)(3)(E)(ii)(I) even though they were actually set aside on July 18, 1984. See § 601.601(d)(2)(ii)(*b*) of this chapter.

(iv) All post-retirement medical or life insurance benefits (or other benefits to the extent paid with amounts set aside to provide post-retirement medical or life insurance benefits) provided after July 18, 1984 (whether or not the employer has maintained a reserve or fund for such benefits) are to be charged, first, against the ''existing reserves'' within the transition rule of section 512(a)(3)(E)(ii)(I) (including amounts attributable to ''existing reserves'' within the transition rule of section 512(a)(3)(E)(ii)(I) for post-retirement medical benefits or for post-retirement life insurance benefits (as the case may be)) and, second, against all other amounts. For purposes of this paragraph (d)(2)(iv), the qualified direct cost of an asset with a useful life extending substantially beyond the end of the taxable year (as determined under Q&A–6 of § 1.419–1T) will be treated as a benefit provided and thus charged against the ''existing reserve'' based on the extent to which such asset is used in the provision of post-retirement medical benefits or post-retirement life insurance benefits (as the case may be). All plans of an employer providing post-retirement medical benefits are to be treated as one plan for purposes of section 512(a)(3)(E)(ii)(III), and all plans of an employer providing post-retirement life insurance benefits are to be treated as one plan for purposes of section 512(a)(3)(E)(ii)(III).

(v) In calculating the unrelated business taxable income of a Covered Entity for a taxable year of such organization, the total income of the Covered Entity for the taxable year is reduced by the income attributable to ''existing reserves'' within the transition rule of section 512(a)(3)(E)(ii)(I) before such income is compared to the excess of the total amount of the assets of the Covered Entity as of the close of the taxable year over the applicable account limit for the taxable year.

(vi) The following example illustrates the calculation of UBTI for a VEBA that has existing reserves.

(A) *Example.* Assume that the total income of a VEBA for a taxable year is $1,000, and that the excess of the total amount of the assets of the VEBA as of the close of the taxable year over the applicable account limit is $600. Assume also that of the $1,000 of total income, $540 is attributable to ''existing reserves'' within the transition rule of section 512(a)(3)(E)(ii)(I). The unrelated business taxable income of this VEBA for the taxable year is $460, determined as the lesser of the following two amounts:

(*1*) The total income of the VEBA for the taxable year, reduced by the extent to which such income is attributable to ''existing reserves'' within the meaning of the transition rule of section 512(a)(3)(E)(ii)(I) ($1,000 − $540 = $460); and

(*2*) The excess of the total amount of the assets of the VEBA as of the close of the taxable year over the applicable account limit ($600).

(B) [Reserved]

(e)(1) *Q–5.* What is the applicability date of this section?

(2) *A–5.* Except as otherwise provided in this paragraph (e)(2), this section is applicable to taxable years beginning on or after December 10, 2019. For rules that apply to earlier periods, see § 1.512(a)–5T, as contained in 26 CFR part 1, revised April 1, 2019.

§ 1.512(a)–5T [Removed]

■ **Par. 3.** Section 1.512(a)–5T is removed.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: November 19, 2019.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2019–26274 Filed 12–9–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket Number USCG–2019–0908]

RIN 1625–AA08

Special Local Regulation; Temporary Change for Recurring Marine Event in the Seventh Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily changing the enforcement period of a special local regulation for a recurring marine event in the Seventh Coast Guard District and adding a temporary safety zone for this event. These regulations apply to the St. Croix Christmas Boat Parade and Fireworks Display in the vicinity of Protestant Cay in St. Croix, USVI, which will take place this year on December 14, 2019. The temporary special local regulation and temporary safety zone is needed to protect personnel, vessels, and the marine environment from the boat parade and fireworks display. Entry of vessels or persons into this regulated area is prohibited unless specifically authorized by the Captain of the Port San Juan.

DATES: This rule is effective on December 14, 2019, from 4 p.m. until 11 p.m.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0908 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Pedro Mendoza, Sector San Juan Prevention Department, Waterways Management Division, U.S. Coast Guard; telephone 787–729–2374, email *Pedro.L.Mendoza@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Coast Guard did not receive notice of the marine event from involved parties with sufficient time to publish a NPRM and to receive public comments prior to the event. It is impracticable to publish an NPRM because the Coast Guard did not receive notice of the alternate date of the boat parade and the addition of a fireworks display until October 31, 2019, and the special local regulation is needed for December 14, 2019. This action is necessary for the protection of life and property on the navigable waters of the United States. Therefore, it would be contrary to the public interest to postpone temporarily amending this special local regulation.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety and security concerns associated with power boat races.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 and 70041. The Captain of the Port San Juan (COTP) has determined that potential hazards associated with the boat parade and fireworks display on December 14, 2019, will be a safety concern for anyone within the vicinity of the event. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters of Christiansted Harbor in the vicinity of Protestant Cay in St. Croix, USVI.

IV. Discussion of the Rule

This rule temporarily changes the date of the Christmas Boat Parade in St. Croix, USVI and adds a fireworks display to the event description. The special local regulation is from 4:00 p.m. until 11:00 p.m. on December 14, 2019. The temporary special local regulation will cover all navigable waters of Christiansted Harbor approximately 200 yards from Protestant Cay. During the fireworks display, an exclusion zone of 700 feet will be established around the deck barges at approximate position 17°45′3″ N, 064°42′10″ W. The duration of the temporary special local regulation is intended to protect personnel, vessels, and the marine environment in these navigable waters during the boat parade and fireworks display. No vessel or person, other than the event participants, will be permitted to enter the regulated area without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the expected size, location and available exceptions to the enforcement of the special local regulation and safety zone. The regulated area will impact a small designated area of Christiansted Harbor in the vicinity of Protestant Cay in St. Croix, USVI during the event for seven hours on December 14, 2019 and thus is limited in time and scope. Although persons and vessels who are not participating in the event will not be able to enter, transit through, anchor in, or remain within the regulated area without authorization from the Captain of the Port San Juan or a designated representative, they may operate in the surrounding area during the enforcement period. Furthermore, the rule will allow vessels to seek permission to enter the regulated area. Persons and vessels may still enter, transit through, anchor in, or remain within the regulated during the enforcement period if authorized by the Captain of the Port San Juan or a designated representative. The Coast Guard will issue a Local Notice to Mariners and a Broadcast Notice to Mariners, allowing mariners to make alternative plans or seek permission to transit the regulated area.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a special local regulation lasting only seven hours that will prohibit entry within the regulated area during the boat parade and fireworks display. It is categorically excluded from further review under paragraphs L60(a) and L61 in Table 3–1 of the Department of Homeland Security Directive 023–01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 100 and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.T799–0908 to read as follows:

§ 100.T799–0908 Special Local Regulation; Christmas Boat Parade, Christiansted Harbor, St. Croix, USVI.

(a) *Location.* The following area is a special local regulation. Christiansted Harbor, 200 yards off-shore surrounding Protestant Cay, St. Croix, USVI, from surface to bottom, beginning in position 17°45′3″ N, 064°42′10″ W, around the cay and back to the beginning position. During the fireworks display an exclusion zone of 700 feet is established around the deck barges at approximate position 17°45′3″ N, 064°42′10″ W. All coordinates are North American Datum 1983.

(b) *Definitions.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, State, and local officers designated by or assisting the Captain of the Port San Juan in the enforcement of the regulated areas.

(c) *Regulations.* (1) Except for those persons and vessels participating in boat parade or enforcing the special local regulation, all persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area.

(2) Persons and vessels may request authorization to enter, transit through, anchor in, remain within the regulated area by contacting the Captain of the Port San Juan by telephone at (787) 289–2041, or a designated representative via VHF radio on channel 16. Those in the regulated area must comply with all lawful orders or directions given to them by the Captain of the Port or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Broadcast Notice to Mariners and on-scene designated representatives.

(d) Enforcement period. This section will be enforced from 4 p.m. until 11 p.m. on December 14, 2019.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 4. Add § 165.T07–0908 to read as follows:

§ 165.T07–0908 Safety Zone; Christmas Boat Parade Fireworks Display, Christiansted Harbor, St. Croix, USVI.

(a) *Location.* A safety zone is established approximately 700 feet around the deck barges at approximate position 17°45′3″ N, 064°42′10″ W. All coordinates are North American Datum 1983.

(b) *Definitions.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast

Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, State, and local officers designated by or assisting the Captain of the Port San Juan in the enforcement of the regulated areas.

(c) *Regulations.* (1) Except for those persons and vessels participating in boat parade or enforcing the special local regulation, all persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area.

(2) Persons and vessels may request authorization to enter, transit through, anchor in, remain within the regulated area by contacting the Captain of the Port San Juan by telephone at (787) 289–2041, or a designated representative via VHF radio on channel 16. Those in the regulated area must comply with all lawful orders or directions given to them by the Captain of the Port or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Broadcast Notice to Mariners and on-scene designated representatives.

(d) Enforcement period. This section will be enforced from 4 p.m. until 11 p.m. on December 14, 2019.

Dated: December 5, 2019.

E. P. King,

Captain, U.S. Coast Guard, Captain of the Port San Juan.

[FR Doc. 2019–26584 Filed 12–9–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2019–0171; FRL–10002–97–Region 4]

Air Plan Approval; Tennessee: Knox County Miscellaneous Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving several Tennessee State Implementation Plan (SIP) revisions submitted by the Tennessee Department of Environment and Conservation (TDEC), on behalf of Knox County's Air Quality Management Division by a letter dated May 24, 2018. The submissions revise four sections of Knox County's Air Quality Management Regulations covering definitions, opening burning, permits and emissions reporting requirements. These actions are being approved pursuant to the Clean Air Act (CAA or Act).

DATES: This rule will be effective January 9, 2020.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2019–0171. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can also be reached via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In a letter dated May 24, 2018, TDEC submitted SIP revisions to EPA for approval into the Knox County portion of the Tennessee SIP.[1] Specifically, the May 24, 2018, SIP revisions include changes to the following Knox County SIP-approved regulations: Section 13.0—''Definitions,'' Section 16.0—''Open Burning,'' Section 25.11—''Limiting a Source's Potential to Emit of VOC by Recordkeeping,'' and Section 26.0—''Monitoring, Recording, and Reporting.'' These revisions are intended, in part, to conform Knox County's regulations with the State of Tennessee's SIP-approved regulations.

See EPA's notice of proposed rulemaking (NPRM) published on October 22, 2019 (84 FR 56407) for further detail on the changes made in the July 2, 2018, submission. Comments were due on November 21, 2019, and EPA received no adverse comments on the NPRM. EPA is approving the changes to four sections of Knox County's rules: Section 13.0—''Definitions,'' Section 16.0—''Open Burning,'' Section 25.11—''Limiting a Source's Potential to Emit of VOC by Recordkeeping,'' and Section 26.0—''Monitoring, Recording, and Reporting'' because these changes are consistent with the CAA.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Knox County's Air Quality Management Regulations, Section 13.0—''Definitions,'' state effective January 24, 2018; Section 16.2—''Definitions,'' state effective January 24, 2018; Section 25.11—''Limiting a Source's Potential to Emit of VOC by Recordkeeping,'' state effective October 18, 2017; and Section 26.7—''Emission Inventory Requirements,'' state effective October 18, 2017. These revisions are intended, in part, to conform Knox County's regulations with the State of Tennessee's SIP-approved regulations. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[2]

III. Final Action

EPA is approving the aforementioned changes to the Knox County portion of the Tennessee SIP submitted on May 24, 2018, that make revisions to Knox County's Air Quality Management Regulations, Section 13.0—''Definitions,'' Section 16.0—''Open Burning,'' Section 25.11—''Limiting a Source's Potential to Emit of VOC by Recordkeeping,'' and Section 26.0—''Monitoring, Recording, and

[1] EPA notes that the Agency received the SIP revision on May 29, 2018.

[2] *See* 62 FR 27968 (May 22, 1997).

Reporting.'' EPA views these changes as being consistent with the CAA.

IV. Statutory and Executive Order Reviews

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

- Are not significant regulatory actions subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Are not Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory actions because SIP approvals are exempted under Executive Order 12866;
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Do not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 10, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 25, 2019.

Mary S. Walker,

Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart RR—Tennessee

■ 2. Section 52.2220(c), Table 3, is amended by:

■ a. Revising the entries for ''13.0'' and ''16.0.''

■ b. Adding an entry for ''16.2'' in numerical order; and

■ c. Under the heading ''Section 25.0—Permits'':

■ i. Removing the entry for ''25.2; 25.4; 25.5; 25.6; 25.7; 25.10; 25.11'' and adding the entry ''25.2; 25.4; 25.5; 25.6; 25.7; 25.10'' in its place;

■ ii. Adding an entry for ''25.11'' in numerical order;

■ iii. Revising the entry for ''26.0''; and

■ iv. Adding an entry for ''26.7'' in numerical order.

The revisions and additions read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

TABLE 3—EPA-APPROVED KNOX COUNTY, REGULATIONS

State section	Title/subject	State effective date	EPA approval date	Explanation
* *	*	*	*	* *
13.0	Definitions	1/24/2018	12/10/2019; [Insert citation of publication].	
* *	*	*	*	* *
16.0	Open Burning	12/14/2005	1/3/07, 72 FR 20	With the exception of 16.2—Definitions.
16.2	Definitions	1/24/2018	12/10/2019; [Insert citation of publication].	

TABLE 3—EPA-APPROVED KNOX COUNTY, REGULATIONS—Continued

State section	Title/subject	State effective date	EPA approval date	Explanation
* * * * * * *				
Section 25.0—Permits				
* * * * * * *				
25.2; 25.4; 25.5; 25.6; 25.7; 25.10.	Application for Permit; Compliance Schedule; Reporting of Information; Exemptions; Payment of Fees; Permit by Rule.	3/12/2014	4/22/2016, 81 FR 23640.	
25.11	Limiting a Source's Potential to Emit of VOC by Recordkeeping.	10/18/2017	12/10/2019; [Insert citation of publication].	
26.0	Monitoring, Recording, and Reporting.	1/21/2015	11/5/2015, 80 FR 68450	With the exception of 26.7—Emission Inventory Requirements.
26.7	Emission Inventory Requirements.	10/18/2017	12/10/2019; [Insert citation of publication].	
* * * * * * *				

* * * * *

[FR Doc. 2019–26465 Filed 12–9–19; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 84, No. 237
Tuesday, December 10, 2019

FEDERAL RESERVE SYSTEM

12 CFR Part 217 and 252

[Docket No. R–1673]

RIN 7100–AF 56

Regulatory Capital Rules: Risk-Based Capital Requirements for Depository Institution Holding Companies Significantly Engaged in Insurance Activities; Extension of Comment Period

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: On October 24, 2019, the Board of Governors of the Federal Reserve System (Board), published in the **Federal Register** a proposal to establish risk-based capital requirements for depository institution holding companies that are significantly engaged in insurance activities. The Board has determined that an extension of the comment period until January 22, 2020, is appropriate.

DATES: For the notice of proposed rulemaking published on October 24, 2019 (84 FR 57240), comments must be received by January 22, 2020.

ADDRESSES: You may submit comments by any of the methods identified in the proposal.

FOR FURTHER INFORMATION CONTACT: Thomas Sullivan, Associate Director, (202) 475–7656; Linda Duzick, Manager, (202) 728–5881; Matti Peltonen, Supervisory Insurance Valuation Analyst, (202) 872–7587; Brad Roberts, Supervisory Insurance Valuation Analyst, (202) 452–2204; or Matthew Walker, Supervisory Insurance Valuation Analyst, (202) 872–4971; Division of Supervision and Regulation; or Laurie Schaffer, Associate General Counsel, (202) 452–2272; David Alexander, Senior Counsel, (202) 452–2877; Andrew Hartlage, Counsel, (202) 452–6483; or Jonah Kind, Senior Attorney, (202) 452–2045; Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For the hearing impaired only, Telecommunication Device for the Deaf, (202) 263–4869.

SUPPLEMENTARY INFORMATION: On October 24, 2019, the Board published in the **Federal Register** a proposal to establish risk-based capital requirements for depository institution holding companies that are significantly engaged in insurance activities.[1] The Board is proposing a risk-based capital framework, termed the Building Block Approach, that adjusts and aggregates existing legal entity capital requirements to determine an enterprise-wide capital requirement, together with a risk-based capital requirement excluding insurance activities, in compliance with section 171 of the Dodd-Frank Act. The Board is additionally proposing to apply a buffer to limit an insurance depository institution holding company's capital distributions and discretionary bonus payments if it does not hold sufficient capital relative to enterprise-wide risk, including risk from insurance activities. The proposal would also revise reporting requirements for depository institution holding companies significantly engaged in insurance activities. The notice of proposed rulemaking stated that the comment period would close on December 23, 2019. The Board subsequently received requests to extend the comment period. An extension of the comment period will provide additional opportunity for the public to consider the proposal and prepare comments, including to address the questions posed by the Board in the proposal. Therefore, the Board is extending the end of the comment period for the proposal from December 23, 2019, to January 22, 2020.

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, December 4, 2019.

Ann Misback,

Secretary of the Board.

[FR Doc. 2019–26475 Filed 12–9–19; 8:45 am]

BILLING CODE P

[1] 84 FR 57240 (October 24, 2019).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–0842; Airspace Docket No. 18–AGL–15]

RIN 2120–AA66

Proposed Amendment of VOR Federal Airways V–59, V–92, V–115, and V–117 in the Vicinity of Newcomerstown, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend VHF Omnidirectional Range (VOR) Federal airways V–59, V–92, V–115, and V–117 due to the planned decommissioning of the VOR portion of the Newcomerstown, OH (CTW), VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID). The Newcomerstown VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program and service availability issues.

DATES: Comments must be received on or before January 24, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2019–0842; Airspace Docket No. 18–AGL–15 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email: *fedreg.legal@nara.gov* or go to *https://*

www.archives.gov/federal-register/cfr/ibr-locations.html.

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2019–0842; Airspace Docket No. 18–AGL–15) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2019–0842; Airspace Docket No. 18–AGL–15.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Blvd., Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The FAA originally planned to decommission the Newcomerstown, OH, (CTW), VOR during Phase 2 of the VOR Minimum Operational Network (MON) program as one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the Final policy statement notice, ''Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082. However, based on a failed flight check which rendered seventy-five percent of the VOR service unusable and resulted in the VOR having been out of service since January 31, 2017, the FAA is now planning to decommissioning the Newcomerstown, OH, VOR in July, 2020. The ATS routes effected by the Newcomerstown VOR decommissioning are VOR Federal airways V–59, V–92, V–115, and V–117.

With the planned decommissioning of the Newcomerstown VOR, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of V–59, V–92, V–115, or V–117 within the affected area. As such, the proposed actions would result in airway segments being removed from V–59, V–92, and V–115, and the last airway point (WISKE fix) in V–117 being redefined.

To overcome the proposed removal of the V–59, V–92, and V–115 airway segments, IFR traffic could file point to point using the existing fixes that will remain in place or receive air traffic control (ATC) radar vectors to continue operating though the area. Additionally, the FAA is retaining the Newcomerstown DME facility in place with the same ''CTW'' identifier to support FAA NextGen flight procedures. To retain V–117 as charted, the FAA is planning to redefine the last airway point (WISKE fix) using intersecting radials from the Bellaire, OH, VOR/DME and the Briggs, OH, VOR/DME NAVAIDs. Visual flight rules (VFR) pilots who elect to navigate via the airways through the affected area could also take advantage of the air traffic services previously listed.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to amend VOR Federal airways V–59, V–92, V–115, and V–117 due to the planned decommissioning of the VOR portion of the Newcomerstown, OH, VOR/DME. The proposed VOR Federal airway actions are described below.

V–59: V–59 currently extends between the Pulaski, VA, VOR/Tactical Air Navigation (VORTAC) NAVAID and Newcomerstown, OH, VOR/DME. The FAA proposes to remove the airway segment between the Parkersburg, WV, VOR/DME and the Newcomerstown, OH, VOR/DME. The unaffected portions of the existing airway would remain as charted.

V–92: V–92 currently extends between the Chicago Heights, IL, VORTAC and Goshen, IN, VORTAC; and between the Newcomerstown, OH; VOR/DME and Bellaire, OH, VOR/DME.

The FAA proposes to remove the airway segment between the Newcomerstown, OH, VOR/DME and the Bellaire, OH, VOR/DME. The unaffected portions of the existing airway would remain as charted.

V–115: V–115 currently extends between the Crestview, FL, VORTAC and Franklin, PA, VOR/DME. The FAA proposes to remove the airway segment between the Parkersburg, WV, VORTAC, and the Franklin, PA, VOR/DME. The unaffected portions of the existing airway would remain as charted.

V–117: V–117 currently extends between the Parkersburg, WV; VORTAC and the intersection of the Bellaire, OH, VOR/DME 044° radial and the Newcomerstown, OH, VOR/DME 099° radial (WISKE fix). The FAA proposes to redefine the WISKE fix as the intersection of the existing Bellaire, OH, VOR/DME 044° radial and the new Briggs, OH, 136°(T)/140°(M) radial. The existing airway would remain as charted.

All radials in the route descriptions below that do not reflect True (T)/Magnetic (M) degree radial information are unchanged and stated in True degrees.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.11D dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The ATS routes listed in this document would be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–59 [Amended]

From Pulaski, VA; Beckley, WV; to Parkersburg, WV.

* * * * *

V–92 [Amended]

From Chicago Heights, IL; to Goshen, IN.

* * * * *

V–115 [Amended]

From Crestview, FL; INT Crestview 001° and Montgomery, AL, 204° radials; Montgomery; INT Montgomery 323° and Vulcan, AL, 177° radials; Vulcan; Choo Choo, GA; Volunteer, TN; Hazard, KY; Charleston, WV; to Parkersburg, WV.

* * * * *

V–117 [Amended]

From Parkersburg, WV; Bellaire, OH; to INT Bellaire 044° and Briggs, OH, 136°(T)/140°(M) radials.

Issued in Washington, DC, on December 2, 2019.

Scott M. Rosenbloom,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2019–26387 Filed 12–9–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–0811; Airspace Docket No. 17–ANM–36]

RIN 2120–AA66

Proposed Establishment of Class E Airspace; Alpine, WY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace extending upward from 700 feet or more above the surface at Alpine Airport, Alpine, WY. The airspace is designed to accommodate new IFR area navigation (RNAV) approaches and IFR departure procedures at the airport, which will support the airport's transition from VFR to IFR operations. This action would ensure the safety and management of IFR operations at the airport.

DATES: Comments must be received on or before January 24, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2019–0811 and Airspace Docket No. 17–ANM–36, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S

216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would establish Class E airspace at Alpine Airport, Alpine, WY to support instrument flight rules (IFR) operations at the airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers (FAA Docket No. FAA–2019–0811 and Airspace Docket No. 17–ANM–36) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.* Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2019–0811; Airspace Docket No. 17–ANM–36." The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov//air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours, except federal holidays, at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E airspace extending upward from 700 feet or more above the surface at the Alpine Airport, Alpine, WY. The establishment of the new Class E airspace will support the airport's transition from VFR to IFR operations. Specifically, it will, to the extent possible, contain IFR departures until reaching 1,200 feet above the surface and IFR arrivals when descending below 1,500 feet above the surface.

The airspace will extend upward from 700 feet above the surface within a 4.0-mile radius to the airport, and within 1 mile each side of the 179° bearing from the airport, extending from the 4.0-mile radius to 5.8 south of the airport, and within 1.8 miles each side of the 321° bearing from the airport, extending from the 4.0-mile radius to 10.5 miles northwest of the airport.

Finally, an additional Class E airspace area will extend upward from 1,200 feet above the surface within a 13-mile radius of the airport.

Class E5 airspace designations are published in paragraph 6005, of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order. FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.171.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

Paragraph 6005. Class E Airspace Areas Extending Upward from 700 feet or more above the Surface of the Earth.

* * * * *

ANM WY E5 ALPINE, WY [New]

Alpine Airport, WY

(lat. 43°10′ 55″ N, long. 111°02′19″ W)

That airspace extending upward from 700 feet above the surface within a 4.0-mile radius of the airport, and within 1 mile each side of the 179° bearing from the airport extending from the 4.0-mile radius to 5.8 miles south of the airport, and 1.8 miles each side of the 321° bearing from the airport extending from the 4.0-mile radius to 10.5 miles northwest of the airport; and that airspace extending upward from 1,200 feet above the surface within a 13-mile radius of the Alpine Airport.

Issued in Seattle, Washington, on December 2, 2019.

Byron Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2019–26378 Filed 12–9–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–0846; Airspace Docket No. 19–AWP–78]

RIN 2120–AA66

Proposed Amendment of Air Traffic Service (ATS) Route V–165; Western United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend one domestic Very High Frequency Omnidirectional Range (VOR) Federal airway (V–165) in the western United States. The modifications are necessary due to the planned decommissioning of the Clovis, CA, VOR portion of the VOR/Tactical Air Navigation (VORTAC) navigation aid (NAVAID), which provides navigation guidance for portions of the affected ATS route. The Clovis, CA, VOR is being decommissioned as part of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Comments must be received on or before January 24, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2019–0846; Airspace Docket No. 19–AWP–78 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2019–0846; Airspace Docket No. 19–AWP–78) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2019–0846; Airspace Docket No. 19–AWP–78.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Western Service Center, Operations

Support Group, Federal Aviation Administration, 2200 South 216th St., Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

V–165 was previously listed in a notice of proposed rulemaking action (Docket No. FAA–2018–0713; Airspace Docket No. 18–AWP–10, published November 5, 2018 (83 FR 55308) for amendment. However, the proposed change to V–165 was withdrawn from that rulemaking effort due to the proposed amendment not achieving flight check satisfaction due to NAVAID out-of-tolerance signal strength (84 FR 35292; July 23, 2019). The remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected airway. As such, proposed modification to V–165 would result in a gap in the ATS route structure. To overcome the gap in V–165, instrument flight rules (IFR) traffic could use VOR Federal airway V–459 at EXTRA INT (INT Tule, CA 339°(T) 323°(M) and Avenal, CA, 042°(T) 026°(M) radials) to Friant VORTAC. Northbound from Friant VORTAC aircraft could utilize V–230 to the northeast to Mina VORTAC to join V–564 northwest bound to Mustang VORTAC and then resume V–165. Alternatively, aircraft could remain on V–459 northwest bound to Linden VOR/DME to join V–28 or V–113 northeast bound to Mustang VORTAC and then resume V–165. Additionally, IFR traffic could file point to point through the affected area using fixes that will remain in place, or receive air traffic control (ATC) radar vectors through the area. Visual flight rules pilots who elect to navigate via the airways through the affected area could also take advantage of the adjacent VOR Federal airways or ATC services listed previously.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify Domestic VOR Federal Airway, V–165. Full route description is in ''The Proposed Amendment'' section of this notice.

The proposed ATS route change is outlined below.

V–165: V–165 currently extends between the Mission Bay CA, VORTAC to the Whatcom WA, VORTAC. V–165 would be amended on the segment between the Tule, CA, VOR/DME and the Mustang, NV, VORTAC. The proposed amendment would stop at EXTRA intersection (INT Tule, CA 339°(T) 323°(M) and Avenal, CA, 042°(T) 026°(M) radials) and then resume at MARRI intersection (INT Squaw Valley, CA 133°(T) 117°(M) and Mustang, NV, 183°(T) 167°(M) radials). The unaffected portion of the existing route will remain as charted.

Domestic VOR Federal Airways are published in paragraph 6010 of FAA Order 7400.11D dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Domestic VOR Federal Airway listed in this document will be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019 and effective September 15, 2019, is amended as follows:

* * * * *

Paragraph 6010—Domestic VOR Federal Airways

V–165 [Amended]

From Mission Bay, CA; INT Mission Bay 270°(T) 255°(M) and Oceanside, CA, 177°(T) 162°(M) radials; Oceanside; 24 miles, 6 miles wide, Seal Beach, CA; six (6) miles wide, INT Seal Beach 287°(T) 272°(M)° and Los Angeles, CA, 138°(T) 123°(M) radials; Los Angeles; INT Los Angeles 357°(T) 342°(M), and Lake Hughes, CA, 154°(T) 139°(M) radials; Lake Hughes; INT Lake Hughes 344°(T) 329°(M) and Shafter, CA, 137°(T) 123°(M) radials; Shafter; Tule, CA; INT Tule 339°(T) 323°(M) and Avenal, CA, 042°(T) 026°(M) radials. From INT Squaw Valley, CA 133°(T) 117°(M) and Mustang, NV, 183°(T) 167°(M) radials; 72 miles, 50 miles, 131 MSL, Mustang, NV; 40 miles, 12 AGL, seven (7) miles, 115 MSL, 54 miles, 135 MSL, 81 miles, 12 AGL, Lakeview, OR; 5 miles, 72 miles, 90 MSL, Deschutes, OR; 16 miles, 19 miles, 95 MSL, 24 miles, 75 MSL, 12 miles, 65 MSL, Newberg, OR; 32 miles, 45 MSL, INT Newberg 355°(T) 334°(M) and Olympia, WA, 195°(T) 176°(M) radials; Olympia; Penn Cove, WA; to Whatcom, WA.

Issued in Washington, DC: December 2, 2019.

Scott M. Rosenbloom,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2019–26392 Filed 12–9–19; 8:45 am]

BILLING CODE 4910–13–P

TENNESSEE VALLEY AUTHORITY

18 CFR Part 1304

RIN 3316–AA23

Floating Cabins

AGENCY: Tennessee Valley Authority.

ACTION: Proposed Rule.

SUMMARY: The Tennessee Valley Authority (TVA) is proposing to amend its regulations that govern floating cabins located on the Tennessee River System. The mooring of floating cabins on the Tennessee River System, if left unaddressed, would pose unacceptable risks to navigation, safety, the environment, and public lands.

DATES: Written comments must be received on or before March 9, 2020.

ADDRESSES: You may submit comments by any of the following methods:

Mail/Hand Delivery: David B. Harrell, Program Manager, Floating Cabins Tennessee Valley Authority, 400 West Summit Hill Drive, WT 11A–K, Knoxville, TN 37902.

Email: dbharrell@tva.gov or *fc@tva.gov.*

FOR FURTHER INFORMATION CONTACT: David B. Harrell, 865–632–1327, *dbharrell@tva.gov.*

SUPPLEMENTARY INFORMATION:

Legal Authority

These proposed amendments are promulgated under the authority of the TVA Act, as amended, 16 U.S.C. 831–831ee, Title V of the Independent Offices Appropriations Act of 1955, 31 U.S.C. 9701, and OMB Circular No. A–25. Under Section 26a of the TVA Act, no obstructions affecting navigation, flood control, or public lands or reservations shall be constructed, operated, or maintained across, along, or in the Tennessee River System without TVA's approval. TVA has long considered nonnavigable structures such as floating cabins to be obstructions that require its approval. In addition, Section 9b of the TVA Act provides that TVA may require floating cabins to be maintained by the owner to reasonable health, safety, and environmental standards. Section 9b also authorizes TVA to levy fees on floating cabin owners as necessary and reasonable to ensure compliance.

Background and Proposed Amendments

TVA is a multi-purpose federal agency that has been charged by Congress with promoting the wise use and conservation of the resources of the Tennessee Valley region, including the Tennessee River System. In carrying out this mission, TVA operates a system of dams and reservoirs on the Tennessee River and its tributaries for the purposes of navigation, flood control, and power production. Consistent with those purposes, TVA uses the system to improve water quality and water supply and to provide a wide range of public benefits including recreation.

To promote the unified development and regulation of the Tennessee River System, Congress directed TVA to approve obstructions across, along, or in the river system under Section 26a of the TVA Act. ''Obstruction'' is a broad term that includes, by way of example, boat docks, piers, boathouses, buoys, floats, boat launching ramps, fills, water intakes, devices for discharging effluents, bridges, aerial cables, culverts, pipelines, fish attractors, shoreline stabilization projects, channel excavations, and floating cabins. TVA also owns, as agent for the United States, much of the shoreland and inundated land along and under its reservoir system.

The proposed amendments would establish health, safety, and environmental standards for floating cabins, including standards for electrical safety, flotation, mooring, and wastewater discharge. The proposed amendments also address TVA's management and administration of the floating cabins program. The proposed amendments would allow floating cabin owners until January 1, 2021, to register with TVA. They also establish permitting requirements for floating cabins and other requirements for repairs, modifications, or alterations to floating cabins and their attached structures.

In addition, TVA also proposes to make other changes to its Section 26a regulations. Certain requirements for flotation and discharges into navigable waters that were prompted by floating cabins will apply to all Section 26a applications and permits. The proposed amendments include other minor changes to TVA's Section 26a regulations for clarity and consistency.

Since 1971, TVA has used its Section 26a authority to prohibit the mooring on the Tennessee River System of new floating cabins (formerly nonnavigable houseboats) that are designed and used primarily for habitation and not for water transportation. In particular, TVA amended its regulations in 1971 to prohibit the mooring or anchoring of new nonnavigable houseboats except for those in existence before November 21, 1971. Criteria were established then to identify when a houseboat was considered ''navigable'' and the conditions under which existing nonnavigable houseboats would be allowed to remain. These criteria were characteristics that TVA determined were indicative of real watercraft, *i.e.,* boats or vessels that are designed and used primarily to traverse water. Since 1971, TVA has made minor changes to its regulations affecting nonnavigable houseboats, most notably in 1978 when TVA prohibited mooring of nonnavigable houseboats on the Tennessee River System except for those in existence on or before February 15, 1978. Effective October 1, 2018, TVA updated its regulations to change the terminology to floating cabins and prohibit new floating cabins that did not exist on the Tennessee River System on or before December 16, 2016.

Despite over 40 years of regulation related to floating cabins, the number of floating cabins on the Tennessee River System continued to increase. In determining what action to take with respect to floating cabins, TVA prepared an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act. This EIS assessed the environmental and socioeconomic impacts of different policies to address the proliferation of floating cabins on the Tennessee River System. TVA released a draft of this EIS for public comment in June 2015 and held four public meetings and a webinar to provide information about its analyses and to facilitate public involvement. Public reaction to this situation widely varied.

Many members of the general public urged TVA to require the removal of all floating cabins because TVA's reservoirs are public resources and owners of floating cabins are occupying public areas. Owners of floating cabins generally supported additional reasonable regulation of their structures, but argued against policies requiring their removal because of the investments they have made in the structures. Other commenters had concerns about discharges of black (sewage) and grey (showers, sinks, etc.) water from floating cabins and shock and electrocution risks associated with the electrical connections to floating cabins. Commenting agencies consistently supported better regulation of floating cabins. The final EIS and associated documents can be found at *https://www.tva.com/floatingcabins.*

After considering the comments it received during the EIS process and its analyses of impacts, TVA identified as its preferred policy one that establishes standards to ensure safer mooring, electrical connections, and protection of water quality. Under the preferred policy, the mooring of new floating cabins would be prohibited on the Tennessee River System. The preferred policy would have required all existing floating cabins, including nonnavigable houseboats, to be removed from the Tennessee River System by January 1, 2036, and be subject to a regulatory program in the interim. On May 5, 2016, the TVA Board of Directors adopted the preferred policy, except the Board extended the removal date to May 5, 2046.

On December 16, 2016, Congress enacted the Water Infrastructure Improvements for the Nation Act of 2016 (WIIN Act). Title IV Section 5003 related to floating cabins and amended the TVA Act to include Section 9b. This new section of the TVA Act provides that TVA may approve and allow the use of floating cabins on waters under the jurisdiction of TVA as of December 16, 2016, if the floating cabin is maintained to reasonable health, safety, and environmental standards as required by the TVA Board of Directors and if the owner pays a compliance fee if assessed by TVA. The WIIN Act stipulates that TVA may not require the removal of a floating cabin that was located on the Tennessee River System as of December 16, 2016: (1) For a period of 15 years if it was granted a permit by TVA before enactment, and (2) for a period of 5 years for a floating cabin that was not granted a permit by TVA before enactment. It further stipulates that TVA may establish regulations to prevent the construction of new floating cabins. These regulations were planned in two phases.

Phase I Floating Cabins Amendments

TVA published ''Phase I'' rule amendments for floating cabins that became effective on October 1, 2018. These amendments clarified the types of structures that TVA will regulate as a floating cabin and prohibited new floating cabins from mooring on the Tennessee River System after December 16, 2016. TVA estimates that approximately 2,250 floating cabins were moored on the Tennessee River System on December 16, 2016. These initial rule amendments also incorporated a requirement for owners to register their floating cabins and identified locations where floating cabins may moor.

Proposed Amendments

The proposed ''Phase II'' rule amendments include health, safety, environmental, and permitting standards that will apply to all floating cabins. A diverse stakeholder group composed of 18 members advised TVA on the development and drafting of these standards. The group represented varied interests and perspectives. Members included representatives from floating cabin owners, lake user interests, fishing interests, marina owners, local power distributors, state and federal regulatory agencies, the insurance industry, and the general public. The full group met five times from August 2017 to June 2019 at various locations, including locations near Norris and Fontana Reservoirs where floating cabins are prevalent. Teleconferences were also held among three subgroups to develop and discuss recommendations in specific subject matter areas. An industry professional in marine electricity presented to the group and helped answer questions regarding electricity at marinas and in water. TVA tested and displayed ground fault protection devices for the group to observe and discuss.

Each of the three subgroups made recommendations for a subset of standards. Recommendations were presented to the full stakeholder group for wastewater, electrical, flotation, mooring, fees, permitting standards, and compliance. TVA reviewed and evaluated the recommendations and responded to each recommendation. TVA refined the recommendations and developed them into these proposed rule amendments for publication for public review and comment. A draft of the rule amendments was reviewed with the stakeholder group in June 2019.

Permitting Program

TVA's proposed standards and permitting requirements for floating cabins will apply to all existing floating cabins, including those formerly referred to as nonnavigable houseboats originally permitted on or before February 15, 1978. All floating cabins and attached structures will require a new permit.

To obtain a permit, owners of floating cabins will have until January 1, 2024, to comply with the standards in TVA's regulations and submit a complete permit application that certifies compliance and includes the payment of a Section 26a permit application fee. TVA will not require floating cabin owners to pay the permit application fee if they possess a permit issued before December 16, 2016, in their name and the structure is compliant with the terms of the permit, constructed in accordance with the permit (same dimensions, attached structures such as docks, and utility connections), and moored at the permitted location. A change in ownership application fee, currently $250, will be charged each time an existing floating cabin owner requests a transfer of the permit to a new owner. Permits will only be transferrable if the structure is fully in compliance with the existing permit.

The proposed permit application submission date of January 1, 2024, will give owners approximately four years from the publication of the standards to bring structures into compliance. TVA encourages floating cabin owners to bring floating cabins into compliance and then apply for a permit without delay. Upon submission of the application, owners of floating cabins may remain in place until TVA acts on the application. If TVA approves the application, TVA will issue a Section 26a permit to the owner. If TVA denies the application, the owner must either correct all deficiencies or remove the structure in accordance with Section 9b of the TVA Act and 18 CFR 1304.406.

Removal

Under the proposed amendments, TVA would require owners to remove their floating cabins if TVA determines a floating cabin is not in compliance with its permit, does not apply for a permit by January 1, 2024, or does not pay the compliance fee if levied by TVA. The requirement to remove a floating cabin would be in accordance with Section 9b of the TVA Act and 18 CFR 1304.406. All structures not removed by the applicable deadline may be removed by TVA at the owner's expense.

Flotation

Unencased flotation (*i.e.* Styrofoam) breaks apart over time, can harm wildlife, and becomes litter in reservoirs or along shorelines. Currently, all docks, floating cabins, and other water-use structures and facilities permitted by TVA are subject to 18 CFR 1304.400, which establishes flotation requirements to protect the environment from harmful flotation materials such as Styrofoam and the contents of metal drums, which were common flotation devices in the past. TVA's current regulations prohibit unencased flotation unless it was previously allowed by TVA, was installed prior to September 8, 2003, and is still serviceable in TVA's judgment. Although TVA interprets this provision to prohibit the installation of unencased flotation to repair or replace existing flotation, the proposed amendments would make this prohibition explicit and would require the removal and replacement of all unencased flotation no later than December 31, 2031. If TVA determines that the existing unencased flotation is no longer serviceable prior to December 31, 2031, owners would have 24 months from notification from TVA to remove and replace it. These changes would apply to all Section 26a permits, including floating cabins.

Mooring

Some floating cabins are moored by running cables across the water to attach to a tree or other anchor on the shoreline. This potentially obstructs navigation and recreation, poses a potential hazard to public safety, and can detract from the scenic integrity of the areas where floating cabins are located. Current regulations require floating cabins to be moored in such a manner as to: (1) Avoid obstruction of or interference with navigation, flood control, public lands, or reservations; (2) avoid adverse effects on public lands or reservations; (3) prevent the preemption of public waters when moored in permanent locations outside of the approved harbor limits of commercial marinas; (4) protect land and land rights owned by the U.S. alongside and subjacent to TVA reservoirs from trespass and other unlawful and unreasonable uses; and (5) maintain, protect, and enhance the quality of the human environment.

These regulations will continue to apply to floating cabins. Two additional requirements will be added. Floating cabin owners must ensure visibility of all mooring cables, and comply with 18 CFR 1304.205(c) which prohibits attachment to trees on TVA property. The method of mooring should be modified, if necessary, to eliminate navigation and safety hazards. If modification of the mooring method is not practical or feasible, TVA's permit will require the hazard to be marked to aid in visibility and to help avoid property damage and personal injury. Permit applicants must indicate how the structure is moored, and TVA will determine if that method is allowable. Any determinations on proper mooring and hazard marking will be made during the permit review process. TVA may require owners to install markers on aerial wires or buoys on underwater cables at specific distances to help increase visibility and warn the public. TVA's current regulations specify four locations where floating cabins must be located. These include areas where the floating cabin was moored as of December 16, 2016, and the owner has sufficient land ownership or landrights as specified in the regulations; locations where the owner had written permission from TVA prior to December 16, 2016; or within the harbor limits of a commercial marina. To prevent sprawl and to better contain the impacts of floating cabins, TVA would prohibit relocation of permitted floating cabins to a different reservoir. TVA would consider applications to relocate existing floating cabins to any commercial marina on their respective reservoir that is willing to accept them. Any relocation except within the harbor limits of the same marina would require advance approval from TVA in the form of a reissued permit and concurrence from the receiving marina operator.

Electrical

Floating cabins can also pose a threat to public safety due to unsafe electrical systems. TVA is aware that floating cabins are currently obtaining electricity from the shore via underwater cables, through onboard portable generators, and by other methods. TVA is not aware of any local, state, or federal entity that currently monitors the construction of floating cabins and enforces building codes. However, after the WIIN Act, these agencies may consider floating cabins to be more like housing rather than boats, and agencies may determine to regulate and inspect those within their jurisdiction. If an agency chooses to regulate, floating cabins would be required to comply with all applicable federal, state, and local laws and regulations regarding electrical wiring and equipment. If a floating cabin is documented to be in violation of any federal, state, or local electrical standard or regulation by the respective regulatory agency, TVA will revoke the permit and require removal of the floating cabin from the Tennessee River System if the violation is not corrected as specified by the regulatory agency in accordance with the agency's requirements.

In addition and at a minimum, TVA would require all floating cabin owners to install ground fault protection and to use properly listed underwater cables. At two-year intervals, TVA will require floating cabin owners to provide certification that the floating cabin meets these requirements.

Wastewater

Floating cabins use various methods to manage their black and grey water. Some have holding tanks for black water (sewage) and use pump-out facilities to dispose of wastewater through land-based systems. TVA has received complaints of some floating cabins discharging black and/or grey water directly to the reservoir. Grey water originates from sinks, showers, dishwashers, and washing machines and is often discharged directly to the reservoir. Black and grey water discharges can contribute to water quality deterioration. Discharges are regulated by state environmental agencies.

TVA would require floating cabin owners to comply with discharge requirements set by local, state, or federal agencies and would rely on those agencies to identify when such requirements are violated. This properly recognizes those agencies' expertise and regulatory roles. If TVA is notified by a federal, state, or local agency that an owner of a floating cabin is not compliant with applicable discharge requirements and has failed to correct that deficiency, TVA would revoke the floating cabin's permit and require the structure to be removed from the Tennessee River System. The potential loss of the Section 26a permit for floating cabins if discharge violations occur should help induce more compliant behavior and complement state agency efforts.

TVA will require a Section 26a permit for all floating cabins, and all TVA permits must comply with the Clean Water Act (CWA). Section 401 of the CWA prohibits federal agencies from issuing a permit to conduct an activity, including the construction or operation of facilities, which may result in any discharge into navigable waters of the United States unless the applicable state agency has certified that the proposed activity will be conducted in a manner that will not violate applicable water quality standards or the certification has been waived. Each certifying agency responsible for implementing the CWA will determine if certifications are required for existing, rebuilt, altered, or combined floating cabins. Some may determine to review and make one determination that applies to all floating cabins within its jurisdiction or some may review each request for floating cabin permits individually. The respective certifying agencies will make this determination.

When Section 401 of the CWA is triggered, TVA will not grant a Section 26a permit for a floating cabin or other obstruction unless a water quality certification has been provided or waived by the respective certifying agency. The proposed rule allows up to one year for the certifying agency to take action. If a certifying agency has not acted within that period of time, TVA will deem the certification requirement to be waived and may then proceed with processing the Section 26a application. This would apply to all Section 26a permit applications.

Maintenance, Alterations, and Rebuilds

Floating cabins that fall into disrepair can threaten public safety, create a boating hazard, and create litter in reservoirs and along shorelines. Therefore, normal repair and maintenance of floating cabins is encouraged and may be undertaken without TVA's permission. By way of example, maintenance activities include painting, changing the internal walls of the enclosed space, replacing shingles or siding, electrical wiring, plumbing, or adding new encased flotation that complies with the regulations. Maintenance activities do not include any activity that would increase the size or dimensions of the floating cabin, including its enclosed or open spaces. Owners should not increase the size (length, width, or height) of the floating cabin or the enclosed or open spaces without TVA's permission and prior written approval.

Any alteration to the approved plans for a floating cabin would be deemed a structural modification and, if approvable, would require a new permit from TVA. With three exceptions, alterations will be prohibited. First, an alteration may be allowed if it is approved in writing in advance by TVA and is necessary to comply with health, safety, and environmental standards. Second, TVA may approve enclosure of open space on the monolithic frame of an existing floating cabin if the enclosure will not result in expansion to the dimensions (length, width, and height) of the monolithic frame. At least 24 contiguous square feet of open space with a minimum width of four feet must be retained on the monolithic frame for boarding. Finally, TVA may allow changes in the roof pitch but no part of the floating cabin may exceed a total height of 14 feet above the lowest floor level of the floating cabin.

Floating cabins may be rebuilt to the exact same dimensions (length, width, and height), including both enclosed and open spaces, as previously approved by TVA. Owners will be required to notify TVA in writing and submit plans 60 days in advance of proposed rebuilding and must receive prior written approval from TVA before beginning construction. TVA may require a new permit for the proposed rebuilding if it includes any changes to the previously approved plans. Owners must submit to TVA four photographs of the rebuilt floating cabin, one from each side, within 30 days of completion.

Combined Floating Cabins

To potentially reduce the number and footprint of floating cabins on the Tennessee River System, TVA is proposing a program that allows removal of two or more existing floating cabins in exchange for one replacement floating cabin. With a permit obtained in advance, TVA may allow owners to remove and replace multiple existing floating cabins with a combined floating cabin that meets certain size requirements. Owners must provide evidence that all existing floating cabins to be removed existed on the Tennessee River System as of December 16, 2016, and must remove the existing floating cabins before construction on the combined floating cabin may begin. The permits for the removed floating cabins will be rendered invalid upon their removal. All combined floating cabins must locate within the harbor limits of a commercial marina and have the marina owner's permission. The combined floating cabin must be located on the same reservoir as any of the existing floating cabins to be exchanged. The maximum size allowable for the new structure would be the lesser of 1000 square feet or the combined size of the monolithic frames of the removed floating cabins. Any amount of the combined size exceeding 1000 square feet would be forfeited and could not be transferred to another party or another project. At least 24 contiguous square feet with a minimum width of four feet must remain open to allow for boarding of the combined floating cabin. The maximum roof height is 14 feet above the lowest floor level. Attached structures such as decks may not be incorporated into the monolithic frame of the combined floating cabin. Requests for combined floating cabins will be deemed major construction and subject to the applicable Section 26a permit application fee.

Attached Structures

Floating cabins will be limited to 250 square feet of attached structures such as decks or swim platforms. Attached structures must remain open and uncovered. All attached structures must be permitted to the floating cabin owner. Attached structures that were a part of the floating cabin as of December 16, 2016, may remain with written approval from TVA. However, any application for certain structural modifications or a combined floating cabin will require the attached structures be reduced to 250 square feet.

Other Changes to Section 26a Regulations

In addition to the changes affecting floating cabins and those for flotation and discharges applicable to all Section 26a permits, TVA is proposing other minor amendments to the Section 26a regulations. These include changes to the TVA locations where applications are addressed, clarification regarding the size of residential water-use facilities in pre-existing developments, and other minor edits for clarity and consistency in the regulations.

III. Administrative Requirements

A. Unfunded Mandates Reform Act and Various Executive Orders Including E.O. 12866, Regulatory Planning and Review; E.O. 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 13045, Protection of Children From Environmental Health Risks; E.O. 13132, Federalism; E.O. 13175, Consultation and Coordination With Indian Tribal Governments; E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, and Use; E.O. 12988, Civil Justice Reform Act; and E.O. 13771, Reducing Regulation and Controlling Regulatory Costs

This proposal contains no federal mandates for state, local, or tribal government or for the private sector. TVA has determined it will not have a significant annual effect of $100 million or more or result in expenditures of $100 million in any one year by state, local, or tribal governments or by the private sector. The proposal will not have a substantial direct effect on the States or Indian tribes, on the relationship between the Federal Government and the States or Indian tribes, or on the distribution of power and responsibilities between the Federal Government and States or Indian tribes. Nor will the proposal have concerns for environmental health or safety risks that may disproportionately affect children, have significant effect on the supply, distribution, or use of energy, or disproportionally impact low-income or minority populations. Unified development and regulation of the Tennessee River System through an approval process for obstructions across, along, or in the river system and management of United States-owned land entrusted to TVA are federal functions for which TVA is responsible under the TVA Act, as amended. In general, this proposal updates TVA's regulations relating to the standards that floating cabins will be required to meet in order to remain on the Tennessee River System. This proposal would establish a charge for individuals or entities that request certain services from TVA relating to use of its property, reservoirs, and permitting for a floating cabin. Absent a request for these services for a Section 26a permit, no entity or individual would be forced to pay a charge. None of the charges would be applied retroactively. The proposal also amends TVA's regulations to clarify a date certain by which all unencased flotation must be removed from TVA's reservoirs. The proposal also amends TVA's regulations to establish a time period after which TVA will deem a state's water quality certification decision to be waived and proceed with processing of Section 26a permit applications. TVA will continue to appropriately review specific requests in accordance with applicable laws, regulations, and Executive Orders. Accordingly, the proposal has no implications for any of the referenced authorities, including the Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs dated January 30, 2017, which affects only ''significant regulatory actions'' as defined by Executive Order 12866.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 605, TVA is required to prepare a regulatory flexibility analysis unless the head of the agency certifies that the proposal will not have a significant economic impact on a substantial number of small entities. TVA's Chief Executive Officer has certified that this proposal will not have a significant economic impact on a substantial number of small entities. The statute defines ''small entity'' as a ''small business,'' ''small organization'' (further defined as a ''not-for-profit enterprise''), or a ''small governmental jurisdiction.'' Most floating cabins are owned by individuals and not businesses, not-for-profit enterprises, or small governmental jurisdictions, and therefore relatively few ''small entities'' will be affected by TVA's proposal. Even if the proposed amendments tangentially impact marinas that accommodate floating cabins, a relatively small number of marinas will be impacted. Accordingly, this rule will not have a significant impact on a substantial number of small entities; no regulatory flexibility analysis is required; and TVA's Chief Executive Officer has made the requisite certification.

List of Subjects in 18 CFR Part 1304

Administrative practice and procedure, Natural resources, Navigation (water), Rivers, Water pollution control.

For the reasons set out in the preamble, the Tennessee Valley Authority proposes to amend 18 CFR part 1304 as follows:

PART 1304—APPROVAL OF CONSTRUCTION IN THE TENNESSEE RIVER SYSTEM AND REGULATION OF STRUCTURES AND OTHER ALTERATIONS

■ 1. The authority citation for 18 CFR Part 1304 continues to read as follows:

Authority: 16 U.S.C 831–831ee.

■ 2. Amend § 1304.2 by:
■ a. Adding a sentence after the second sentence of paragraph (a);
■ b. Revising paragraph (b);
■ c. Revising the first sentence of paragraph (c)(1) introductory text;
■ d. Revising paragraph (c)(1)(i);
■ e. Revising the second sentence of paragraph (c)(2) introductory text;
■ f. Revising the first sentence of paragraph (c)(2)(i);
■ g. Revising paragraph (c)(2)(ii)(A); and
■ h. Adding three sentences after the first sentence of paragraph (d).

The additions and revisions read as follows:

§ 1304.2 Application.

(a) * * * If the facility is an existing floating cabin, it must meet the requirements of subpart B. * * *

(b) Applications shall be addressed to the Tennessee Valley Authority, at the appropriate Regional Watershed Office location as listed on the application and on TVA's website. To contact an office, call 1–800–882–5263 or email *plic@tva.gov.* Applications are available on TVA's website.

(c) * * *

(1) * * * By way of example only, minor facilities may include: boat docks, piers, rafts, boathouses, fences, steps, gazebos, and floating cabins. * * *

(i) *Completed application form.* One copy of the application shall be prepared and submitted. Application forms are available on TVA's website. The application shall include a project description which indicates what is to be built, removed, or modified, and the sequence of the work. Applications for floating cabins shall include written evidence that the floating cabin was located or moored on the Tennessee River System as of December 16, 2016. An application to relocate a floating cabin to a marina shall include evidence of approval from the marina operator.

* * * * *

(2) * * * By way of example only, major projects and facilities may include: Marinas, community docks, barge terminals, utility crossings, bridges, culverts, roads, wastewater discharges, water intakes, dredging, placement of fill, and combined floating cabins. * * *

(i) * * * Application forms are available on TVA's website. * * *

(ii) * * *

(A) Be prepared electronically or on paper suitable for reproduction (no larger than 11 by 17 inches).

(d) * * * No section 26a permit will be granted until required certification has been obtained or has been waived. If a certifying agency has not acted within one (1) year of an applicant's request for certification from the respective agency, TVA will deem the certification requirement to be waived and proceed with processing of the section 26a permit application. * * *

■ 3. Amend § 1304.10 by adding paragraph (c) to read as follows:

§ 1304.10 Change in ownership of approved facilities or activities.

* * * * *

(c) Change in ownership of a floating cabin is addressed in § 1304.102.

■ 4. Amend § 1304.100 by revising the last sentence and adding two sentences thereafter to read as follows:

§ 1304.100 Scope and intent.

* * * Existing floating cabins may remain moored on the Tennessee River System provided they remain in compliance with the rules in this part and obtain a permit from TVA issued after [DATE OF FINAL RULE]. All permits for nonnavigable houseboats or floating cabins that were not located on the Tennessee River System as of December 16, 2016, are terminated. Unless otherwise noted, the term floating cabin refers to the primary structure on the monolithic frame as well as all attached structures.

■ 5. Amend § 1304.101 by:
■ a. Revising paragraphs (b), (c), (d), (e), and (g); and
■ b. Adding paragraphs (h), (i), (j), and (k);

The additions and revisions read as follows:

§ 1304.101 Floating cabins.

* * * * *

(b) Owners of floating cabins are required to register the floating cabin with TVA before January 1, 2021. Floating cabin owners must submit certain required information with their registration. Registration shall include the following information: Clear and current photographs of the structure; a drawing or drawings showing in reasonable detail the size and shape of the floating cabin (length, width, and height) and attached structures, such as decks or slips (length, width, and height); and a completed and signed TVA registration form. The completed TVA registration form shall include the mailing and contact information of the owner(s); the TVA permit or TVA-issued numbers (when applicable); the mooring location of the floating cabin; how the floating cabin is moored; how electrical service is provided; how waste water and sewage is managed; and an owner's signature.

(c) All floating cabins shall comply with the standards in § 1304.103 and make application for a section 26a permit by January 1, 2024.

(d) Existing floating cabins may remain on the Tennessee River System provided they stay in compliance with the rules contained in this part and pay any necessary and reasonable fees levied by TVA to ensure compliance with TVA's regulations, in accordance with section 9b of the TVA Act.

(e) Existing floating cabins must be moored at one of the following locations:

(1) To the bank of the reservoir at locations where the owner of the floating cabin is the owner or lessee (or the licensee of such owner or lessee) of the proposed mooring location provided the floating cabin was moored at such location prior to December 16, 2016;

(2) At locations described by § 1304.201(a)(1), (2), and (3) provided the floating cabin was moored at such location prior to December 16, 2016;

(3) To the bank of the reservoir at locations where the owner of the floating cabin obtained written approval from TVA pursuant to subpart A of this part authorizing mooring at such location on or before December 16, 2016; or

(4) Within the designated and approved harbor limits of a commercial marina that complies with § 1304.404. As provided in § 1304.404, TVA may adjust harbor limits and require relocation of an existing floating cabin within the harbor limits.

* * * * *

(g) A floating cabin moored at a location approved pursuant to this subpart shall not be relocated and moored at a different location without a permit from TVA, except for movement to a new location within the designated harbor limits of the same commercial marina. Existing floating cabins may only relocate to the harbor limits of a commercial marina that complies with § 1304.404 on the same reservoir where the floating cabin was moored as of December 16, 2016. Relocation of a floating cabin to another TVA reservoir is prohibited.

(h)(1) Existing floating cabins shall be maintained in a good state of repair and may be maintained without additional approval from TVA. By way of example, these activities may include painting, changing the internal walls within the existing enclosed space, replacing the shingles, siding, electrical wiring, or plumbing, or adding new flotation in compliance with § 1304.400. Repair and maintenance activities shall not modify any external walls or the dimensions (length, width, and height) of the floating cabin or the enclosed or open space.

(2) Any alterations to the dimensions or approved plans for an existing floating cabin shall be deemed a structural modification and shall require prior written approval from TVA. All expansions in length, width, or height are prohibited, except under the following circumstances if approved in writing in advance by TVA:

(i) TVA may allow alterations necessary to comply with health, safety, and environmental standards;

(ii) TVA may allow enclosure of existing open space on the monolithic frame of the existing floating cabin if the enclosure will not result in expansion to the dimensions (length, width, and height) of the monolithic frame. At least 24 contiguous square feet of open space with a minimum width of four feet shall be maintained on the monolithic frame for boarding; or

(iii) TVA may allow changes in roof pitch but no part of the floating cabin may exceed a total height of 14 feet above the lowest floor level.

(3) Owners must notify TVA in writing and submit plans 60 days in advance of proposed rebuilding of a floating cabin. The owner shall not begin construction until prior written approval from TVA is received. TVA may require a new permit for the proposed rebuilding. The rebuilt floating cabin shall match the exact configuration and dimensions (length, width, and height) of both the total floating cabin and the enclosed and open space as approved by TVA. Owners shall submit to TVA four photographs of the rebuilt floating cabin, one from each side, within 30 days of completion.

(i) TVA may allow the exchange of multiple existing floating cabins removed from the Tennessee River System for a single combined floating cabin under the following conditions:

(1) Prior written approval from TVA shall be obtained before taking any actions. This request shall be regarded as an application for a major facility under § 1304.2. Evidence shall be provided to TVA that all existing floating cabins to be exchanged were located on the Tennessee River System as of December 16, 2016.

(2) Plans for removal of the existing floating cabin(s) shall be approved in writing by TVA before removal occurs, and the floating cabin(s) shall be removed at the owner's expense before construction of the new combined floating cabin may begin. Approvals of the existing floating cabins to be exchanged will be terminated.

(3) The combined floating cabin shall be moored within the harbor limits of a commercial marina that complies with § 1304.404. The owner shall provide evidence of approval from the marina operator to locate within the marina. The combined floating cabin must be located on the same reservoir as any of the existing floating cabins to be exchanged.

(4) The maximum total size of the monolithic frame of the combined floating cabin is 1,000 square feet or the sum of the square footage of the monolithic frames of the existing exchanged floating cabins, whichever is less. At least 24 contiguous square feet with a minimum width of four feet must remain open to allow for boarding of the combined floating cabin. Any square footage of the existing exchanged floating cabins that exceeds the maximum allowable total size of a combined floating cabin is not transferrable to other projects or owners.

(5) The maximum roof height is 14 feet above the lowest floor level.

(6) Attached structures such as decks or swim platforms may not be covered or enclosed or incorporated into the monolithic frame of a combined floating cabin.

(j) Floating cabins are limited to 250 square feet of open, uncovered attached structures. All attached structures must be permitted to the floating cabin owner. Attached structures that were a part of the floating cabin as of December 16, 2016, may remain with written approval from TVA, but any application for a structural modification as described in § 1304.101(h)(2) or a combined floating cabin as described in § 1304.101(i) will require the attached structures be reduced to 250 square feet.

(k) Any floating cabin not in compliance with this part is subject to the applicable removal provisions of § 1304.406 and section 9b of the TVA Act.

■ 6. Revise § 1304.102 to read as follows:

§ 1304.102 Numbering of floating cabins and change in ownership.

(a) All approved floating cabins and attached structures shall display a number assigned by TVA. The owner of the floating cabin shall paint or attach a facsimile of the number on a readily visible part of the outside of the facilities in letters at least three inches high. If TVA provided a placard or tag, it must be displayed on a readily visible part of the outside of the floating cabin.

(b) When there is a change in ownership of the floating cabin, the new owner shall notify TVA within 60 days. Upon application to TVA by the new owner, the new owner may continue to use the existing floating cabin or carry out permitted activities pending TVA's decision on reissuance of the permit. TVA shall reissue the permit upon determining the floating cabin is in good repair, is the same configuration and dimensions (length, width, and height) of both the total structure and the enclosed and open space as previously permitted, moored in the same location or in the harbor limits of the same commercial marina, and complies with the conditions of the previous approval and the requirements of this subpart.

■ 7. Add section § 1304.103 to read as follows:

§ 1304.103 Health, safety, and environmental standards.

(a) *Wastewater.* Floating cabins shall comply with § 1304.2(d) with regard to discharges into navigable waters of the United States. All discharges, sewage, and wastewater, and the pumping, collection, storage, transport, and treatment of sewage and wastewater shall be managed in accordance with all applicable federal, state, and local laws and regulations. If a floating cabin is documented to be in violation of any federal, state, or local discharge or water quality regulation by the respective regulatory agency, TVA will revoke the permit and require removal of the floating cabin from the Tennessee River System if the violation is not corrected as specified by the regulatory agency in accordance with the agency's requirements.

(b) *Flotation.* Floating cabins shall comply with the requirements for flotation devices and material contained in § 1304.400.

(c) *Mooring.* All floating cabins must be moored in such a manner as to:

(1) Avoid obstruction of or interference with navigation, flood control, public lands, or reservations;

(2) Avoid adverse effects on public lands or reservations;

(3) Prevent the preemption of public waters when moored in permanent locations outside of the approved harbor limits of commercial marinas;

(4) Protect land and landrights owned by the United States alongside and subjacent to TVA reservoirs from trespass and other unlawful and unreasonable uses;

(5) Maintain, protect, and enhance the quality of the human environment;

(6) Ensure visibility of all mooring cables; and

(7) Comply with § 1304.205(c).

(d) *Electrical standards.* Floating cabins shall comply with all applicable federal, state, and local laws and regulations regarding electrical wiring and equipment. If a floating cabin is documented to be in violation of any federal, state, or local electrical standard or regulation by the respective regulatory agency, TVA will revoke the permit and require removal of the floating cabin from the Tennessee River System if the violation is not corrected as specified by the regulatory agency in accordance with the agency's requirements. Floating cabin owners shall provide certification of compliance with the electrical standards of this subpart to TVA by January 1, 2024, and every two years thereafter. The certification must be signed by a licensed electrical engineer, a state-certified electrical inspector, or a person certified by the International Association of Electrical Inspectors, the International Code Council, or an equivalent organization.

(1) All floating cabins must meet the following minimum requirements for ground fault protection:

(i) The feeder(s) from electrical service on the shore to the floating cabin shall have ground fault protection not exceeding 100 milliamps.

(ii) If the floating cabin has a transformer, the transformer shall have ground fault protection not exceeding 100 milliamps at the first overcurrent protection device on the secondary side of the transformer. The conductors from the transformer enclosure to the overcurrent protection device shall not exceed 10 feet and shall be installed in a raceway.

(iii) If the floating cabin is located in a marina and the feeder supplying the floating cabin is part of the marina's electrical system, the feeder shall have ground fault protection not exceeding 100 milliamps.

(iv) If another source of electrical power is utilized on a floating cabin, such as but not limited to a generator, photovoltaic cell, or wind turbine, the source of electrical power shall have ground fault protection not exceeding 100 milliamps at the first overcurrent protection device for each source. For permanently installed sources, the conductors from the source to the first overcurrent protection device shall not exceed 10 feet and shall be installed in a raceway.

(v) The floating cabin owner may determine the devices that are utilized to achieve the ground fault protection requirement provided such devices are labeled and listed from a third-party testing laboratory for the purpose of the installation.

(2) A portable power cable shall be installed from the shore to the floating cabin and shall, at a minimum, meet the requirements of National Fire Protection Association 70 Article 555.13 (A)(2) and (B)(4) of the 2017 National Electrical Code. For new portable power cables installed after <the effective date of these regulations>, the cables shall meet the requirements of the most recent version of the National Electric Code.

■ 8. Amend § 1304.204 by revising paragraphs (a) and (i) to read as follows:

§ 1304.204 Docks, piers, and boathouses.

* * * * *

(a) Docks, piers, boathouses, and all other residential water-use facilities shall not exceed a total footprint area of 1,000 square feet, unless the proposed water-use facility will be located in an area of preexisting development. For the purpose of this regulation, ''preexisting development'' means either: The water-use facility will be located in a subdivision recorded before November 1, 1999, and TVA permitted at least one water-use facility in the subdivision prior to November 1, 1999; or if there is no subdivision, where the water-use facility will be located within a quarter-mile radius of another water-use facility that TVA permitted prior to November 1, 1999. Water-use facilities located in an area of preexisting development shall not exceed a total footprint area of 1,800 square feet.

* * * * *

(i) Where the applicant owns or controls less than 50 feet of property adjoining TVA shoreland, the overall width of the facilities permitted along the shore shall be limited to ensure sufficient space to accommodate other property owners.

* * * * *

■ 9. Amend § 1304.212 by revising paragraph (a)(1) to read as follows:

§ 1304.212 Waivers.

(a) * * *

(1) The property is within a preexisting development as defined in § 1304.204(a); and

* * * * *

■ 10. Amend § 1304.302 by revising the first sentence to read as follows:

§ 1304.302 Vegetation management on flowage easement shoreland.

Removal, modification, or establishment of vegetation on privately-owned shoreland subject to a

TVA flowage easement generally does not require approval by TVA. * * *

■ 11. Revise § 1304.400(a) to read as follows.

§ 1304.400 Flotation devices and material, all floating structures.

(a)(1) By December 31, 2031, all unencased (*i.e.* Styrofoam) flotation shall have been removed and replaced with flotation consistent with this subpart. Structures continuing to use unencased flotation on or after December 31, 2031, will be subject to removal under § 1304.406. Use or re-use of unencased flotation for repairs, replacement, or new construction is prohibited. Existing unencased flotation (secured in place prior to September 8, 2003) may continue to be used until December 31, 2031, so long as it remains attached and in good condition in TVA's judgement. If in TVA's judgement, the flotation is no longer serviceable, it shall be replaced with approved flotation within 24 months upon notification from TVA.

(2) All flotation for docks, boat mooring buoys, floating cabins and attached structures, and other water-use structures and facilities, shall be of materials commercially manufactured for marine use. Flotation materials shall be fabricated so as not to become water-logged, crack, peel, fragment, or be subject to loss of beads. Flotation materials shall be resistant to puncture, penetration, damage by animals, and fire. Any flotation within 40 feet of a line carrying fuel shall be 100 percent impervious to water and fuel. Use of plastic, metal, or other previously used drums or containers for encasement or flotation purposes is prohibited, except as provided in paragraph (c) of this section for certain metal drums already in use. For any flotation devices or material, repair or replacement is required when it no longer performs its designated function or it exhibits any of the conditions prohibited by this subpart.

* * * * *

■ 12. Amend § 1304.412 by:

■ a. Adding in alphabetical order definitions for ''Attached structure'', ''Combined floating cabin'', ''Floating cabin'', ''Monolithic frame'', and ''Structural Modification''; and

■ b. Revising the definitions for ''Backlot'', ''Community outlot'', and ''Rebuilding''.

The additions and revisions read as follows:

§ 1304.412 Definitions.

* * * * *

Attached structure means a floating deck, walkway, platform, slip, or other structure that supports the use of a floating cabin and can be detached from the floating cabin. Attached structures are not considered part of the monolithic frame of a floating cabin.

* * * * *

Backlot means a residential lot not located adjacent to the shoreland but located in a subdivision associated with the shoreland.

* * * * *

Combined floating cabin means a single floating cabin that replaces two or more existing floating cabins.

* * * * *

Community outlot means a subdivision lot located adjacent to the shoreland and designated by deed, subdivision covenant, or recorded plat as available for use by designated property owners within the subdivision.

* * * * *

Floating cabin means a nonnavigable houseboat approved by TVA on or before December 16, 2016, and other floating structures moored on the Tennessee River System as of this date, and determined by TVA in its sole discretion to be designed and used primarily for human habitation or occupation and not designed and used primarily for navigation or transportation on the water.

* * * * *

Monolithic frame means the supporting floor structure of a floating cabin that is constructed as one rigid component. It specifically excludes any attached structures such as decks and platforms, regardless of when they were connected or how they are connected (*e.g.,* pins, hinges, bolts, ropes, etc.).

* * * * *

Rebuilding means replacement of all or a significant portion of an approved obstruction to the same configuration, total footprint, and dimensions (length, width, and height of the obstruction or enclosed or open space) as the approved plans, standards, and conditions of the section 26a permit.

* * * * *

Structural modification means any alteration to the dimensions (length, width, and height of the obstruction or enclosed or open space) or approved plans of a structure; in the case of floating cabins, the dimensions include the total dimensions of the floating cabin or enclosed or open space.

* * * * *

David L. Bowling,

Vice President, River and Resources Stewardship.

[FR Doc. 2019–25934 Filed 12–9–19; 8:45 am]

BILLING CODE 8120–08–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2018–0026]

RIN 0960–AI27

Rules Regarding the Frequency and Notice of Continuing Disability Reviews; Extension of Comment Period

AGENCY: Social Security Administration.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On November 18, 2019, we published the proposed rule Rules Regarding the Frequency and Notice of Continuing Disability Reviews in the **Federal Register**, and solicited public comments. We provided a 60-day comment period ending January 17, 2020. We are extending the comment period for 15 days.

DATES: The comment period for the proposed rule published November 18, 2019, at 84 FR 63588, is extended. Comments should be received on or before January 31, 2020.

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–2018–0026 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–2018–0026 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Address your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise

Building, 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: Cheryl A. Williams, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 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.*

Andrew Saul,

Commissioner of Social Security.

[FR Doc. 2019–26485 Filed 12–9–19; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[Docket ID ED–2019–OSERS–0134]

Proposed Priority and Requirements—Technical Assistance on State Data Collection—National Technical Assistance Center To Improve State Capacity To Collect, Report, Analyze, and Use Accurate IDEA Part B and Part C Fiscal Data

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Proposed priority and requirements.

SUMMARY: The mission of the Office of Special Education and Rehabilitative Services (OSERS) is to improve early childhood, educational, and employment outcomes and raise expectations for all people with disabilities, their families, their communities, and the Nation. As such, the Department of Education (Department) proposes a funding priority and requirements under the Technical Assistance on State Data Collection program. The Department may use the proposed priority for competitions in fiscal year (FY) 2020 and later years. We take this action to focus attention on an identified national need to provide technical assistance (TA) to improve the capacity of States to meet the data collection requirements under Parts B and C of the Individuals with Disabilities Education Act (IDEA). The National Technical Assistance Center to Improve State Capacity to Collect, Report, Analyze, and Use Accurate IDEA Part B and Part C Fiscal Data (Fiscal Data Center) would support States in collecting, reporting, and determining how to best analyze and use their IDEA Part B and C fiscal data to establish and meet high expectations for each child with a disability and would customize its TA to meet each State's specific needs.

DATES: We must receive your comments on or before February 24, 2020.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

• *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''Help.''

• *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments, address them to Charles Kniseley, U.S. Department of Education, 400 Maryland Avenue SW, Room 5133, Potomac Center Plaza, Washington, DC 20202–5076.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Charles Kniseley, U.S. Department of Education, 400 Maryland Avenue SW, Room 5133, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7322. Email: *Charles.Kniseley@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

[Catalog of Federal Domestic Assistance (CFDA) Number: 84.373F.]

Invitation to Comment: We invite you to submit comments regarding the proposed priority and requirements. To ensure that your comments have maximum effect in developing the notice of final priority and requirements we urge you to clearly identify the specific topic that each comment addresses.

We are particularly interested in comments about whether the proposed priority or any of the proposed requirements would be challenging for new applicants to meet and, if so, how the proposed priority or requirements could be revised to address potential challenges.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 13771 and their overall requirement of reducing regulatory burden that might result from this proposed priority and these proposed requirements. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about the proposed priority and requirements by accessing *Regulations.gov.* You may also inspect the comments in person in room 5133, 550 12th Street SW, Potomac Center Plaza, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed priority and requirements. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Purpose of Program: The purpose of the Technical Assistance on State Data Collection program is to improve the capacity of States to meet IDEA data collection and reporting requirements. Funding for the program is authorized under section 611(c)(1) of IDEA, which gives the Secretary the authority to reserve not more than one-half of 1 percent of the amounts appropriated under Part B for each fiscal year to provide TA activities authorized under section 616(i), where needed, to improve the capacity of States to meet the data collection requirements under Parts B and C of IDEA. The maximum amount the Secretary may reserve under this set-aside for any fiscal year is

$25,000,000, cumulatively adjusted by the rate of inflation. Section 616(i) of IDEA requires the Secretary to review the data collection and analysis capacity of States to ensure that data and information determined necessary for the implementation of section 616 of IDEA are collected, analyzed, and accurately reported to the Secretary. It also requires the Secretary to provide TA (from funds reserved under section 611(c)(1)), where needed, to improve the capacity of States to meet the data collection requirements under Parts B and C of IDEA, which include the data collection and reporting requirements in sections 616 and 618 of IDEA. Additionally, the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 gives the Secretary the authority to use funds reserved under section 611(c) to ''administer and carry out other services and activities to improve data collection, coordination, quality, and use under parts B and C of the IDEA.'' Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019; Div. B, Title III of Public Law 115–245; 132 Stat. 3100 (2018).

To help ensure this program meets State needs, we invited the public to provide input on the Technical Assistance on State Data Collection program from April 24, 2018, through May 24, 2018, on the ED.gov OSERS Blog.[1] In response to this invitation, we received 63 relevant responses, all of which we considered in our development of this document. Sixty-two supported our continuing to fund TA centers; only one supported one of the other options we presented, specifically, to invite State educational agencies (SEAs) and State lead agencies (LAs) to directly apply for funds reserved under section 611(c) to purchase TA to improve their capacity to meet their IDEA Part B and Part C data collection requirements. A few commenters noted some concerns regarding overlap between TA centers and a need for cross-State collaboration TA opportunities.

We address these concerns in the proposed priority by (1) including a requirement for the Fiscal Data Center to offer cross-State collaboration TA opportunities; and (2) clarifying that the scope of the Fiscal Data Center will be distinct from the scope of two separate centers that will provide TA on other non-fiscal data: The National Technical Assistance Center to Improve State Capacity to Collect, Report, Analyze, and Use Accurate IDEA Part B Data, CFDA number 84.373Y, and the National Technical Assistance Center to Improve State Capacity to Collect, Report, Analyze, and Use Accurate Early Childhood IDEA Data, CFDA number 84.373Z, for which the notices of final priority and requirements (NFP) were published in the **Federal Register** on August 12, 2019 (84 FR 39736 and 84 FR 39727).

Program Authority: 20 U.S.C. 1411(c), 1416(i), 1418(c), and 1442; the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019; Div. B, Title III of Public Law 115–245, Consolidated Appropriations Act, 2019; 132 Stat. 3100 (2018).

Applicable Program Regulations: 34 CFR 300.702.

Proposed Priority: The Assistant Secretary proposes the following priority for this program. We may apply this proposed priority in any year in which this program is in effect.

National Technical Assistance Center To Improve State Capacity To Collect, Report, Analyze, and Use Accurate IDEA Part B and Part C Fiscal Data

Background: The purpose of this proposed priority is to establish a Fiscal Data Center to provide States with TA to assist them in meeting their fiscal data collection and reporting obligations under IDEA. Under Part B of IDEA, State educational agencies (SEAs) are required to submit fiscal data to the Department in (1) the IDEA Part B local educational agency (LEA) Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) (LEA MOE/CEIS) Data Collection; and (2) Section V of the IDEA Part B Annual Application. Under IDEA Part C, State lead agencies (LAs) are also required to report fiscal data to the Department in (1) Section III of the IDEA Part C Annual Application (use of funds); and (2) Section IV of the IDEA Part C Annual Application (indirect costs).

In reviewing the data submitted by States, the Department finds that States continue to need support to build their capacity to submit valid and reliable IDEA Part B and Part C fiscal data. It is important for these data to be accurate so that States can use them to more effectively manage all available funding resources for services for children with disabilities and ensure that IDEA funds are used as a payor of last resort. In addition, under IDEA Part B, States may suffer significant monetary consequences as a result of inaccurate data reporting or noncompliance identified through these data collections.

Data Under IDEA Part B

In FY 2014 the Department funded the Technical Assistance on State Data Collection—IDEA Fiscal Data Center, which provided TA to improve the capacity of States to meet the following IDEA Part B fiscal data collection requirements under section 618 of IDEA: (1) Maintenance of State Financial Support (MFS) for special education and related services; and (2) LEA MOE/CEIS.

Since that time, the Department added new data elements to the LEA MOE/CEIS data collection based on the final LEA MOE regulations that were published in the **Federal Register** on April 28, 2015 (80 FR 23644), and States will need to ensure that the data they submit under those new elements are valid and reliable. In addition, the Department continues to identify errors in States' Part B LEA MOE/CEIS data submissions through its annual review process. Finally, based on the Office of Special Education Programs' (OSEP) monitoring visits and subsequent fiscal findings in several States, OSEP has determined that States continue to need support in understanding the requirements relating to the data elements reported under the LEA MOE/CEIS data collection.

For example, OSEP has identified noncompliance in the methodologies used by some States to calculate the amounts of their LEAs' IDEA Part B subgrants. This type of noncompliance has broader implications for LEAs and States that receive increased or decreased funding for special education and related services. As an illustration of the potential impact of fiscal noncompliance, an error in calculating the amount of an LEA's IDEA Part B allocation affects the amounts the LEA may expend to meet other fiscal requirements, such as LEA MOE reduction under 34 CFR 300.205, voluntary CEIS under 34 CFR 300.226(a), comprehensive CEIS under 34 CFR 300.646(d), and proportionate share for parentally placed private school children with disabilities under 34 CFR 300.133. Based on the complexities and high stakes involved in reporting valid and reliable IDEA Part B fiscal data, the Department determined that States continue to need TA to improve their data collection capacity, their ability to analyze and use that data, and their ability to ensure data

[1] See *https://sites.ed.gov/osers/2018/04/use-of-part-b-program-funds-for-technical-assistance-to-states-on-idea-data-collection/.*

are accurate and can be reported to the Department and the public.[2]

Accurately collecting and reporting valid and reliable IDEA Part B fiscal data is critically important for States and LEAs. Failure of a State to report accurate data on MFS may result in a reduction of IDEA Part B section 611 funds. Failure of an LEA to meet LEA MOE may result in repayment by the SEA of non-Federal funds to the Department. In addition, accurate fiscal information is needed for States to make informed decisions on the use of their IDEA Part B funds. Finally, valid and reliable fiscal data allow OSEP to better protect the Federal interest in the approximately $13.2 billion of IDEA Part B grants made available to States by the Department in Federal fiscal year (FFY) 2019 by ensuring that States and LEAs meet their obligation to collect and report accurate data on IDEA's MFS and LEA MOE requirements.

TA on collecting, reporting, analyzing, and using other IDEA Part B and Part C data reported under sections 616 and 618 of IDEA would be provided by the National Technical Assistance Center to Improve State Capacity to Collect, Report, Analyze, and Use Accurate IDEA Part B Data, CFDA number 84.373Y, and the National Technical Assistance Center to Improve State Capacity to Collect, Report, Analyze, and Use Accurate Early Childhood IDEA Data, CFDA number 84.373Z, for which notices of final priority and requirements (NFP) were published in the **Federal Register** on August 12, 2019 (84 FR 39736 and 84 FR 39727).

Data Under IDEA Part C

In its review of State submissions of IDEA Part C fiscal data, the Department found that States need support to submit accurate, valid, and reliable data in two areas: (1) Use of IDEA Part C funds; and (2) indirect costs.[3] In its reviews, OSEP found inconsistencies within the fiscal data reported by a State LA and between the fiscal data reported and the related fiscal certification and assurances that the State must provide in its IDEA Part C Annual Application.

In its IDEA Part C Annual Application, each LA must provide several fiscal-related assurances and a fiscal-related certification. Specifically, each LA must—(1) ensure its statewide system has a single line of responsibility, including: (a) The identification and coordination of all available resources for early intervention services within the State, including those from Federal, State, local, and private sources, consistent with subpart F of 34 CFR part 303; and (b) the assignment of financial responsibility in accordance with subpart F of 34 CFR part 303 and specifically ensure IDEA Part C funds are used as payor of last resort (including any method under IDEA section 640); (2) coordinate all available funding sources for IDEA Part C services (including its system of payments); (3) use IDEA Part C funds to supplement, not supplant, the level of State and local funds expended for infants and toddlers with disabilities; and (4) charge administrative direct and indirect costs to the Part C grant consistent with applicable Federal fiscal requirements.[4]

In addition, each LA must certify that the arrangements to establish financial responsibility for the provision of Part C services among appropriate public agencies under 34 CFR 303.511 and the lead agency's contracts with early intervention service (EIS) providers regarding financial responsibility for the provision of Part C services meet the requirements in 34 CFR 303.500 through 303.521 and are current as of the date of submission of the certification.[5] Fiscal data related to this certification may need to also be reported in Section III of the IDEA Part C Annual State Application under funding for other State agencies to the extent Federal IDEA Part C funds are used in conjunction with State funding or other support provided by State agencies other than the State lead agency.

In several instances, States' reporting of IDEA Part C fiscal data in their applications indicates that there is confusion related to the implementation of underlying Part C fiscal requirements. Many States need support in understanding the administrative costs that may be charged to IDEA Part C grants as direct and indirect costs. Additionally, in their annual application numerous States are unable to identify or disaggregate the costs for direct services, as well as costs attributable to other State agencies, due to confusion regarding the fiscal certification, and fiscal assurances regarding the payor of last resort, system of payments, methods, and related fiscal coordination requirements.

OSEP's review of the fiscal data in Section III of the IDEA Part C application (use of funds) indicates that States need TA in this area. This review has identified inconsistencies in data across categories of expenses (including direct and indirect costs) and between the fiscal data reported by the State and the related fiscal assurances and certification regarding funding needed or provided by other State agencies (and any methods, such as interagency agreements or other appropriate written mechanisms) and the State's related application requirements, including its system of payments policies. States' fiscal data reflect confusion with the fiscal requirements not only under the IDEA Part C statute and regulations, but also the fiscal requirements under the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, codified in 2 CFR part 200 (OMB Uniform Guidance).

Specifically, OSEP has identified issues with, and States have raised questions about, how to report IDEA Part C fiscal data regarding the amount of IDEA Part C funds to be used for: (1) Administrative costs, such as positions partially or wholly funded by IDEA Part C funds, and the amount of fringe benefits (reported in Section III.A.); (2) maintenance and implementation activities for the LA and the State Interagency Coordinating Council (ICC) (including any costs that require prior approval by OSEP, such as equipment, rent, and participant support costs for trainings and conferences) (reported in Section III.B.); (3) direct services (disaggregated by the type of service and expended consistently with IDEA's payor-of-last-resort and system of payments requirements) (reported in Section III.C.); and (4) activities by other State agencies (reported in Section III.D.). The fiscal data in each of these categories reflects a need for TA on the requirements in the OMB Uniform Guidance as they apply to IDEA Part C LAs and EIS providers.

OSEP has also found that States need TA with Section III use of funds grant amendment requests after the grant is issued to comply with fiscal requirements and in order to expend unused IDEA Part C funds prior to those funds lapsing. These fiscal requirements

[2] The Department's FY 2014 notice of proposed priority (79 FR 24661) provided information on the challenges States face in understanding, submitting, analyzing and using IDEA Part B fiscal data.

[3] These fiscal data are reported in the following sections of the IDEA Part C Application: (1) Section III: Use of Federal IDEA Part C Funds for the State LA and the Interagency Coordinating Council (ICC); and (2) Section IV.B: Restricted Indirect Cost Rate/Cost Allocation Plan data, which the Department collects, *inter alia,* under section 618(a)(3) of IDEA.

[4] These assurances are provided in Section II.B., items 13 and 24. The assurance numbers are from the FFY 2019 IDEA Part C Annual State Application, which can be accessed at *https://osep.grads360.org/#communities/pdc/documents/17654.*

[5] This is certification number 3 in Section II.C. of the application, and it is provided, under IDEA section 640 and 34 CFR 303.202, in Section II.C. It can be accessed at *https://osep.grads360.org/#communities/pdc/documents/17654.*

are also codified in the OMB Uniform Guidance.

In Section IV.B. of the IDEA Part C application, the LA must report on whether the State plans to charge indirect costs to the IDEA Part C grant through the use of a restricted indirect cost rate agreement or a cost allocation plan that is approved by the LA's Federal cognizant agency and provide appropriate documentation.

Sections III.F.6 and IV.B also require States to indicate that, if indirect costs are being charged to the IDEA Part C grant, the State must indicate the total amount of the overall Federal IDEA Part C grant funds that will be charged for restricted indirect costs and provide appropriate approval documentation. If the State charges indirect costs to its IDEA Part C grant, then, under 34 CFR 303.225(c), an LA may charge them through either: (1) A restricted indirect cost rate agreement that meets the requirements in 34 CFR 76.560 through 76.569; or (2) a cost allocation plan that meets the non-supplanting requirements in 34 CFR 303.225(b) and 34 CFR part 76.[6] OSEP has worked with LAs when it identifies large amounts of IDEA Part C funding being reserved for administrative or indirect costs and believes that LAs need TA both on reporting indirect cost data to the Department in the application and on applying indirect costs and related Federal requirements to the IDEA Part C grant. This is particularly relevant to LAs that have a cognizant Federal agency other than the Department and to ensure that States and LAs meet requirements in Education Department General Administrative Regulations and the OMB Uniform Guidance, which require indirect costs for IDEA Part C grants to be calculated on a restricted basis due to IDEA Part C's nonsupplanting requirement.[7] The Fiscal Data Center would support States in appropriately applying their previously negotiated or provisionally approved indirect cost rate agreements or a cost allocation plan as described above. The Fiscal Data Center would not support LAs in negotiating an indirect cost rate agreement with their cognizant agencies.

States need TA in reporting valid and reliable IDEA Part C fiscal data, understanding the underlying requirements in Section III and Section IV of the IDEA Part C Annual State Application, and optimally using and analyzing the data submitted to the Department.

Indirect Costs Charged by the Fiscal Data Center to the Grant

In addition, we propose for this priority to include an indirect cost cap that is the lesser of the grantee's actual indirect costs as determined by the grantee's negotiated indirect cost rate agreement with its cognizant Federal agency and 40 percent of the grantee's modified total direct cost (MTDC) base. We believe this cap is appropriate as it maximizes the availability of funds for the primary TA purposes of this priority. The Department has done an analysis of the indirect cost rates for all current TA centers funded under the Technical Assistance and Dissemination and Technical Assistance on State Data Collection programs as well as other grantees that are large, midsize, and small businesses and small nonprofit organizations and has found that, in general, total indirect costs charged on these grants by these entities were at or below 35 percent of total direct costs (TDC). We recognize that, dependent on the structure of the investment and activities, the MTDC base could be much smaller than the TDC, which would imply a higher indirect cost rate than those calculated here. The Department arrived at a 40 percent rate to address some of that variation. This would account for a 12 percent variance between TDC and MTDC. However, we note that, in the absence of a cap, certain entities would likely charge indirect cost rates in excess of 40 percent of MTDC. Based on our analysis, it appears that those entities would likely be larger for-profit and nonprofit organizations, but these organizations appear to be outliers when compared to the majority of other large businesses as well as the entirety of OSEP's grantees. Setting an indirect cost rate cap of 40 percent would be in line with the majority of applicants' existing negotiated rates with the cognizant Federal agency.

This proposed priority aligns with two priorities from the Secretary's Final Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on March 2, 2018 (83 FR 9096): Priority 2: Promoting Innovation and Efficiency, Streamlining Education With an Increased Focus on Student Outcomes, and Providing Increased Value to Students and Taxpayers; and Priority 5: Meeting the Unique Needs of Students and Children with Disabilities and/or Those With Unique Gifts and Talents.

The Fiscal Data Center must be operated in a manner consistently with nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

Proposed Priority: The purpose of this proposed priority is to fund a cooperative agreement to establish and operate the National Technical Assistance Center to Improve State Capacity to Collect, Report, Analyze, and Use Accurate IDEA Part B and Part C Fiscal Data (Fiscal Data Center).

The Fiscal Data Center will provide TA to improve the capacity of States to meet the IDEA Part B and C fiscal data collection requirements under IDEA section 618 and increase States' knowledge of the underlying IDEA fiscal requirements and calculations necessary to submit valid and reliable data for the following collections: (1) MFS in Section V of the IDEA Part B Annual State Application; (2) LEA MOE/CEIS; (3) Description of Use of Federal IDEA Part C Funds for the LA and the ICC in Section III of the IDEA Part C Annual State Application; and (4) Restricted Indirect Cost Rate/Cost Allocation Plan Information in Sections III and IV of the IDEA Part C Annual State Application. States will also receive TA from the Fiscal Data Center on the underlying fiscal requirements of IDEA related to these collections and how they impact the States' ability to meet IDEA fiscal data collection requirements.

Note: The Fiscal Data Center may neither provide TA to States on negotiating indirect cost rate agreements with their cognizant Federal agencies nor act as an agent or representative of States in such negotiations.

The Fiscal Data Center must be designed to achieve, at a minimum, the following outcomes:

(a) Increased capacity of States to collect, report, analyze, and use high-quality IDEA Part B and Part C fiscal data;

(b) Increased State knowledge of underlying statutory and regulatory fiscal requirements and the calculations necessary to submit valid and reliable fiscal data under IDEA Part B and Part C;

(c) Improved fiscal infrastructure (*e.g.,* sample interagency agreements, standard operating procedures and templates) by coordinating and promoting communication and effective

[6] Approximately three quarters of States have a department of health or social services as the LA for Part C. In those cases, the U.S. Department of Health and Human Services is the cognizant Federal agency for indirect cost purposes. For certain territories, the U.S. Department of the Interior is the cognizant Federal agency for indirect cost purposes. For LAs that are also SEAs, the Department is the cognizant agency for approving the LA's restricted indirect cost rate or cost allocation plan. If an LA has a cognizant Federal agency other than the Department for determining the LA's restricted indirect cost rate or approving its cost allocation plan, the LA must attach a copy of the approved restricted indirect cost rate agreement or cost allocation plan to the Department in the IDEA Part C Annual Application.

[7] Appendix VI and Appendix VII to 2 CFR 200.

fiscal data collection and reporting strategies among relevant State offices, including SEAs, other State agencies, LEAs, schools, LAs, and early intervention service (EIS) programs or providers;

(d) Increased capacity of States to submit accurate and timely fiscal data to enhance current State validation procedures to prevent errors in State-reported IDEA data;

(e) Increased capacity of States to train personnel to meet the IDEA fiscal data collection and reporting requirements under section 618 of IDEA through development of effective tools and resources (*e.g.,* templates, tools, calculators, and documentation of State data processes); and providing opportunities for in-person and virtual cross-State collaboration about IDEA fiscal data collection and reporting requirements (required under section 618 of IDEA);

(f) Improved capacity of SEAs, LEAs, LAs, and EIS programs or providers to collect and use IDEA fiscal data to identify issues and address those issues through monitoring, TA, and stakeholder involvement; and

(g) Improved IDEA fiscal data validation using results from data reviews conducted by the Department to work with States and generate tools that can be used by States to accurately communicate fiscal data to local consumers (*e.g.,* parents, LEAs, EIS programs or providers, the general public) and lead to improvements in the validity and reliability of fiscal data required by IDEA.

Types of Priorities: When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Proposed Requirements: The Assistant Secretary proposes the following requirements for this program. We may apply one or more of these proposed requirements in any year in which this program is in effect.

Applicants must—

(a) Describe, in the narrative section of the application under ''Significance,'' how the proposed project will—

(1) Use knowledge of how SEAs, LAs, LEAs, and EIS programs and providers are meeting IDEA Part B and Part C fiscal data collection and reporting requirements and the underlying statutory and regulatory fiscal requirements, as well as knowledge of State and local data collection systems, as appropriate;

(2) Examine applicable national, State, and local data to determine the current capacity needs of SEAs, LAs, LEAs, and EIS programs and providers to meet IDEA Part B and Part C fiscal data collection and reporting requirements;

(3) Train SEAs and LAs on how to use IDEA section 618 fiscal data as a means of both improving data quality and identifying programmatic strengths and areas for improvement; and

(4) Disseminate information regarding how SEAs and LAs are currently meeting IDEA fiscal data collection and reporting requirements and are using IDEA section 618 data as a means of both improving data quality and identifying programmatic strengths and areas for improvement.

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how the proposed project will—

(1) Ensure equal access and treatment for members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. To meet this requirement, the applicant must describe how it will—

(i) Identify the needs of the intended recipients for TA and information; and

(ii) Ensure that services and products meet the needs of the intended recipients of the grant;

(2) Achieve its goals, objectives, and intended outcomes. To meet this requirement, the applicant must provide—

(i) Measurable intended project outcomes; and

(ii) In Appendix A, the logic model (as defined in 34 CFR 77.1) by which the proposed project will achieve its intended outcomes that depicts, at a minimum, the goals, activities, outputs, and intended outcomes of the proposed project;

(3) Use a conceptual framework to develop project plans and activities, describing any underlying concepts, assumptions, expectations, beliefs, or theories, as well as the presumed relationships or linkages among these variables, and any empirical support for this framework. Include a copy of the conceptual framework in Appendix A;

Note: The following websites provide more information on logic models and conceptual frameworks: *www.osepideasthatwork.org/logicModel* and *www.osepideasthatwork.org/resources-grantees/program-areas/ta-ta/tad-project-logic-model-and-conceptual-framework.*

(4) Be based on current research and make use of evidence-based practices (EBPs).[8] To meet this requirement, the applicant must describe—

(i) The current research on fiscal data management and data system integration, and related EBPs; and

(ii) How the proposed project will incorporate current research and EBPs in the development and delivery of its products and services;

(5) Develop products and provide services that are of high quality and sufficient intensity and duration to achieve the intended outcomes of the proposed project. To address this requirement, the applicant must describe—

(i) How it proposes to identify or develop the knowledge base on fiscal data management and data system integration and the underlying fiscal requirements of IDEA;

(ii) Its proposed approach to universal, general TA,[9] which must identify the intended recipients, including the type and number of recipients, that will receive the products and services under this approach;

(iii) Its proposed approach to targeted, specialized TA,[10] which must identify—

[8] For the purposes of this priority, ''evidence-based'' means the proposed project component is supported, at a minimum, by evidence that demonstrates a rationale (as defined in 34 CFR 77.1), where a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

[9] ''Universal, general TA'' means TA and information provided to independent users through their own initiative, resulting in minimal interaction with TA center staff and including one-time, invited or offered conference presentations by TA center staff. This category of TA also includes information or products, such as newsletters, guidebooks, or research syntheses, downloaded from the TA center's website by independent users. Brief communications by TA center staff with recipients, either by telephone or email, are also considered universal, general TA.

[10] ''Targeted, specialized TA'' means TA services based on needs common to multiple recipients and

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(A) The intended recipients, including the type and number of recipients, that will receive the products and services under this approach;

(B) Its proposed approach to measure the readiness of potential TA recipients to work with the project, assessing, at a minimum, their current infrastructure, available resources, and ability to build capacity at the State and local levels; and

(C) The process by which the proposed project will collaborate with OSEP-funded centers and other federally funded TA centers to develop and implement a coordinated TA plan when such other centers are involved in a State; and

(iv) Its proposed approach to intensive, sustained TA,[11] which must identify—

(A) The intended recipients, including the type and number of recipients, that will receive the products and services under this approach;

(B) Its proposed approach to addressing States' challenges reporting high-quality IDEA fiscal data to the Department and the public, which should, at a minimum, include providing on-site consultants to the SEA or LA to—

(*1*) Assess all 57 IDEA Part C programs to determine LA organizational structure and their capacity to submit valid and reliable IDEA Part C fiscal data;

(*2*) Assess all 60 entities that receive IDEA Part B grants to determine their capacity to submit valid and reliable IDEA Part B fiscal data;

(*3*) Identify and document model practices for data management and data system integration policies, procedures, processes, and activities within the State;

(*4*) Develop and adapt tools and provide technical solutions to meet State-specific data needs; and

(*5*) Develop a sustainability plan for the State to continue the data management and data system integration work in the future;

(C) Its proposed approach to measure the readiness of SEAs and LAs to work with the project, including their commitment to the initiative, alignment of the initiative to their needs, current infrastructure, available resources, and ability to build capacity at the State and local levels;

(D) Its proposed plan to prioritize States with the greatest need for intensive TA to receive products and services;

(E) Its proposed plan for assisting SEAs and LAs to build or enhance training systems that include professional development based on adult learning principles and coaching;

(F) Its proposed plan for working with appropriate levels of the education system (*e.g.,* SEAs, regional TA providers, districts, local programs, families) to ensure that there is communication between each level and that there are systems in place to support the collection, reporting, analysis, and use of high-quality IDEA fiscal data as well as fiscal data management and data system integration; and

(G) The process by which the proposed project will collaborate with OSEP-funded centers and other federally funded TA centers to develop and implement a coordinated TA plan when they are involved in a State;

(6) Develop products and implement services that maximize efficiency. To address this requirement, the applicant must describe—

(i) How the proposed project will use technology to achieve the intended project outcomes;

(ii) With whom the proposed project will collaborate and the intended outcomes of this collaboration; and

(iii) How the proposed project will use non-project resources to achieve the intended project outcomes.

(c) In the narrative section of the application under ''Quality of the project evaluation,'' include an evaluation plan for the project developed in consultation with and implemented by a third-party evaluator.[12] The evaluation plan must—

(1) Articulate formative and summative evaluation questions, including important process and outcome evaluation questions. These questions should be related to the project's proposed logic model required in paragraph (b)(2)(ii) of these requirements;

(2) Describe how progress in and fidelity of implementation, as well as project outcomes, will be measured to answer the evaluation questions. Specify the measures and associated instruments or sources for data appropriate to the evaluation questions. Include information regarding reliability and validity of measures where appropriate;

(3) Describe strategies for analyzing data and how data collected as part of this plan will be used to inform and improve service delivery over the course of the project and to refine the proposed logic model and evaluation plan, including subsequent data collection;

(4) Provide a timeline for conducting the evaluation and include staff assignments for completing the plan. The timeline must indicate that the data will be available annually for the Annual Performance Report (APR); and

(5) Dedicate sufficient funds in each budget year to cover the costs of developing or refining the evaluation plan in consultation with a third-party evaluator, as well as the costs associated with the implementation of the evaluation plan by the third-party evaluator.

(d) Demonstrate, in the narrative section of the application under ''Adequacy of resources,'' how—

(1) The proposed project will encourage applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate;

(2) The proposed key project personnel, consultants, and subcontractors have the qualifications and experience to carry out the proposed activities and achieve the project's intended outcomes;

(3) The applicant and any key partners have adequate resources to carry out the proposed activities;

(4) The proposed costs are reasonable in relation to the anticipated results and benefits, and funds will be spent in a way that increases their efficiency and cost-effectiveness, including by reducing waste or achieving better outcomes; and

(5) The applicant will ensure that it will recover the lesser of: (i) Its actual indirect costs as determined by the grantee's negotiated indirect cost rate agreement with its cognizant Federal agency; and (ii) 40 percent of its modified total direct cost (MTDC) base as defined in 2 CFR 200.68.

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not extensively individualized. A relationship is established between the TA recipient and one or more TA center staff. This category of TA includes one-time, labor-intensive events, such as facilitating strategic planning or hosting regional or national conferences. It can also include episodic, less labor-intensive events that extend over a period of time, such as facilitating a series of conference calls on single or multiple topics that are designed around the needs of the recipients. Facilitating communities of practice can also be considered targeted, specialized TA.

[11] ''Intensive, sustained TA'' means TA services often provided on-site and requiring a stable, ongoing relationship between the TA center staff and the TA recipient. ''TA services'' are defined as negotiated series of activities designed to reach a valued outcome. This category of TA should result in changes to policy, program, practice, or operations that support increased recipient capacity or improved outcomes at one or more systems levels.

[12] A ''third-party'' evaluator is an independent and impartial program evaluator who is contracted by the grantee to conduct an objective evaluation of the project. This evaluator must not have participated in the development or implementation of any project activities, except for the evaluation activities, nor have any financial interest in the outcome of the evaluation.

Note: The MTDC is different from the total amount of the grant. Additionally, the MTDC is not the same as calculating a percentage of each or a specific expenditure category. If the grantee is billing based on the MTDC base, the grantee must make its MTDC documentation available to the program office and the Department's Indirect Cost Unit. If a grantee's allocable indirect costs exceed 40 percent of its MTDC as defined in 2 CFR 200.68, the grantee may not recoup the excess by shifting the cost to other grants or contracts with the U.S. Government, unless specifically authorized by legislation. The grantee must use non-Federal revenue sources to pay for such unrecovered costs.

(e) Demonstrate, in the narrative section of the application under ''Quality of the management plan,'' how—

(1) The proposed management plan will ensure that the project's intended outcomes will be achieved on time and within budget. To address this requirement, the applicant must describe—

(i) Clearly defined responsibilities for key project personnel, consultants, and subcontractors, as applicable; and

(ii) Timelines and milestones for accomplishing the project tasks;

(2) Key project personnel and any consultants and subcontractors will be allocated and how these allocations are appropriate and adequate to achieve the project's intended outcomes;

(3) The proposed management plan will ensure that the products and services provided are of high quality, relevant, and useful to recipients; and

(4) The proposed project will benefit from a diversity of perspectives, including those of families, educators, TA providers, researchers, and policy makers, among others, in its development and operation.

(f) Address the following application requirements:

(1) Include, in Appendix A, personnel-loading charts and timelines, as applicable, to illustrate the management plan described in the narrative;

(2) Include, in the budget, attendance at the following:

(i) A one and one-half day kick-off meeting in Washington, DC, after receipt of the award, and an annual planning meeting in Washington, DC, with the OSEP project officer and other relevant staff during each subsequent year of the project period.

Note: Within 30 days of receipt of the award, a post-award teleconference must be held between the OSEP project officer and the grantee's project director or other authorized representative;

(ii) A two and one-half day project directors' conference in Washington, DC, during each year of the project period; and

(iii) Three annual two-day trips to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP;

(3) Include, in the budget, a line item for an annual set-aside of 5 percent of the grant amount to support emerging needs that are consistent with the proposed project's intended outcomes, as those needs are identified in consultation with, and approved by, the OSEP project officer. With approval from the OSEP project officer, the project must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period;

(4) Maintain a high-quality website, with an easy-to-navigate design, that meets government or industry-recognized standards for accessibility;

(5) Include, in Appendix A, an assurance to assist OSEP with the transfer of pertinent resources and products and to maintain the continuity of services to States during the transition to this new award period and at the end of this award period, as appropriate; and

(6) Budget at least 50 percent of the grant award for providing intensive, sustained TA.

Final Priority and Requirements: We will announce the final priority and requirements in a document in the **Federal Register**. We will determine the final priority and requirements after considering public comments and other information available to the Department. This document does not preclude us from proposing additional priorities or requirements, subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use this proposed priority and one or more of these proposed requirements, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, OMB determines whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

OMB has determined that this proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new rule that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new rule must be fully offset by the elimination of existing costs through deregulatory actions. Because the proposed regulatory action is not significant, the requirements of Executive Order 13771 do not apply.

We have also reviewed this proposed regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the

behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing the proposed priority and requirements only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

In addition, we have considered the potential benefits of this regulatory action and have noted these benefits in the background section of this document.

Paperwork Reduction Act of 1995

The proposed priority and requirements contain information collection requirements that are approved by OMB under OMB control number 1894–0006; the proposed priority and requirements do not affect the currently approved data collection.

Regulatory Flexibility Act Certification: The Secretary certifies that this proposed regulatory action would not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define ''small entities'' as for-profit or nonprofit institutions with total annual revenue below $7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, school districts, or special districts), with a population of less than 50,000.

The small entities that this proposed regulatory action would affect are SEAs; LEAs, including charter schools that operate as LEAs under State law; institutions of higher education; other public agencies; private nonprofit organizations; freely associated States and outlying areas; Indian Tribes or Tribal organizations; and for-profit organizations. We believe that the costs imposed on an applicant by the proposed priority and requirements would be limited to paperwork burden related to preparing an application and that the benefits of this proposed priority and these proposed requirements would outweigh any costs incurred by the applicant.

Participation in the Technical Assistance on State Data Collection program is voluntary. For this reason, the proposed priority and requirements would impose no burden on small entities unless they applied for funding under the program. We expect that in determining whether to apply for Technical Assistance on State Data Collection program funds, an eligible entity would evaluate the requirements of preparing an application and any associated costs, and weigh them against the benefits likely to be achieved by receiving a Technical Assistance on State Data Collection program grant. An eligible entity would probably apply only if it determines that the likely benefits exceed the costs of preparing an application.

We believe that the proposed priority and requirements would not impose any additional burden on a small entity applying for a grant than the entity would face in the absence of the proposed action. That is, the length of the applications those entities would submit in the absence of the proposed regulatory action and the time needed to prepare an application would likely be the same.

This proposed regulatory action would not have a significant economic impact on a small entity once it receives a grant because it would be able to meet the costs of compliance using the funds provided under this program. We invite comments from small eligible entities as to whether they believe this proposed regulatory action would have a significant economic impact on them and, if so, request evidence to support that belief.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,

Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2019–26477 Filed 12–9–19; 8:45 am]

BILLING CODE 4000–01–P

POSTAL REGULATORY COMMISSION

39 CFR part 3050

[Docket No. RM2020–2; Order No. 5336]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is acknowledging a recent filing requesting the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports (Proposal Ten). This document

informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 28, 2020.

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

On November 29, 2019, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports.[1] The Petition identifies the proposed analytical changes filed in this docket as Proposal Ten.

II. Proposal Ten

Background. Postmasters are compensated through the Workload Service Credit (WSC) system where pay grade is determined by credits earned. Petition, Proposal Ten at 1. These credits are earned in various ways, such as the amount of revenue flowing through a post office and for performing non-revenue activities like serving post office boxes and performing administrative functions. *Id.* Currently, the costs of Postmaster compensation are attributed to products based on the regression analysis presented in Docket No. R84–1, which measures the variability between WSCs and Postmaster costs. *Id.* The Postal Service indicates that, given the time that has passed since Docket No. R84–1, investigation into the Postmaster compensation costs was necessary. *Id.* at 1–2.

Proposal. The current methodology relies upon a regression using only ten data points because, at the time the model was developed in Docket No. R84–1, the Postal Service lacked data on WSCs for individual post offices. *Id.* at 3. However, the Postal Service now routinely collects data on Postmaster workload for operational purposes. *Id.* Proposal Ten seeks to update and improve the variabilities for calculating attributable Postmaster costs based on a new study of Postmaster costs ''that relies upon operational Postmaster data and reflects the current structure of Postmaster activities and compensation.'' [2] The methodology proposed by the Postal Service for the computation of Postmaster compensation volume-variability combines the shift in the number of Postmasters from one EAS grade to the next with changes in the resulting salary. Petition, Proposal Ten at 3–5. Thus, the value for Postmaster compensation volume-variability comes from two sources: (1) The percentage change in the number of Postmasters moving from one grade to the next; and (2) the percentage increase in the minimum salary across the two EAS grades. *Id.* at 5; *see also id.* at Table 1.

Impact. Currently, a single variability is applied to accrued Postmaster compensation costs. *Id.* at 6. Under the Postal Service's proposed methodology, different variabilities are estimated for each EAS grade. *Id.* The accrued cost for each grade is multiplied by its estimated variability, resulting in volume-variable costs for each grade. *Id.* Those grade-level volume-variable costs are summed to get the total volume-variable costs for Postmaster compensation. *Id.* The total volume-variable cost is then divided by total accrued cost to obtain the overall volume-variability. *Id.*

The Postal Service states that the proposed approach results in lower volume-variability for Postmaster compensation costs for three reasons. *Id.* First, the volume-variability of Docket No. R84–1 was ''overstated due to a computational error'' and correcting the error reduces the volume-variability to 13 percent. *Id.*

Second, the Postal Services notes that Post Office Structure Plan (POStPlan) eliminated lower EAS grades, where movement to the next grade-level and salary increases occurred more rapidly, resulting in higher volume-variability.[3] This is significant because, as mail volume increases, WSCs are earned resulting in EAS grade changes and salary increases that, in turn, increase Postmaster compensation costs. In the higher EAS grades, moving to the next grade-level requires much larger increases in WSCs. Thus, more typical increases in WSCs for these higher EAS grades are less likely to cause Postmasters to move up to a higher minimum salary and increase Postmaster compensation costs. *Id.* at 6. Accordingly, a given percentage increase in volume is, under the current structure, less likely to induce an increase in Postmaster compensation cost, which in turn has the effect of creating a lower volume-variability. *Id.* at 6–7.

Third, the Postal Services notes that the current approach measures how quickly salaries would rise from an overall increase in WSCs. *Id.* at 7. This is suboptimal because ''each EAS grade has a wide band of WSCs associated with it, and most post offices have a level of WSCs such that typical increases in their WSCs will keep the Postmaster in the same [EAS] grade.'' *Id.* The Postal Service states that the proposed approach would account for the amount of WSCs Postmasters actually earn and how quickly the existing complement of Postmasters would move up a grade if WSCs were increased, neither of which are currently measured. *Id.*

The Postal Service acknowledges that reduced volume-variability causes a reduction in total volume-variable costs for Postmaster compensation and proportional reductions ''per piece by product.'' *Id.* However, the Postal Service notes that ''Postmaster costs per piece are typically quite small'' thus ''the overall impacts on volume[-]variable costs per piece are generally quite small.'' *Id.*

III. Notice and Comment

The Commission establishes Docket No. RM2020–2 for consideration of matters raised by the Petition. More information on the Petition may be accessed via the Commission's website at *http://www.prc.gov.* Interested persons may submit comments on the Petition and Proposal Ten no later than February 28, 2020. Pursuant to 39 U.S.C. 505, Lawrence Fenster is designated as an officer of the Commission (Public Representative) to represent the

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Ten), November 29, 2019 (Petition). The Postal Service filed a notice of filing of non-public materials relating to Proposal Ten. Notice of Filing of USPS–RM2020–2/1 and USPS–RM2020–2/NP1 and Application for Nonpublic Treatment, November 29, 2019.

[2] *Id.* at 1. The Postal Service's Petition was accompanied by a study supporting its proposal. *See* Michael D. Bradley, *Investigating the Variability of Postmaster Costs,** November 29, 2019.

[3] *Id.* The POStPlan changed the hours at smaller post offices and changed the Postmaster compensation structure. *Id.* at 2. Following the implementation of POStPlan, post offices that were in the EAS grades below EAS–18 are no longer in the EAS system. *Id.*

interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2020–2 for consideration of the matters raised by the Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Ten), filed November 29, 2019.

2. Comments by interested persons in this proceeding are due no later than February 28, 2020.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Lawrence Fenster to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Darcie S. Tokioka,

Acting Secretary.

[FR Doc. 2019–26488 Filed 12–9–19; 8:45 am]

BILLING CODE 7710–FW–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[Docket No. 191202–0097]

RIN 0648–BH28

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Construction Activities at Naval Weapons Station Seal Beach, California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals over the course of five years (2020–2025) incidental to conducting construction activities related to development of a new ammunition pier at Seal Beach, California. As required by the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take, and requests comments on the proposed regulations. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and will summarize and respond to such comments in the final notice of our decision.

DATES: Comments and information must be received no later than January 9, 2020.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2019–0131, by either of the following methods:

• *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0131,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the Navy's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-ammunition-pier-and-turning-basin-naval.* In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

We received an application from the Navy requesting five-year regulations and authorization to take multiple species of marine mammals. This proposed rule would establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take by Level B harassment of marine mammals incidental to the Navy's construction activities related to development of a new ammunition pier at Seal Beach, California, including impact and vibratory pile driving. Please see ''Background'' below for definitions of harassment.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the ''Proposed Mitigation'' section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this proposed rule containing five-year regulations, and for any subsequent LOAs. As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Proposed Rule

Following is a summary of the major provisions of this proposed rule regarding Navy construction activities. These measures include:

• Required monitoring of the construction areas to detect the presence of marine mammals before beginning construction activities.

• Shutdown of construction activities under certain circumstances to avoid injury of marine mammals.

• Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the proposed action qualifies to be categorically excluded from further NEPA review.

Information in the Navy's application and this notice collectively provide the environmental information related to proposed issuance of these regulations and subsequent incidental take authorization for public review and comment. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the request for incidental take authorization.

Summary of Request

On September 10, 2019, we received an adequate and complete request from the Navy requesting authorization for take of marine mammals incidental to construction activities related to development of a new ammunition pier at Seal Beach, California. On September 17, 2019 (84 FR 48914), we published a notice of receipt of the Navy's application in the **Federal Register**, requesting comments and information related to the request for 30 days. Our consideration of the Navy's request was informed by review by the Marine Mammal Commission, and the Navy submitted a revised, final version of the application on November 26, 2019. No formal comments were received during the public review period.

The Navy proposes to conduct construction necessary for development of a new ammunition pier at Naval Weapons Station (NWS) Seal Beach, California. Construction activities include construction of a new pile-supported pier, construction of a new breakwater and causeway, dredging of the turning basin and creation of a new navigation channel for public access, installation of new moorings and pile-supported mooring dolphins, and demolition of existing facilities. Among other activities, construction would include use of impact and vibratory pile driving, including installation and removal of steel, concrete, and timber piles. Hereafter (unless otherwise specified or detailed) we use the term ''pile driving'' to refer to both pile installation and pile removal. The use of both vibratory and impact pile driving is expected to produce underwater sound at levels that have the potential to result in harassment of marine mammals.

The Navy requests authorization to take individuals of five species by Level B harassment. The proposed regulations would be valid for five years (2020–2025).

Description of the Specified Activity

Overview

NWS Seal Beach is the U.S. Pacific Fleet's primary weapons station on the West Coast of the United States. As such, NWS Seal Beach has three primary missions: Storage of Navy and Marine Corps ammunition, missile systems maintenance, and loading and unloading of Navy warships and larger Coast Guard vessels. The existing wharf at NWS Seal Beach is past its design life—over 65 years old—and was constructed prior to the introduction of modern seismic codes. Seismic design deficiencies are of significant concern due to the proximity to active faults and high liquefaction potential of underlying soils. The current condition and configuration of the existing pier and turning basin limits the size and number of ships that can be loaded and unloaded with ammunition at the same time and presents safety and security concerns due to the proximity of naval munitions operations to civilian small boat traffic and the Pacific Coast Highway. Therefore, the proposed construction activities are necessary to sustain and enhance mission capability by eliminating deficiencies associated with the condition, configuration, and capacity of the existing pier and turning basin.

In-water pile driving work is expected to require approximately three years, but could occur at any time during the five-year period of validity of these proposed regulations. The Navy estimates installing approximately 900 primarily concrete piles in total in order to construct the new pier. Construction will include use of impact and vibratory pile driving. Aspects of construction activities other than pile driving are not anticipated to have the potential to result in incidental take of marine mammals because they are either above water or do not produce levels of underwater sound with likely potential to result in marine mammal disturbance.

Dates and Duration

The proposed regulations would be valid for a period of five years (2020–2025). The specified activities may occur at any time during the five-year period of validity of the proposed regulations. Pile driving activity would be completed over an approximately three-year period that is not necessarily consecutive during the five-year period of validity of these proposed regulations.

Pile driving would typically occur only from Monday through Friday during typical working hours (*i.e.,* during daylight hours). Estimated days of pile driving are based on a conservative production rate of approximately three piles per day for installation of 922 piles, *i.e.,* 308 days. An additional 28 days is assumed for removal of piles. Therefore, the estimated number of total pile driving days is approximately 336 over the five-year period. These totals include both extraction and installation of piles, and represent a conservative estimate of pile driving days. In a real construction situation, pile driving production rates would be maximized when possible and actual daily production rates may be higher, resulting in fewer actual pile driving days.

Specified Geographical Region

Construction activities at NWS Seal Beach will be located within Orange County, California, adjacent to the Port of Long Beach. The City of Seal Beach is situated between the Cities of Long Beach to the west and Huntington Beach to the east (see Figure 1–1 in the Navy's application). The specific site of the proposed construction activities is within Anaheim Bay, a small harbor that is completely enclosed by two jetties and land, aside from a narrow entrance channel (see Figure 1–2 of the Navy's application). Depth within Anaheim Bay, which is maintained through dredging, is approximately 10 meters, and the substrate is composed of soft sand and mud alluvial sediments. The jetty-enclosed entrance channel extends 1.3 km from the existing pier location to the approximately 200-m opening between the jetties.

The Anaheim Bay entrance is located approximately 5 miles (8 km) from the Ports of Los Angeles/Long Beach, which together form one of the busiest container ports in the world. Numerous associated ship anchorages are arrayed in the vicinity. In 2016 there were 4,277 ship port visits with over 8,400 ship transits of these nearshore waters (U.S. Army Corps of Engineers, 2017). Associated with these port visits and transits, pilot vessels and tug boats are also active in the vicinity of the port. Immediately adjacent to the Anaheim Bay entrance are entrances to the Huntington Beach and Alamitos/Long Beach marinas, which together have more than 2,000 boat slips. Finally, an offshore petroleum extraction platform is located approximately 1.4 km offshore from the Anaheim Bay entrance. Therefore, it may reasonably be assumed that the Anaheim Bay entrance is situated in an environment of substantial anthropogenic noise.

Also of note regarding the environment of Anaheim Bay, the first phase of this proposed project, which would be completed prior to beginning in-water pile driving work, includes construction of a breakwater perpendicular to the Anaheim Bay entrance channel. Therefore, acoustic footprints associated with subsequent in-water construction activities occurring shoreward of the breakwater would be physically limited to Anaheim Bay (see Figures 1–3 and 6–4 of the Navy's application).

Detailed Description of Activities

As described above, the Navy has requested incidental take regulations for construction activities associated with development of a new ammunition pier at NWS Seal Beach, California. The entire project would include potential upgrades to the existing wharf to remain operational while the new pier is being built, the construction of a breakwater to reduce wave heights at the pier, a causeway, pile-supported mooring dolphins, a navigation channel for public boat access into and out of Huntington Harbor, dredging for the pier and Navy ship turning basin, and operational support buildings on and near the pier. Aspects of construction activities other than pile driving are not anticipated to have the potential to result in incidental take of marine mammals because they are either above water or do not produce levels of underwater sound with likely potential to result in marine mammal disturbance.

The project would be completed in two different phases. As noted above, the first phase would include construction of a breakwater perpendicular to the entrance channel. Subsequent elements of the first phase would consist of potential upgrades to the existing wharf to allow for continued operation while the new pier is under construction, dredging of the turning basin and navigation channel for public access, removal of existing navigation aids, fill of mitigation areas, partial fill of the causeway, creation of a breakwater and jetties for the navigation channel for public access, relocation of barge mooring buoys, installation of a new floating security barrier, placement of new Navy navigation buoys, and implementation of an indicator pile program to determine feasibility of concrete piles. Partial construction of the new ammunition pier with concrete pile supports may begin during the first phase. The second phase of the project would consist of fill to expand the east mole for the truck turnaround, completion of causeway fill, installation of remaining pier structural and support piles, construction of the new pier and fender system, construction of waterfront facilities, installation of utilities, and demolition of the wharf primary fendering system. (For full details of the project, please see the Navy's application, including the schematic diagram provided as Figure 1–2.)

In-water pile driving activities with the potential to cause take of marine mammals include removal of existing navigation piles, installation of mooring anchors, and installation of piles required for the new ammunition pier. Only pile extraction and installation using vibratory and impact pile drivers is expected to have the potential to result in incidental take of marine mammals. Therefore, only vibratory and impact pile driving are carried forward for further analysis.

Vibratory hammers, which can be used to either install or extract a pile, contain a system of counter-rotating eccentric weights powered by hydraulic motors, and are designed in such a way that horizontal vibrations cancel out, while vertical vibrations are transmitted into the pile. The pile driving machine is lifted and positioned over the pile by means of an excavator or crane, and is fastened to the pile by a clamp and/or bolts. The vibrations produced cause liquefaction of the substrate surrounding the pile, enabling the pile to be extracted or driven into the ground using the weight of the pile plus the hammer. Impact hammers use a rising and falling piston to repeatedly strike a pile and drive it into the ground. Impact or vibratory pile driving could occur on any day, but would not occur simultaneously.

Please see Table 1–1 of the Navy's application for a summary of piles to be installed and/or removed. The navigation piles that currently guide public vessel traffic, consisting of two timber pile clusters (dolphins) of approximately 8 to 10 piles each plus three additional single steel pipe piles, would be removed. All piles are approximately 24-in (61-cm) diameter. Timber piles are likely to be removed by cutting at the mudline, while the three steel piles would be extracted using the vibratory driver. However, it is possible that some timber piles may need to be removed using vibratory extraction. Therefore, we assume for purposes of analysis that all piles will be removed using vibratory extraction.

The planned indicator pile program would involve impact driving 17 24-in octagonal concrete piles in order to verify the driving conditions and establish the final driving lengths prior to fabrication of the final production piles that would be used to construct the new pier.

The new pier itself would be pile-supported with a total of approximately 900 piles (concrete and concrete-filled fiberglass) of various sizes connected to a cast-in-place concrete deck and beams. The majority of these production piles are expected to be jetted to within 1.5–3 m of tip elevation and then completed via impact driving. Piles are expected to largely be 24-in octagonal or square.

There will be a total of five new moorings installed, with two of those moorings outside of the new breakwater. Use of a vibratory hammer is required to install ''plate anchors'' that provide permanent secure holdings for planned mooring buoys. Plate anchors consist of a steel plate that is driven to project depth (9–12 m) beneath the seafloor. The anchor is driven by use of a 12-in (30-cm) steel beam called a ''follower.'' The follower is slotted on the bottom, fits into the plate anchor, and together the assembly consisting of the plate anchor and follower are driven into the substrate. Once the assembly has been driven to the required depth using a combination of impact and vibratory driving, the follower is removed using vibratory extraction, leaving the plate anchor at the required depth. First, the plate anchor is driven with a vibratory hammer to within several feet of final depth (maximum driving time approximately 45 minutes). An impact hammer is then used to drive the plate anchor to final elevation (potentially requiring up to an additional 45 minutes). Finally, the follower is extracted using a vibratory hammer (up to a maximum of 30 minutes).

We assume that potential impacts of the specified activity on marine mammals will be limited to the area within the largely enclosed Anaheim Bay. As detailed later in ''Estimated Take,'' impact driving of concrete piles is expected to produce relatively small ensonified areas that would not extend beyond the entrance to Anaheim Bay under any circumstances. However, limited vibratory driving is anticipated. As noted above, the first component of project activity will be construction of a breakwater parallel to the Anaheim Bay entrance. Noise produced through subsequent pile driving activities conducted shoreward of the breakwater will therefore be shielded from potentially extending beyond the entrance to Anaheim Bay. All pile driving activity would be conducted shoreward of the new breakwater, aside from installation of the two aforementioned mooring anchors. Regarding this component of project activity, associated vibratory driving would nominally have a Level B harassment zone that would extend in a narrow strip through the jetty opening that forms the entrance to Anaheim Bay. However, we have determined that any potential sound that does escape the Anaheim Bay entrance should not reasonably be anticipated to result in harassment of marine mammals.

Primarily, and as detailed above, the environment surrounding the entrance to Anaheim Bay is extremely busy in terms of commercial shipping and other anthropogenic activities. The continuous noise produced through use of the vibratory hammer would not likely be sufficiently distinguishable from other ongoing noise sources that are part of the environmental baseline as to expect marine mammals to exhibit responses of a degree sufficient to rise to the level of a take. Additional contributing factors include the distance from the source to the Anaheim Bay entrance, the limited footprint of ensonification that could potentially exit that entrance, and the limited duration of activity (*i.e.,* less than two hours per day for two days).

Description of Marine Mammals in the Area of the Specified Activity

We have reviewed the Navy's species descriptions—which summarize available information regarding status and trends, distribution and habitat preferences, behavior and life history, and auditory capabilities of the potentially affected species—for accuracy and completeness and refer the reader to Sections 3 and 4 of the Navy's application, instead of reprinting the information here. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SAR; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*www.fisheries.noaa.gov/find-species*).

Table 1 lists all species with expected potential for occurrence in the specified geographical region where the Navy proposes to conduct the specified activities and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2019). PBR, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population, is considered in concert with known sources of ongoing anthropogenic mortality (as described in NMFS's SARs).

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. All managed stocks in the specified geographical regions are assessed in NMFS's U.S. Pacific SARs. All values presented in Table 1 are the most recent available at the time of writing and are available in the 2018 SARs.

Five species (with six managed stocks) are considered to have the potential to be affected by Navy activities. A significantly more diverse marine mammal fauna occurs in deeper offshore waters of the specified geographical region. However, these additional species have not been observed in the vicinity of the action area and, for reasons described previously, are not anticipated to potentially be affected by the specified activity. For additional detail, please see section 3 of the Navy's application. We note that one additional species—the Pacific white-sided dolphin (*Lagenorhynchus obliquidens*)—has been observed in the vicinity of the entrance to Anaheim Bay. However, authorization of take for this species was not requested by the Navy due to their seasonal and generally rare occurrence in the area. In addition, the sea otter (*Enhydra lutris*) is found in California coastal waters. However, sea otters are managed by the U.S. Fish and Wildlife Service and are not considered further in this document.

TABLE 1—MARINE MAMMALS POTENTIALLY AFFECTED BY NAVY CONSTRUCTION ACTIVITIES

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	-; N	26,960 (0.05; 25,849; 2016).	801	139
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae						
Common bottlenose dolphin.	*Tursiops truncatus truncatus*.	California Coastal	-; N	453 (0.06; 346; 2011)	2.7	≥2.0
ENP long-beaked common dolphin.	*Delphinus delphis bairdii*	California	-; N	101,305 (0.49; 68,432; 2014).	657	≥35.4
Common dolphin	*D. d. delphis*	CA/OR/WA	-; N	969,861 (0.17; 839,325; 2014).	8,393	≥40
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions)						
California sea lion	*Zalophus californianus*	United States	-; N	257,606 (n/a; 233,515; 2014).	14,011	≥321
Family Phocidae (earless seals)						
Harbor seal	*Phoca vitulina richardii*	California	-; N	30,968 (n/a; 27,348; 2012).	1,641	43

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable. For certain stocks of pinnipeds, abundance estimates are based upon observations of animals (often pups) ashore multiplied by some correction factor derived from knowledge of the species' (or similar species') life history to arrive at a best abundance estimate; therefore, there is no associated CV. In these cases, the minimum abundance may represent actual counts of all animals ashore.

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.*, commercial fisheries, subsistence hunting, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value. All M/SI values are as presented in the 2018 SARs.

Marine mammals do not regularly use Anaheim Bay for any purpose, and there is no known habitat of any importance (including pinniped haul-outs) located within Anaheim Bay. The Navy has conducted a semi-regular monitoring effort within Anaheim Bay over the past several years. This monitoring effort is the primary source of information regarding marine mammal occurrence therein. Monthly shore-based observations were conducted for marine mammals in Anaheim Bay for 12 months beginning in August 2016. Monitoring was conducted by two observers continuously scanning the bay with both the naked eye and handheld binoculars from two fixed positions. The observation positions allowed for clear visibility of the entirety of Anaheim Bay. The observers covered daylight hours from 7:30 to 4:30 over a one- or two-day period with the goal to survey a full 8 hours of observations each month. A total of approximately 72 observation hours were ultimately conducted. This effort and the resulting observations are detailed in a Navy report (Bredvik *et al.*, 2017). Subsequently, consultants were retained to provide environmental monitoring services during a dredging project, including conducting an observational effort for marine mammals. This effort included daily monitoring during dredging effort from March through June of 2019 (Merkel and Associates, Inc., 2019). The observational data cited below include some records of animals occurring in waters outside the Anaheim Bay entrance.

The California sea lion is the most commonly observed marine mammal species within Anaheim Bay and the nearby Seal Beach National Wildlife Refuge. This species was sighted at least once in Anaheim Bay during almost every survey in the 2016–2017 effort, with all sightings of the species in water. Subsequent monitoring associated with dredging also routinely encountered California sea lions within Anaheim Bay. During Navy monitoring, California sea lions were observed on 25 occasions, with all but one sighting of a lone individual. The exception was a single observation of three sea lions. During dredging monitoring, California sea lions were observed on 67 occasions, typically one or two individuals per occasion but with a maximum observed group of six. Individual sea lions may occasionally haul out on the rock jetties or other areas, but have not been observed hauling out frequently and there are no known haul-outs or areas of congregation.

Harbor seals are more rarely observed in Anaheim Bay. During a 2016–2017 survey effort, individual harbor seals were observed on four occasions, and monitoring associated with dredging encountered individual harbor seals on three occasions. Harbor seals have rarely been observed hauled out, but there are no regular haul-out sites in Anaheim Bay.

Bottlenose dolphins are generally considered to be the second-most commonly observed species in Anaheim Bay, having been sighted several times within Anaheim Bay as well as at the Seal Beach National Wildlife Refuge. During Navy monitoring, pairs of bottlenose dolphins were sighted on four occasions. Bottlenose dolphins were observed during dredging monitoring on 17 occasions, with groups ranging from two to ten animals.

There are two stocks of common dolphin present in California waters, with the two generally indistinguishable. Therefore, observations of common dolphins are not attributed to stock, and we propose to authorize take of common dolphins generically. This take is analyzed as though it may entirely be attributed to both stocks as a worst-case scenario. Common dolphins were frequently observed during monitoring effort but more commonly observed in waters of outer Anaheim Bay or adjacent to the Anaheim Bay entrance. Navy monitoring reported a single occurrence of a pair of common dolphins. However, common dolphins were observed on 31 occasions during dredging monitoring, with groups ranging from two to nine animals.

Gray whales migrate along the Pacific coast twice a year between October and July and would only potentially be present in the region while migrating. Gray whales are not generally expected to occur in Anaheim Bay. However, individual gray whales were observed on four occasions during dredging monitoring, with one of these sightings reported inside Anaheim Bay. As a precaution, the Navy has requested authorization of take for this species.

Unusual Mortality Events (UME)

A UME is defined under the MMPA as ‘‘a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response.’’ Currently ongoing investigations along the west coast involving species at issue in these proposed regulations include gray whales and California sea lions.

Since January 1, 2019, elevated gray whale strandings have occurred along the west coast of North America from Mexico through Alaska. As of September 30, 2019, 212 gray whale strandings have been confirmed, with 121 of these in the United States and 34 in California. Several dead whales have been emaciated with moderate to heavy whale lice (cyamid) loads. Necropsies have been conducted on a subset of whales with additional findings of vessel strike in three whales and entanglement in one whale. In Mexico, 50–55 percent of the free-ranging whales observed in the lagoons this winter were reported as ‘‘skinny’’ compared to the annual average of 10–12 percent ‘‘skinny’’ whales normally seen. Necropsy findings of emaciation are not consistent across all of the whales examined, so more research is needed. Please see *www.fisheries.noaa.gov/national/marine-life-distress/2019-gray-whale-unusual-mortality-event-along-west-coast* for more information.

Beginning in January 2013 and continuing through 2016, elevated strandings of California sea lion pups were observed in southern California, with live sea lion strandings nearly three times higher than the historical average in 2015. Findings to date indicate that a change in the availability of sea lion prey, especially sardines, a high value food source for nursing mothers, is a likely contributor to the large number of strandings. Sardine spawning grounds shifted further offshore in 2012 and 2013, and while other prey were available (market squid and rockfish), these may not have provided adequate nutrition in the milk of sea lion mothers supporting pups, or for newly-weaned pups foraging on their own. This UME remains under investigation. Please see *www.fisheries.noaa.gov/national/marine-life-distress/2013-2017-california-sea-lion-unusual-mortality-event-california* for more information.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). NMFS (2018) describes generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. The functional groups and the associated frequencies are indicated below (note that these frequency ranges correspond to the range for the composite group, with the entire range not necessarily reflecting the capabilities of every species within that group):

- Low-frequency cetaceans (mysticetes): Generalized hearing is estimated to occur between approximately 7 hertz (Hz) and 35 kilohertz (kHz);
- Mid-frequency cetaceans (larger toothed whales, beaked whales, and most delphinids): Generalized hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High-frequency cetaceans (porpoises, river dolphins, and members of the genera *Kogia* and *Cephalorhynchus;* including two members of the genus *Lagenorhynchus,* on the basis of recent echolocation data and genetic data): Generalized hearing is estimated to occur between approximately 275 Hz and 160 kHz;
- Pinnipeds in water; Phocidae (true seals): Functional hearing is estimated to occur between approximately 50 Hz to 86 kHz; and
- Pinnipeds in water; Otariidae (eared seals): Functional hearing is estimated to occur between 60 Hz and 39 kHz for Otariidae.

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Five marine mammal species (three cetacean and two pinniped (one otariid and one phocid) species) have the potential to co-occur with Navy construction activities. Please refer to Table 1. Of the three cetacean species that may be present, one is classified as a low-frequency cetacean (gray whale) and two are classified as mid-frequency cetaceans (dolphins).

Potential Effects of the Specified Activity on Marine Mammals and Their Habitat

Sections 6 and 9 of the Navy’s application include a comprehensive summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat, including specific discussion of potential effects to marine mammals from noise produced through pile driving. We have reviewed the

Navy's discussion of potential effects for accuracy and completeness in its application and refer to that information rather than repeating it here. Alternatively, NMFS has included a lengthy discussion of the potential effects of noise on marine mammals, including specifically from pile driving, in numerous other **Federal Register** notices. Please see, *e.g.,* 83 FR 9366 (March 5, 2018); 84 FR 54867 (October 11, 2019); 82 FR 36360 (August 4, 2017), or view documents available online at *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

The ''Estimated Take'' section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by the specified activity. The ''Negligible Impact Analysis and Determination'' section includes an analysis of how these activities will impact marine mammals and considers the content of this section, the ''Estimated Take'' section, and the ''Proposed Mitigation'' section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations.

Description of Sound Sources

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see, *e.g.,* Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983).

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the ''loudness'' of a sound and is typically described using the relative unit of the decibel (dB). A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)), and is a logarithmic unit that accounts for large variations in amplitude. Therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) represents the SPL referenced at a distance of 1 m from the source (referenced to 1 μPa), while the received level is the SPL at the listener's position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 μPa^2-s) represents the total energy in a stated frequency band over a stated time interval or event and considers both intensity and duration of exposure. The per-pulse SEL is calculated over the time window containing the entire pulse (*i.e.,* 100 percent of the acoustic energy). SEL is a cumulative metric; it can be accumulated over a single pulse, or calculated over periods containing multiple pulses. Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source and is represented in the same units as the rms sound pressure.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for sound produced by the pile driving activity considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly.

The sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 decibels (dB) from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Underwater ambient sound in the vicinity of Anaheim Bay is comprised of sounds produced by a number of natural and anthropogenic sources and varies both geographically and temporally. Human-generated sound is a significant contributor to the ambient acoustic environment at the installations considered here. The underwater acoustic environment will vary depending on the amount of anthropogenic activity, weather conditions, and tidal currents but, given the high anthropogenic use of the area, anthropogenic noise is likely to dominate the ambient soundscape. Details of source types are described in the following text.

Sounds are often considered to fall into one of two general types: pulsed and non-pulsed (defined in the following). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts. The distinction between these two sound types is not always obvious, as certain signals share properties of both pulsed and non-pulsed sounds. A signal near a source could be categorized as a pulse, but due to propagation effects as it moves farther from the source, the signal duration becomes longer (*e.g.,* Greene and Richardson, 1988).

Pulsed sound sources (*e.g.,* airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

The impulsive sound generated by impact hammers is characterized by rapid rise times and high peak levels. Vibratory hammers produce non-impulsive, continuous noise at levels significantly lower than those produced by impact hammers. Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization, which will inform both NMFS's consideration of whether the number of takes is ''small'' and the negligible impact determination.

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Take of marine mammals incidental to Navy construction activities could occur as a result of Level B harassment only. Below we describe how the potential take is estimated.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to exhibit behavioral disruptions (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Although available data are consistent with the basic concept that louder sounds evoke more significant behavioral responses than softer sounds, defining sound levels that disrupt behavioral patterns is difficult because responses depend on the context in which the animal receives the sound, including an animal's behavioral mode when it hears sounds (*e.g.,* feeding, resting, or migrating), prior experience, and biological factors (*e.g.,* age and sex). Some species are known to be more highly sensitive to certain anthropogenic sounds than other species. Other contextual factors, such as signal characteristics, distance from the source, and signal to noise ratio, may also help determine response to a given received level of sound. Therefore, levels at which responses occur are not necessarily consistent and can be difficult to predict (Southall *et al.,* 2007; Ellison *et al.,* 2012; Bain and Williams, 2006).

However, based on the practical need to use a relatively simple threshold based on available information that is both predictable and measurable for most activities, NMFS has historically used a generalized acoustic threshold based on received level to estimate the onset of Level B harassment. These thresholds are 160 dB rms (intermittent sources) and 120 dB rms (continuous sources).

Level A Harassment—NMFS's ''Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing'' (NMFS, 2018) identifies dual criteria to assess the potential for auditory injury (Level A harassment) to occur for different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise. The technical guidance identifies the received levels, or thresholds, above which individual marine mammals are predicted to experience changes in their hearing sensitivity for all underwater anthropogenic sound sources, and reflects the best available science on the potential for noise to affect auditory sensitivity by:

• Dividing sound sources into two groups (*i.e.,* impulsive and non-impulsive) based on their potential to affect hearing sensitivity;

• Choosing metrics that best address the impacts of noise on hearing sensitivity, *i.e.,* peak sound pressure level (peak SPL) (reflects the physical properties of impulsive sound sources to affect hearing sensitivity) and cumulative sound exposure level (cSEL) (accounts for not only level of exposure but also duration of exposure); and

• Dividing marine mammals into hearing groups and developing auditory weighting functions based on the science supporting that not all marine mammals hear and use sound in the same manner.

The premise of the dual criteria approach is that, while there is no definitive answer to the question of which acoustic metric is most appropriate for assessing the potential for injury, both the received level and duration of received signals are important to an understanding of the potential for auditory injury. Therefore, peak SPL is used to define a pressure criterion above which auditory injury is predicted to occur, regardless of exposure duration (*i.e.,* any single exposure at or above this level is considered to cause auditory injury), and cSEL is used to account for the total energy received over the duration of sound exposure (*i.e.,* both received level and duration of exposure) (Southall *et al.,* 2007, 2019; NMFS, 2018). As a general principle, whichever criterion is exceeded first (*i.e.,* results in the largest isopleth) would be used as the effective injury criterion (*i.e.,* the more precautionary of the criteria). Note that cSEL acoustic threshold levels incorporate marine mammal auditory weighting functions, while peak pressure thresholds do not (*i.e.,* flat or unweighted). Weighting functions for each hearing group (*e.g.,* low-, mid-, and high-frequency cetaceans) are described in NMFS (2018).

NMFS (2018) recommends 24 hours as a maximum accumulation period relative to cSEL thresholds. These thresholds were developed by compiling and synthesizing the best available science, and are provided in Table 2 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS (2018), which is available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 2—EXPOSURE CRITERIA FOR AUDITORY INJURY

Hearing group	Peak pressure [1] (dB)	Cumulative sound exposure level [2]	
		Impulsive (dB)	Non-impulsive (dB)
Low-frequency cetaceans	219	183	199
Mid-frequency cetaceans	230	185	198
Phocid pinnipeds	218	185	201
Otariid pinnipeds	232	203	219

[1] Referenced to 1 μPa; unweighted within generalized hearing range.
[2] Referenced to 1 μPa^2-s; weighted according to appropriate auditory weighting function.

Zones of Ensonification

Sound Propagation—Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

Where:

$TL = B * \log_{10}(R_1/R_2)$,

B = transmission loss coefficient (assumed to be 15)

R_1 = the distance of the modeled SPL from the driven pile, and

R_2 = the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source (20*log(range)). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source (10*log(range)). As is common practice in coastal waters, here we assume practical spreading loss (4.5 dB reduction in sound level for each doubling of distance). Practical spreading is a compromise that is often used under conditions where water depth increases as the receiver moves away from the shoreline, resulting in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions.

In this analysis, site-specific propagation modeling was performed on behalf of the Navy by Dr. Peter Dahl (see ''Modeling of Sound Propagation from Pile Driving Marine Construction at Seal Beach,'' available online at *www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-ammunition-pier-and-turning-basin-naval*). This more complex modeling approach accounts for factors such as depth, substrate, and frequency-dependency. This modeling was performed for propagation associated with impact and vibratory driving of 24-in concrete piles and 12-in steel beams, and for vibratory driving of 30-in steel piles (as proxy for removal of 24-in steel piles). Propagation loss associated with vibratory removal of 24-in timber piles was represented through practical spreading.

The above-referenced Dahl propagation analysis is provided for a more realistic understanding of actual ensonification effects at multiple specific locations within Anaheim Bay due to impact driving of concrete piles, impact and vibratory driving of steel beams, and vibratory driving of steel pipe piles. These actual zones are depicted in Figures 6–4 through 6–7 of the Navy's application. Notably, this analysis indicates that, for vibratory installation of piles seaward of the intended breakwater, maximum Level B harassment isopleth distances would be less than 1.5 km (before taking into account the aforementioned noise environment outside of Anaheim Bay. However, these Level B harassment areas do not factor into the take estimation process, as a density-based method is not used. We also note that the Dahl analysis indicates that all Level A harassment isopleth distances are likely less than 10 meters. However, we take a more precautionary approach to estimation of these distances through use of the NMFS User Spreadsheet, as described in greater detail in the following. Isopleth distances given in Table 5 are estimated using the spreadsheet (Level A harassment) or are simply calculated assuming practical spreading (Level B harassment).

Sound Source Levels—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. Numerous studies have examined sound pressure levels (SPLs) recorded from underwater pile driving projects in

California. Proxy values given in Table 3 are those used in the Dahl propagation analysis discussed above. The values for 24-in concrete piles are summary values provided in Table 2–2 of Caltrans (2015). Proxy values for impact driving of 12-in steel beams are from measurements of the same piles taken at Elkhorn Slough, near Moss Landing, CA, and are found in Figure I.4–8 of Caltrans (2015). The values for vibratory driving of 30-in steel piles and 12-in steel beams are from measurements conducted by the U.S. Navy during construction of a pier in San Diego Bay. The Dahl analysis did not address vibratory driving of timber piles, the Caltrans compendium does not provide values for vibratory removal of timber piles, and few data are available for this activity. We use acoustic monitoring data from construction activity in Elliott Bay, Washington as a proxy (Greenbusch Group, 2018). This project included vibratory removal of 14-in timber piles, and reported source measurements at different distances for 63 individual piles. The median value as normalized to 10 m distance is given in Table 3. NMFS views this as the best available data for vibratory removal of timber piles.

TABLE 3—ASSUMED SOURCE LEVELS

Method	Type	Size (in)	SPL (rms) [1]	SPL (peak) [1]	SEL [1]
Impact	Concrete	24	175	193	160
	Steel I-beam	12	181	194	171
Vibratory	Timber	24	152	n/a	n/a
	Steel I-beam	12	170	n/a	n/a
	Steel pipe	24	170	n/a	n/a

[1] Source levels presented at standard distance of 10 m from the driven pile. Peak source levels are not typically evaluated for vibratory pile driving, as they are lower than the relevant thresholds for auditory injury. SEL source levels for vibratory driving are equivalent to SPL (rms) source levels.

Level A Harassment—In order to assess the potential for injury on the basis of the cumulative SEL metric, one must estimate the total strikes (impact driving) or the total driving duration (vibratory driving) over which energy is assumed to accumulate. Table 4 presents an estimate of average strikes per day; average strikes per day and average daily duration values are used in the exposure analyses. Values given in Table 4 are engineering assumptions provided by the Navy.

TABLE 4—ESTIMATED DAILY STRIKES AND DRIVING DURATION

Pile type and method	Installation rate per day	Estimated duration	
		Average strikes/pile	Average daily duration (min)
12-in steel; impact	1	390	n/a
24-in concrete; impact	3	667	n/a
12-in steel; vibratory	1	n/a	75
24-in timber; vibratory	1	n/a	60
24-in steel; vibratory	1	n/a	60

Delineation of potential injury zones on the basis of the peak pressure metric was performed using the SPL(peak) values provided in Table 3 above. As described previously, source levels for peak pressure are unweighted within the generalized hearing range, while SEL source levels are weighted according to the appropriate auditory weighting function. Delineation of potential injury zones on the basis of the cumulative SEL metric for impact and vibratory driving were performed using single-frequency weighting factor adjustments (WFA) of 2.0 and 2.5 kHz, respectively, as recommended by the NMFS User Spreadsheet, described in NMFS's Technical Guidance (NMFS, 2018). In order to assist in simple application of the auditory weighting functions, NMFS recommends WFAs for use with specific types of activities that produce broadband or narrowband noise. WFAs consider marine mammal auditory weighting functions by focusing on a single frequency. This will typically result in higher predicted exposures for broadband sounds, because only one frequency is being considered, compared to exposures associated with the ability to fully incorporate the Technical Guidance's weighting functions. Note that, for use in delineating assumed Level A harassment zones through use of the User Spreadsheet, practical spreading was assumed.

In consideration of the assumptions relating to sound source levels, propagation, and pile driving rates, notional radial distances to relevant thresholds were calculated (Table 5). However, these distances are sometimes constrained by topography. Actual notional ensonified zones, calculated using site-specific propagation modeling (Dahl, 2018) are shown in Figures 6–4 to 6–7 of the Navy's application. For production piles, these zones are modeled on the basis of a centrally-located, notional pile. Note that these figures assume the presence of the breakwater that will be constructed prior to pile driving activity.

TABLE 5—CALCULATED DISTANCES TO LEVEL A AND LEVEL B HARASSMENT ZONES

Pile	Driver	PW		OW		LF		MF		Level B [1]
		pk	cSEL	pk	cSEL	pk	cSEL	pk	cSEL	
24-in concrete	Impact	n/a	25	n/a	<10	n/a	46	n/a	<10	100
12-in steel	Impact	n/a	45	n/a	<10	n/a	85	n/a	<10	251
24-in steel	Vibratory	n/a	17	n/a	<10	n/a	27	n/a	<10	21,544
12-in steel	Vibratory	n/a	19	n/a	<10	n/a	32	n/a	<10	21,544
24-in timber	Vibratory	n/a	<10	n/a	<10	n/a	<10	n/a	<10	1,359

Note: PW=Phocid; OW=Otariid; LF=low frequency; MF=mid frequency; HF=high frequency; pk=peak pressure; cSEL=cumulative SEL.
[1] Calculated free-field values only; all zones are assumed restricted to Anaheim Bay.

Exposure Estimates

Available information regarding marine mammal occurrence at NWS Seal Beach was summarized previously in ''Description of Marine Mammals in the Area of the Specified Activity.'' Given the small area of Anaheim Bay, infrequent occurrence of marine mammals, and limited observational data available, we do not use these data to support calculation of density values, but rather use the maximum observed group size in conjunction with the expected days of pile driving to develop take estimates. The Navy assumes a total of 336 days of pile driving activity over the five-year period of effectiveness of this proposed rule. However, the total days are assumed to occur over a three-year period during the five years. Therefore, the Navy assumes 112 pile driving days per year for three years.

To quantitatively assess exposure of marine mammals to noise from pile driving activities, the Navy used two methods. For pinniped species, which are assumed to have the potential to occur on any day of pile driving, the maximum group size is multiplied by the total annual pile driving days to generate the annual take estimate. For cetacean species, whose occurrence is assumed to be more sporadic in nature, the assumed group size is multiplied by an assumed proportion of total annual pile driving days. The assumed proportion reasonably reflects the observational data available for Anaheim Bay. This calculation is performed as: 112 annual pile driving days/30 days per month times × assumed monthly days present. Given the small calculated Level A harassment zone sizes, we assume that no Level A harassment is likely to occur, for any species. The Navy's proposed mitigation measures further reduce the low likelihood that any incidents of Level A harassment would occur, and none are proposed for authorization.

California Sea Lion—California sea lions are regularly observed, typically as individuals or in pairs. However, a maximum group of six sea lions was observed in Anaheim Bay. Therefore, the Navy estimates take as six sea lions per day for 112 days annually, yielding an estimate of 672 incidents of take annually and 2,016 incidents over the duration of the rule.

Harbor Seal—Individual harbor seals are infrequently observed in Anaheim Bay. However, as a relatively common coastal pinniped, the Navy assumes that one harbor seal could be present on each day of pile driving. Therefore, the Navy estimates take as one seal per day for 112 days annually, yielding an estimate of 112 incidents of take annually and 336 incidents over the duration of the rule.

Bottlenose Dolphin—The Navy assumes that groups of up to ten bottlenose dolphins may occur in Anaheim Bay on six occasions per month, yielding an annual estimate of 220 incidents of take, and 660 over the duration of the rule. These dolphins are assumed to be from the California coastal stock of bottlenose dolphin.

Common Dolphin—The Navy assumes that groups of up to nine common dolphins may occur in Anaheim Bay on ten occasions per month, yielding an annual estimate of 336 incidents of take, and 1,008 over the duration of the rule. These dolphins could be from either the California/Oregon/Washington stock of common dolphin or from a subspecies stock, the eastern North Pacific long-beaked common dolphin.

Gray Whale—Individual gray whales have rarely been observed in the vicinity of the entrance to Anaheim Bay. The Navy assumes that a single gray whale may occur in Anaheim Bay on two occasions per month, yielding an annual estimate of seven incidents of take, and 21 over the duration of the rule.

The total proposed take authorization for all species is summarized in Table 6 below. No authorization of take by Level A harassment is proposed for authorization.

TABLE 6—PROPOSED TAKE AUTHORIZATION BY LEVEL B HARASSMENT

Species	Annual	Total	Percent [1]
California sea lion	672	2,016	0.3
Harbor seal	112	336	0.4
Bottlenose dolphin	220	660	48.6
Common dolphin	336	1,008	<0.1/0.3
Gray whale	7	21	<0.1

[1] Reflects annual take number.

Proposed Mitigation

Under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (''least practicable adverse impact''). NMFS does not have a regulatory definition for ''least practicable adverse impact.'' However, NMFS's implementing regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, implementation of the measure(s) is expected to reduce impacts to marine mammal species or stocks, their habitat, and their availability for subsistence uses. This analysis will consider such things as the nature of the potential adverse impact (such as likelihood, scope, and range), the likelihood that the measure will be effective if implemented, and the likelihood of successful implementation.

(2) The practicability of the measure for applicant implementation. Practicability of implementation may consider such things as cost, impact on operations, personnel safety, and practicality of implementation.

The mitigation strategies described below largely follow those required and successfully implemented under previous incidental take authorizations issued in association with similar construction activities. Estimated zones of influence (ZOI; see ''Estimated Take'') were used to develop mitigation measures for pile driving activities. Background discussion related to underwater sound concepts and terminology is provided in the section on ''Description of Sound Sources,'' earlier in this preamble. The ZOIs were used to inform mitigation zones that would be established to prevent Level A harassment and to monitor Level B harassment.

In addition to the specific measures described later in this section, the Navy would conduct briefings for construction supervisors and crews, the marine mammal monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures.

Timing

As described previously, the Navy would conduct construction activities only during daylight hours. This is a voluntary description by the Navy of expected construction scheduling that we do not treat as an absolute requirement. Therefore, this commitment is not considered in making our preliminary determinations and is not included in the proposed regulatory text found at the end of this preamble.

Monitoring and Shutdown for Pile Driving

The following measures would apply to the Navy's mitigation through shutdown and disturbance zones:

Shutdown Zone—The purpose of a shutdown zone is to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area), thus preventing some undesirable outcome, such as auditory injury or behavioral disturbance of sensitive species (serious injury or death are unlikely outcomes even in the absence of mitigation measures). For all pile driving activities, the Navy would establish a minimum shutdown zone with a radial distance of 10 m. This minimum zone is intended to prevent the already unlikely possibility of physical interaction with construction equipment and to establish a precautionary minimum zone with regard to acoustic effects.

In most cases, the minimum shutdown zone of 10 m is expected to contain the area in which auditory injury could occur. In all circumstances where the predicted Level A harassment zone exceeds the minimum zone, the Navy proposes to implement a shutdown zone equal to the predicted Level A harassment zone (see Table 5). In all cases, predicted injury zones are calculated on the basis of cumulative sound exposure, as peak pressure source levels produce smaller predicted zones.

Injury zone predictions generated using the optional user spreadsheet are precautionary due to a number of simplifying assumptions. For example, the spreadsheet tool assumes that marine mammals remain stationary during the activity and does not account for potential recovery between intermittent sounds. In addition, the tool incorporates the acoustic guidance's weighting functions through use of a single-frequency weighting factor adjustment intended to represent the signal's 95 percent frequency contour percentile (*i.e.,* upper frequency below which 95 percent of total cumulative energy is contained; Charif *et al.,* 2010). This will typically result in higher predicted exposures for broadband sounds, because only one frequency is being considered, compared to exposures associated with the ability to fully incorporate the guidance's weighting functions.

Disturbance Zone—Disturbance zones are the areas in which sound pressure levels equal or exceed 160 and 120 dB rms (for impact and vibratory pile driving, respectively). Regarding vibratory driving occurring outside the breakwater, we assume that the disturbance zone is truncated at the entrance to Anaheim Bay. Disturbance zones provide utility for monitoring conducted for mitigation purposes (*i.e.,* shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of disturbance zones enables observers to be aware of and communicate the presence of marine mammals in the project area but outside the shutdown zone, and thus prepare for potential shutdowns of activity. The primary purpose of disturbance zone monitoring is for documenting incidents of Level B harassment. Disturbance zone monitoring is discussed in greater detail later (see ''Proposed Monitoring and Reporting''). Nominal radial distances for disturbance zones are shown in Table 5.

In order to document observed incidents of harassment, monitors record all marine mammal observations, regardless of location. The observer's location and the location of the pile being driven are known, and the location of the animal may be estimated as a distance from the observer and then compared to the location from the pile. It may then be estimated whether the animal was exposed to sound levels constituting incidental harassment on the basis of predicted distances to relevant thresholds in post-processing of observational data, and a precise accounting of observed incidents of harassment created.

Monitoring Protocols—Monitoring would be conducted before, during, and after pile driving activities. In addition, observers will record all incidents of marine mammal occurrence, regardless of distance from activity, and monitors will document any behavioral reactions in concert with distance from piles being driven. Observations made outside the shutdown zone will not result in shutdown; that pile segment will be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile driving activities would be halted. Monitoring will take place from 30 minutes prior to initiation through 30 minutes post-completion of pile driving activities. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

The following additional measures apply to visual monitoring:

(1) Monitoring will be conducted by qualified, trained protected species observers, who will be placed at the best vantage point(s) practicable (*i.e.,* construction barges, on shore, or any other suitable location) to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator. Observers would have no other construction-related tasks while conducting monitoring. Observers should have the following minimum qualifications:

• Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;

• Ability to conduct field observations and collect data according to assigned protocols;

• Experience or training in the field identification of marine mammals, including the identification of behaviors;

• Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

• Writing skills sufficient to document observations including, but not limited to: the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury of marine mammals from construction noise within a defined shutdown zone; and marine mammal behavior; and

• Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Observer teams employed by the Navy in satisfaction of the mitigation and monitoring requirements described herein must meet the following additional requirements:

• Independent observers (*i.e.,* not construction personnel) are required.

• At least one observer must have prior experience working as an observer.

• Other observers may substitute education (degree in biological science or related field) or training for experience.

• Where a team of three or more observers are required, one observer should be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer.

• We will require submission and approval of observer CVs.

(2) Prior to the start of pile driving activity, the shutdown zone will be monitored for 30 minutes to ensure that it is clear of marine mammals. Pile driving will only commence once observers have declared the shutdown zone clear of marine mammals; animals will be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition), and their behavior will be monitored and documented. The shutdown zone may only be declared clear, and pile driving started, when the entire shutdown zone is visible (*i.e.,* when not obscured by dark, rain, fog, *etc.*). In addition, if such conditions should arise during impact pile driving that is already underway, the activity would be halted.

(3) If a marine mammal approaches or enters the shutdown zone during the course of pile driving operations, activity will be halted and delayed until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or fifteen minutes have passed without re-detection of the animal. Monitoring will be conducted throughout the time required to drive a pile and for thirty minutes following the conclusion of pile driving.

Soft Start

The use of a soft start procedure is believed to provide additional protection to marine mammals by warning marine mammals or providing them with a chance to leave the area prior to the hammer operating at full capacity, and typically involves a requirement to initiate sound from the hammer at reduced energy followed by a waiting period. This procedure is repeated two additional times. It is difficult to specify the reduction in energy for any given hammer because of variation across drivers and, for impact hammers, the actual number of strikes at reduced energy will vary because operating the hammer at less than full power results in ''bouncing'' of the hammer as it strikes the pile, resulting in multiple ''strikes.'' The Navy will utilize soft start techniques for impact pile driving. We require an initial set of three strikes from the impact hammer at reduced energy, followed by a 30-second waiting period, then two subsequent 3-strike sets. Soft start will be required at the beginning of each day's impact pile driving work and at any time following a cessation of impact pile driving of thirty minutes or longer; the requirement to implement soft start for impact driving is independent of whether vibratory driving has occurred within the prior 30 minutes.

We have carefully evaluated the Navy's proposed mitigation measures and considered a range of other measures in the context of ensuring that we prescribed the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Based on our evaluation of these measures, we have preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses.

Proposed Monitoring and Reporting

In order to issue an LOA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of the authorized taking. NMFS's MMPA implementing regulations further describe the information that an applicant should provide when requesting an authorization (50 CFR 216.104(a)(13)), including the means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on populations of marine mammals.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

• Occurrence of significant interactions with marine mammal species in action area (*e.g.,* animals that came close to the vessel, contacted the gear, or are otherwise rare or displaying unusual behavior).

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.

- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

Visual Marine Mammal Observations

The Navy will collect sighting data and behavioral responses to pile driving activity for marine mammal species observed in the region of activity during the period of activity. The Navy will employ a minimum of two qualified observers at all times to monitor shutdown zones and the surrounding waters of Anaheim Bay. In order to accomplish visual coverage of the entirety of Anaheim Bay, it is possible that additional observers will be used. All observers will be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring. The Navy would monitor all shutdown zones at all times, and would monitor disturbance zones as conditions allow. The Navy would conduct monitoring before, during, and after pile driving, with observers located at the best practicable vantage points.

As described in ''Proposed Mitigation'' and based on our requirements, the Navy would implement the following procedures for pile driving:

- Marine mammal observers would be located at the best vantage point(s) in order to properly see the entire shutdown zone and as much of the disturbance zone as possible.
- During all observation periods, observers will use binoculars and the naked eye to search continuously for marine mammals.
- If the shutdown zones are obscured by fog or poor lighting conditions, pile driving at that location will not be initiated until that zone is visible. Should such conditions arise while impact driving is underway, the activity would be halted.
- The shutdown zone around the pile would be monitored for the presence of marine mammals before, during, and after all pile driving activity.

Individuals implementing the monitoring protocol will assess its effectiveness using an adaptive approach. Monitoring biologists will use their best professional judgment throughout implementation and seek improvements to these methods when deemed appropriate. Any modifications to the protocol will be coordinated between NMFS and the Navy.

Data Collection

We require that observers use standardized data forms. Among other pieces of information, the Navy will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and a description of specific actions that ensued and resulting behavior of the animal, if any. We require that, at a minimum, the following information be collected on the sighting forms:

- Date and time that monitored activity begins or ends;
- Construction activities occurring during each observation period;
- Weather parameters (*e.g.,* wind speed, percent cloud cover, visibility);
- Water conditions (*e.g.,* sea state, tide state);
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;
- Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
- Description of implementation of mitigation measures (*e.g.,* shutdown or delay);
- Locations of all marine mammal observations; and
- Other human activity in the area.

The Navy will note in behavioral observations, to the extent such observations are possible, if an animal has remained in the area during construction activities. Therefore, it may be possible to identify if the same animal or different individuals are being exposed.

Reporting

A draft report would be submitted to NMFS within 90 days of the completion of each calendar year. The report will include marine mammal observations pre-activity, during-activity, and post-activity during pile driving days, and will also provide descriptions of any behavioral responses to construction activities by marine mammals and a complete description of all mitigation shutdowns and the results of those actions and an extrapolated total take estimate based on the number of marine mammals observed during the course of construction. A final report must be submitted within 30 days following resolution of comments on the draft report. The Navy would also submit a comprehensive summary report covering all activities conducted under the incidental take regulations.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR), NMFS and to the regional stranding coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' by mortality, serious injury, and Level A or Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality).

Pile driving activities associated with this construction action, as described previously, have the potential to disturb marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only from underwater sounds generated from pile driving. Potential takes could occur if individual marine mammals are present in the ensonified zone when pile driving is happening.

No serious injury or mortality would be expected even in the absence of the proposed mitigation measures. No Level A harassment is anticipated given the nature of the activities, *i.e.,* much of the anticipated activity would involve vibratory driving and/or brief impact installation of primarily non-steel piles, and measures designed to minimize the possibility of injury. The limited potential for injury is expected to be essentially eliminated through implementation of the planned mitigation measures—soft start (for impact driving) and shutdown zones. Impact driving, as compared with vibratory driving, has source characteristics (short, sharp pulses with higher peak levels and much sharper rise time to reach those peaks) that are potentially injurious or more likely to produce severe behavioral reactions. Given sufficient notice through use of soft start, marine mammals are expected to move away from a sound source that is annoying prior to its becoming potentially injurious or resulting in more severe behavioral reactions. Environmental conditions are expected to generally be good, with calm sea states, and we expect conditions would allow a high marine mammal detection capability, enabling a high rate of success in implementation of shutdowns to avoid injury.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted in San Diego Bay, San Francisco Bay, and in the Puget Sound region, which have taken place with no known long-term adverse consequences from behavioral harassment.

The Navy has conducted multi-year activities potentially affecting marine mammals, and typically involving greater levels of activity and/or more impactful activities (*e.g.,* impact driving of steel piles) than is contemplated here, in various locations such as San Diego Bay as well as locations in Washington inland waters. Reporting from these activities has similarly reported no apparently consequential behavioral reactions or long-term effects on marine mammal populations. Repeated exposures of individuals to relatively low levels of sound outside of preferred habitat areas are unlikely to significantly disrupt critical behaviors. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring. Effects of the specified activity are expected to be limited to the enclosed waters of Anaheim Bay, which provides relatively low-quality habitat and no known habitat areas of any importance. Therefore, we expect that animals annoyed by project sound would simply avoid the area and use more-preferred habitats.

In summary, this negligible impact analysis is founded on the following factors: (1) The possibility of serious injury or mortality may reasonably be considered discountable; (2) as a result of the nature of the activity in concert with the planned mitigation requirements, injury is not anticipated; (3) the anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior; (4) the absence of any significant habitat within the project area, including known areas or features of special significance for foraging or reproduction; and (5) the presumed efficacy of the proposed mitigation measures in reducing the effects of the specified activity to the level of least practicable adverse impact.

In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, we preliminarily find that the total marine mammal take from the Navy's construction activities will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(A) of the MMPA for specified activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Please see Table 6 for information relating to this small numbers analysis. We propose to authorize incidental take of five marine mammal species (with take of one species potentially occurring for two stocks). The total annual amount of taking proposed for authorization is less than one percent for all stocks other than the California coastal bottlenose dolphin, for which the proposed annual take represents greater than one-third of the best available population abundance, if we were to assume that all takes occurred to distinct individuals. However, these numbers represent the estimated incidents of take, not the number of individuals taken. That is, it is likely that a relatively small subset of California coastal bottlenose dolphins would be incidentally harassed by project activities. California coastal bottlenose dolphins range from San Francisco Bay to San Diego (and south into Mexico) and the specified activity would be stationary within an enclosed water body that is not recognized as an area of any special significance for coastal bottlenose dolphins (and is therefore not an area of dolphin aggregation, as evident in Navy observational records). We therefore believe that the estimated numbers of takes likely represent repeated exposures of a much smaller number of bottlenose dolphins and that, based on the limited region of exposure in comparison with the known distribution of the coastal bottlenose dolphin, these estimated incidents of take represent small numbers of bottlenose dolphins. Therefore, the proposed annual take levels would be of small numbers for all stocks.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population sizes of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by these actions. Therefore, we have determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to Navy construction activities would contain an adaptive management component.

The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Endangered Species Act (ESA)

No marine mammal species listed under the ESA are expected to be affected by these activities. Therefore, we have determined that section 7 consultation under the ESA is not required.

Request for Information

NMFS requests interested persons to submit comments, information, and suggestions concerning the Navy request and the proposed regulations (see ADDRESSES). All comments will be reviewed and evaluated as we prepare a final rule and make final determinations on whether to issue the requested authorization. This notice and referenced documents provide all environmental information relating to our proposed action for public review.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The U.S. Navy is the sole entity that would be subject to the requirements in these proposed regulations, and the Navy is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

This proposed rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a Federal agency.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 3, 2019.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 218 is proposed to be amended as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Add subpart D to part 218 to read as follows:

Subpart D—Taking Marine Mammals Incidental to U.S. Navy Construction Activities at Naval Weapons Station Seal Beach, California

Subpart D—Taking Marine Mammals Incidental to U.S. Navy Construction Activities at Naval Weapons Station Seal Beach, California

§ 218.30 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to maintenance construction activities.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) only if it occurs within California coastal waters in the vicinity of Naval Weapons Station Seal Beach.

§ 218.31 Effective dates.

Regulations in this subpart are effective from [EFFECTIVE DATE OF FINAL RULE] through [DATE 5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE].

§ 218.32 Permissible methods of taking.

Under LOAs issued pursuant to § 216.106 of this chapter and § 218.36, the Holder of the LOA (hereinafter ''Navy'') may incidentally, but not intentionally, take marine mammals within the area described in § 218.30(b) by Level B harassment associated with construction activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 218.33 Prohibitions.

Notwithstanding takings contemplated in § 218.32 and authorized by an LOA issued under § 216.106 of this chapter and § 218.36, no person in connection with the activities described in § 218.30 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under § 216.106 of this chapter and § 218.36;

(b) Take any marine mammal not specified in such LOAs;

(c) Take any marine mammal specified in such LOAs in any manner other than as specified;

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 218.34 Mitigation requirements.

When conducting the activities identified in § 218.30(a), the mitigation measures contained in any LOA issued under § 216.106 of this chapter and § 218.36 must be implemented. These mitigation measures shall include but are not limited to:

(a) General conditions:

(1) A copy of any issued LOA must be in the possession of the Navy, its designees, and work crew personnel operating under the authority of the issued LOA.

(2) The Navy shall conduct briefings for construction supervisors and crews, the monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures.

(b) Shutdown zones:

(1) For all pile driving activity, the Navy shall implement a minimum shutdown zone of a 10 m radius around the pile. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(2) For all pile driving activity, the Navy shall implement shutdown zones with radial distances as identified in any LOA issued under § 216.106 of this chapter and § 218.36. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(3) For all pile driving activity, the Navy shall designate monitoring zones with radial distances as identified in any LOA issued under § 216.106 of this chapter and § 218.36.

(c) Shutdown protocols:

(1) The Navy shall deploy marine mammal observers as described in § 218.35.

(2) For all pile driving activities, a minimum of one observer shall be stationed at the active pile driving rig or in reasonable proximity in order to monitor the shutdown zone.

(3) Monitoring shall take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-activity monitoring shall be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals shall be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior shall be monitored and documented. Monitoring shall occur throughout the time required to drive a pile. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

(4) If a marine mammal approaches or enters the shutdown zone, all pile driving activities at that location shall be halted. If pile driving is halted or delayed due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal.

(5) Monitoring shall be conducted by trained observers, who shall have no other assigned tasks during monitoring periods. Trained observers shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. The Navy shall adhere to the following additional observer qualifications:

(i) Independent observers (*i.e.,* not construction personnel) are required.

(ii) At least one observer must have prior experience working as an observer.

(iii) Other observers may substitute education (degree in biological science or related field) or training for experience.

(iv) Where a team of three or more observers are required, one observer shall be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer.

(v) The Navy shall submit observer CVs for approval by NMFS.

(d) Soft start: The Navy shall use soft start techniques for impact pile driving. Soft start for impact drivers requires contractors to provide an initial set of three strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy three-strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

§ 218.35 Requirements for monitoring and reporting.

(a) Trained observers shall receive a general environmental awareness briefing conducted by Navy staff. At minimum, training shall include identification of marine mammals that may occur in the project vicinity and relevant mitigation and monitoring requirements. All observers shall have no other construction-related tasks while conducting monitoring.

(b) For shutdown zone monitoring, the Navy shall report on implementation of shutdown or delay procedures, including whether the procedures were not implemented and why (when relevant).

(c) The Navy shall deploy a minimum of one additional observer to aid in monitoring disturbance zones. This observer shall collect sighting data and behavioral responses to pile driving for marine mammal species observed in the region of activity during the period of activity, and shall communicate with the shutdown zone observer as appropriate with regard to the presence of marine mammals. All observers shall be trained in identification and reporting of marine mammal behaviors.

(d) The Navy must submit annual and summary reports.

(1) Annual reporting:

(i) Navy shall submit an annual summary report to NMFS not later than 90 days following the end of each calendar year. Navy shall provide a final report within 30 days following resolution of comments on the draft report.

(ii) These reports shall contain, at minimum, the following:

(A) Date and time that monitored activity begins or ends;

(B) Construction activities occurring during each observation period;

(C) Weather parameters (*e.g.,* wind speed, percent cloud cover, visibility);

(D) Water conditions (*e.g.,* sea state, tide state);

(E) Species, numbers, and, if possible, sex and age class of marine mammals;

(F) Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;

(G) Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;

(H) Description of implementation of mitigation measures (*e.g.,* shutdown or delay);

(I) Locations of all marine mammal observations; and

(J) Other human activity in the area.

(2) Navy shall submit a comprehensive summary report to NMFS not later than ninety days following the conclusion of marine mammal monitoring efforts described in this subpart.

(e) Reporting of injured or dead marine mammals: In the event that personnel involved in the survey activities discover an injured or dead marine mammal, the LOA-holder must report the incident to the Office of Protected Resources (OPR), NMFS and to the West Coast Regional Stranding Network as soon as feasible. The report must include the following information:

(1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(2) Species identification (if known) or description of the animal(s) involved;

(3) Condition of the animal(s) (including carcass condition if the animal is dead);

(4) Observed behaviors of the animal(s), if alive;

(5) If available, photographs or video footage of the animal(s); and

(6) General circumstances under which the animal was discovered.

§ 218.36 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Navy must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Navy must apply for and obtain a modification of the LOA as described in § 218.37.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within thirty days of a determination.

§ 218.37 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 218.36 for the activity identified in § 218.30(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under § 216.106 of this chapter and § 218.36 for the activity identified in § 218.30(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from the Navy's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to § 216.106 of this chapter and § 218.36, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

§ 218.38–§ 218.39 [Reserved]

[FR Doc. 2019–26429 Filed 12–9–19; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No.: 191202–0096]

RIN 0648–BJ42

Control Date for Catcher/Processors Using Pot Gear in the Bering Sea and Aleutian Islands Pacific Cod Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking (ANPR); control date.

SUMMARY: At the request of the North Pacific Fishery Management Council (Council), this notice announces a control date of December 10, 2019, that may be used as a reference date for a future management action to limit

future access to the Bering Sea and Aleutian Islands (BSAI) Pacific cod pot catcher/processor sector. This notice is intended to promote awareness of possible rulemaking and provide notice to the public that any participation in the BSAI Pacific cod pot catcher/processor sector after the control date may not ensure continued access to this fishery under a future management action. This notice is also intended to discourage speculative entry into this fishery while the Council considers whether and how access to the fishery may be further limited under a future management action.

DATES: December 10, 2019, shall be known as the control date for the BSAI Pacific cod pot catcher/processor sector fishery and may be used as a reference date for participation in a future management action that is consistent with the Council's objectives and applicable Federal laws.

FOR FURTHER INFORMATION CONTACT: Kurt Iverson: 907–586–7228 or *Kurt.Iverson@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the U.S. exclusive economic zone (EEZ) of the BSAI under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The Council prepared, and NMFS approved, the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 679.

This advance notice of proposed rulemaking would apply to owners and operators of catcher/processor vessels that participate in Federal groundfish fisheries with pot gear in the BSAI. The BSAI is defined at § 679.2 and shown in Figure 1 to 50 CFR part 679.

The Council and NMFS annually establish overfishing limits and annual total allowable catch limits for groundfish species to sustainably manage the groundfish fisheries in the BSAI. To achieve these objectives, NMFS requires vessel operators participating in BSAI Pacific cod fisheries to comply with various regulatory restrictions, such as fishery closures and limits on participation and effort, to maintain catch within specified total allowable catch limits.

The Council and NMFS have long sought to control fishing effort in the North Pacific Ocean to ensure that fisheries are conservatively managed and do not exceed established biological thresholds. One of the measures used by the Council and NMFS is the license limitation program (LLP), which limits access to the federally managed groundfish, crab, and scallop fisheries in the BSAI and the Gulf of Alaska. For groundfish, the LLP requires that persons hold and assign a license to each vessel that is used to fish in federally managed fisheries, with some limited exemptions. The preamble to the final rule implementing the groundfish LLP provides a more detailed explanation of the rationale for specific provisions in the LLP (October 1, 1998; 63 FR 52642).

A vessel participating in groundfish fisheries in Federal waters in the BSAI or GOA is required to have an LLP license with the applicable area, gear, and operation type endorsements, and a sufficient maximum length overall (MLOA) In 2019, there were a total of eight LLP licenses with a BS Pacific cod pot catcher/processor (C/P) endorsement. Of those eight LLP licenses, five LLP licenses also had an AI Pacific cod pot C/P endorsement, three LLP licenses also had a BS Pacific cod HAL C/P endorsement, and three LLP licenses also had an AI Pacific cod HAL C/P endorsement.

In October 2019, the Council reviewed a discussion paper and received public testimony from participants in the BSAI Pacific cod pot C/P sector. These participants indicated that a new vessel entered the fishery in recent years and this new entry may negatively impact the ability of historical fishery participants to maintain groundfish harvests and processing in the BSAI.

After considering this public testimony, the Council stated its intent to evaluate methods for further limiting access to the BSAI Pacific cod pot catcher/processor sector in a future management action. To dampen the effect of speculative entry into this sector during this deliberative period, the Council announced a control date. This date corresponds to the date of publication of this advance notice of proposed rulemaking after the end of the 2019 fishing season and prior to the start of the 2020 fishing season.

The control date may be used as a reference date for a future management action to further limit access to the BSAI Pacific cod pot catcher/processor sector. The Council clarified that the control date would not obligate the Council to use this control date in any future management action. Further, the control date would not obligate the Council to take any action or prevent the Council from selecting another control date. Accordingly, this notice is intended to promote awareness that the Council may develop a future management action to achieve its objectives for the BSAI Pacific cod pot catcher/processor sector fishery; to provide notice to the public that any current or future access to the Pacific cod pot catcher/processor fishery may be affected or restricted; and to discourage speculative participation and behavior in the fisheries while the Council considers whether to initiate a management action to further limit access to this fishery. Any measures the Council considers may require changes to the FMP. Such measures may be adopted in a future amendment to the FMP, which would include opportunity for further public participation and comment.

NMFS encourages public participation in the Council's consideration of a management action to further limit access to BSAI Pacific cod fishery. Please consult the Council's website at *http://www.npfmc.org/* for information on public participation in the Council's decision-making process. The Council is scheduled to receive an initial review draft Analysis at its meeting scheduled for March 30, 2020 through April 7, 2020.

This notification and control date do not impose any legal obligations, requirements, or expectations.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 2, 2019.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2019–26395 Filed 12–9–19; 8:45 am]

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Notices

Federal Register

Vol. 84, No. 237

Tuesday, December 10, 2019

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–SC–19–0098; SC20–983–1]

Notice of Request for Extension and Revision of a Currently Approved Information Collection for Pistachios Grown in California, Arizona, and New Mexico (Marketing Order No. 983)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intent to request an extension for and revision to a currently approved information collection for Pistachios Grown in California, Arizona, and New Mexico, pursuant to Federal Marketing Order No. 983.

DATES: Comments on this notice must be received by February 10, 2020.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or internet: *www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *www.regulations.gov.* All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Pushpa Kathir, Marketing Specialist, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone:(202) 205–2829; Fax: (202) 720–8938; or Email: *pushpa.kathir@usda.gov.*

Small businesses may request information on this notice by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491; Fax: (202) 720–8938; or Email: *richard.lower@usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Pistachios Grown in California, Arizona, and New Mexico, Marketing Order No. 983.

OMB Number: 0581–0215.

Expiration Date of Approval: June 30, 2020.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: Under the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674), fresh fruits, vegetables, and specialty crop industries can enter into marketing order programs which provide an opportunity for producers, in a specified production area, to work together to solve marketing problems that cannot be solved individually. The Secretary of Agriculture is authorized to oversee the marketing order's operations and issue regulations recommended by a committee of representatives from each commodity industry.

The Specialty Crops Program is part of the larger AMS, and is responsible for overseeing Federal marketing order operations.

This notice pertains to the Federal marketing order regulating the handling of pistachios grown in California, Arizona, and New Mexico (7 CFR part 983), hereinafter referred to as the ''Order.'' The Order authorizes grade and size requirements, as well as a requirement for aflatoxin testing on domestic shipments only.

The Administrative Committee for Pistachios (Committee) locally administers the Order that requires handlers to submit certain information to the Committee to effectively implement program requirements, fulfill the intent of the AMAA, and assist the industry in carrying out marketing decisions. Only authorized employees of the Committee, and authorized representatives of the USDA have access to information provided on the forms.

Requesting public comments on the forms described below is part of the process to obtain approval through the Office of Management and Budget (OMB).

The forms needing OMB approval are contained in OMB No. 0581–0215 and include Committee nominations and ballots for producers (SC–245 and SC–246) and handlers (SC–245A and SC–244); background statements for Committee nominees (SC–243); marketing agreement (SC–242); and referendum (SC–240A) and continuance ballots (SC–240).

There are also forms to report assessment receipts (ACP–1), notify for failed lot dispositions (ACP–2), apply for exemption from handling requirements (ACP–3), request for minimal testing for aflatoxins (ACP–4), report inter-handler transfers (ACP–5), provide monthly inventory and shipment data (ACP–6), and submit lists of producers and deliveries (ACP–7).

In this renewal, the Committee suggested modifications to forms to streamline the process of pistachio handlers reporting information. The Failed Lot Notification (ACP–2) was combined with the Failed Lot Disposition and Rework Report (ACP–3) to make a new ACP–2 form. The remaining ACP forms were renumbered to maintain sequential order.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.28 hours per response.

Respondents: Pistachio producers, handlers, and testing laboratories.

Estimated Number of Respondents: 1220.

Estimated Number of Responses: 1959.37.

Estimated Number of Responses per Respondent: 1.61.

Estimated Total Annual Burden on Respondents: 540.29 hours.

Comments: Comments are invited on: (1) Whether the proposed collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) 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.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Authority: Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Dated: December 2, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–26542 Filed 12–9–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Performance Review Board Membership

AGENCY: Office of Human Resource Management, Departmental Administration, USDA.

ACTION: Notice of Performance Review Board Appointments.

SUMMARY: This notice announces the members of the Senior Executive Service (SES) and Senior Level (SL) and Scientific or Professional (ST) Performance Review Boards. Agriculture has two PRBs with representatives from each USDA Mission Area. The PRBs are comprised of a Chairperson and a mix of career and noncareer senior executives and senior professionals that meet annually to review and evaluate performance appraisal documents. The PRB provides a written recommendation to the Secretary for final approval of each executive's performance rating, performance-based pay adjustment, and performance award. The PRBs are advised by the Office of Human Resources Management, Office of General Counsel, and Office of the Assistant Secretary for Civil Rights to ensure compliance with laws and regulations.

DATES: The board membership is applicable beginning on November 21, 2019.

FOR FURTHER INFORMATION CONTACT: Mary Pletcher Rice, Chief Human Capital Officer, Office of Human Resources Management, telephone: (202) 756–7149, or Karlease Kelly, Chief Learning Officer, telephone: (202) 720–0185.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the USDA PRB members are named below:

Abbott, Linda; Bretting, Peter; Bucknall, Janet; Davis, Scott; Denton, Angilla; Dixon, Antoine; Dombroski, Patricia; Fantinato, Jessica; Giles, Misty; Glendenning, Roger; Hamer Jr., Hubert; Harwood, Joy; Ibarra, Robert; Laconte, Cara; Liu, Simon; Long, Cynthia; Martin, Michiko; Messner, Kurt; Morris, Erin; Mulach, Ronald; Pollard, Nicole; Prestemon, Jeff; Rhoads, Matthew; Rodriguez-Franco, Carlos; Rowley, Allen; Su, Emily; Tkacz, Kailee; Tohamy, Soumaya; Walker, Lorren; Watson, Michael; Daniel Whitley; and Zakarka, Christine.

Mary Pletcher Rice,

Chief Human Capital Officer, Office of Human Resources Management.

[FR Doc. 2019–26543 Filed 12–9–19; 8:45 am]

BILLING CODE 3410–96–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Request for information: Self-Determination Demonstration Project for Tribes That Administer the Food Distribution Program on Indian Reservations

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

ACTION: Notice; request for information

SUMMARY: This is a Request for Information to help the Secretary of the U.S. Department of Agriculture (the Secretary or USDA) develop the additional criteria, as authorized in the Agriculture Improvement Act of 2018, for a self-determination demonstration project related to the purchase of agricultural commodities for the Food Distribution Program on Indian Reservations (FDPIR). USDA requests feedback from Indian Tribal Organizations (ITOs) and State agencies that administer FDPIR, Tribal leaders and representatives, and Tribal associations. This notice is not a request for proposal and does not commit the Government to issue a solicitation, make an award, or pay any costs associated with responding to this announcement. All submitted information shall remain with the Government and will not be returned. All responses will become part of the public record and will not be held confidential.

USDA received authority in section 4003(b) of the Agriculture Improvement Act of 2018 (Pub. L. 115–334, the 2018 Farm Bill) to establish a demonstration project for one or more Tribal Organization(s) administering FDPIR to enter into self-determination contracts to purchase agricultural commodities (which are hereafter referred to as ''food(s)'') for the FDPIR food package for their Indian Tribe. These Tribally purchased foods will be issued to FDPIR participants in lieu of similar USDA Foods available in the FDPIR food package. The 2018 Farm Bill authorizes up to $5 million to remain available until expended to carry out this demonstration project; however, availability of funds is subject to Congressional appropriations.

The objective of this Request for Information is to receive feedback to assist USDA in developing the process and criteria for determining if a FDPIR Tribal Organization is eligible for a self-determination demonstration project contract, as specified in the 2018 Farm Bill under Section 4003(b)(3). USDA invites comments on specific questions included in this Request for Information (see **SUPPLEMENTARY INFORMATION**) and welcomes comments from those involved in the administration of FDPIR, Tribal leaders and representatives, and Tribal associations. USDA will use the comments in response to this Request for Information to inform the competitive process for entering into a self-determination contract(s) as required by Section 4003(b)(2) of the 2018 Farm Bill, upon receipt of Congressional appropriations.

DATES: To be assured of consideration, written comments must be submitted or postmarked on or before February 10, 2020.

ADDRESSES: The Food and Nutrition Service, USDA, invites the submission of the requested information through one of the following methods:

• *Preferred method:* Submit information through the Federal eRulemaking Portal at http://*www.regulations.gov.* Follow the online instructions for submissions.

• *Mail:* Submissions should be addressed to Erica Antonson, Branch Chief, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place, Alexandria, VA 22314.

• *Email:* Send comments to *FDPIR-RC@usda.gov* with a subject line ''FDPIR: RFI 638 Demonstration Project''.

All information properly and timely submitted, using one of the three methods described above and in response to this request for information, will be included in the record and will be made available to the public on the internet at *http://www.regulations.gov.* Please be advised that the substance of the information provided and the identity of the individuals or entities submitting it will be subject to public disclosure.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this request for information should be directed to *FDPIR-RC@usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Program Information

FDPIR provides USDA Foods to income-eligible households living on Indian reservations, and to American Indian households residing in approved areas near reservations and in Oklahoma. The Food and Nutrition Service (FNS), an agency of USDA, administers FDPIR at the Federal level. The program is administered locally by either ITOs or an agency of a State government. ITOs and State agencies, known as FDPIR administering agencies, store and distribute the foods, determine applicant eligibility, and provide nutrition education to recipients. FNS provides FDPIR administering agencies with funds for program administrative costs.

FNS has an agreement with the Agricultural Marketing Service (AMS), another agency of USDA, and the Department of Defense's Defense Logistics Agency (DLA) to buy food for the FDPIR program. Eligible households may choose from over 100 nutritious, domestically produced items across a variety of categories including meat/poultry, dairy, grains, and fruits/vegetables to make up a monthly food package benefit. In recent years, FNS has also worked to expand the availability of traditional foods as part of the food package, including bison, wild rice, wild salmon, catfish, and blue cornmeal. In addition, most FDPIR programs receive a variety of fresh produce as part of the food package. FNS also works closely with the Food Package Review Work Group, a work group comprised of Tribal representatives and Tribal nutritionists, to review the FDPIR food package on an ongoing basis with the goal of revising it to better meet the nutritional needs and food preferences of program participants. As of FY 2019, there are approximately 276 tribes receiving benefits under FDPIR through 102 ITOs and 3 State agencies. The program serves approximately 85,000 participants on an average monthly basis.

II. 2018 Farm Bill

Section 4003(b) of the 2018 Farm Bill authorizes a demonstration project for one or more Tribal Organization(s) within the FDPIR to enter into self-determination contracts to procure foods to supplant FDPIR foods purchased by USDA for their Indian Tribe. Self-determination contracts are also known as 638 Contracts in reference to Public Law 93–638, the Indian Self-Determination and Education Assistance Act. This authority allows Tribal Organizations to take on a larger administrative role in delivering federally funded services and to have more control over the governmental affairs of their Organizations, fostering further self-governance. The 2018 Farm Bill provision under Section 4003(b) supports Tribal Organization self-governance by specifically allowing Tribal Organizations to procure foods instead of USDA.

The 2018 Farm Bill specifically provides the following on Tribal Organization eligibility and procurement of foods for this demonstration project:

Tribal Organization Eligibility (Section 4003(b)(3)(B))

- A Tribal Organization(s) must be successfully administering FDPIR;
- A Tribal Organization(s) must have capacity to purchase agricultural foods following the criteria listed under Procurement of Agricultural Commodities in section 4003(b)(4) below; and
- A Tribal Organization(s) must meet any other criteria determined by the Secretary, in consultation with the Secretary of Interior and Indian tribes.

Procurement of Agricultural Commodities (Section 4003(b)(4))

- A Tribal Organization(s) must be able to procure foods that are domestically produced for this demonstration project;
- Food(s) selected for this demonstration project will supplant, not supplement, the type of agricultural food(s) currently available in the FDPIR food package;
- Food(s) selected for this demonstration project must be of similar or higher nutritional value than the food(s) it is supplanting in the existing FDPIR food package; and
- Food(s) selected for this demonstration project must meet any other criteria determined by the Secretary.

The specific requirements noted above will inform which Tribal Organization(s) are eligible to participate in the demonstration project. Eligible Tribal Organizations will have an opportunity to apply for participation based on a process to be determined and informed by answers to the questions below.

III. Questions

USDA requests that commenters respond in detail to any or all of the items below to help inform who may be eligible for a self-determination contract under Section 4003(b) of the 2018 Farm Bill. Please provide any material that addresses the information requested or any other information that may be pertinent. USDA will consider comments that may require regulatory changes. Additional references or links to materials are welcome.

1. What process should be used to determine which Tribal Organizations should be selected to participate in this demonstration project given that project funds are limited?
2. What, if any, additional criteria should be established for a Tribal Organization to be considered eligible to participate in this demonstration project?
3. What factors should be considered in determining whether a Tribal Organization has the capacity to purchase agricultural foods for this demonstration project?
4. Are there any specific criteria that should be given priority in the selection process?

Dated: December 5, 2019.

Pamilyn Miller,

Administrator, Food and Nutrition Service.

[FR Doc. 2019–26565 Filed 12–9–19; 8:45 am]

BILLING CODE 3410–30–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Oregon Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

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 the meeting of the Oregon Advisory Committee (Committee) to the Commission will be held at 12:00 p.m.

(Pacific Time) Friday, December 20, 2019. The purpose of this meeting is for the Committee to brainstorm ideas for their civil rights project.

DATES: The meeting will be held on Friday, December 20, 2019 at 12:00 p.m. PT.

Public Call Information: Dial: 800–367–2403, Conference ID: 6707876.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes (DFO) at *afortes@usccr.gov* or (213) 894–3437.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the following toll-free call-in number: 800–367–2403, conference ID number: 6707876. 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 1–800–877–8339 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 Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012. They may be faxed to the Commission at (213) 894–0508, or emailed Ana Victoria Fortes at *afortes@usccr.gov*. Persons who desire additional information may contact the Regional Programs Unit at (213) 894–3437.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meetings at *https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzlwAAA*.

Please click on the "Committee Meetings" tab. Records generated from these meetings may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meetings. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome
II. Project Process
III. Brainstorm Civil Rights Topics
IV. Public Comment
V. Good of the Order
VI. Adjournment

Dated: December 4, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–26481 Filed 12–9–19; 8:45 am]

BILLING CODE: P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Procedure for Parties on the Entity List and Unverified List To Request Removal or Modification of Their Listing

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: To ensure consideration, written comments must be submitted on or before February 10, 2020.

ADDRESSES: Direct all written comments to Mark Crace, IC Liaison, Bureau of Industry and Security, 1401 Constitution Avenue, Suite 2099B, Washington, DC 20233 (or via the internet at *PRAcomments@doc.gov*). Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection is needed to provide a procedure for persons or organizations listed on the Entity List and Unverified List to request removal or modification of the entry that affects them. The Entity List appears at 15 CFR part 744, Supp. No. 4, and the Unverified List appears at 15 CFR part 744, Supp. No. 6. The Entity List and Unverified List are used to inform the public of certain parties whose presence in a transaction that is subject to the Export Administration Regulations (15 CFR parts 730–799) requires a license from the Bureau of Industry and Security (BIS). Requests for removal from the Entity List would be reviewed by the Departments of Commerce, State, and Defense, and Energy and Treasury as appropriate. The interagency decision, as communicated to the requesting entity by BIS, would be the final agency action on such a request. Requests for removal from the Unverified List would be reviewed by the Department of Commerce. The decision, as communicated to the requesting entity by BIS, would be the final agency action on such a request. This is a voluntary collection.

II. Method of Collection

Paper only: Via mail or fax.

III. Data

OMB Control Number: 0694–0134.
Form Number(s): N/A.
Type of Review: Regular Submission.
Type of Review: Extension without change of a currently approved collection.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 5.
Estimated Time per Response: 3 hours.
Estimated Total Annual Burden Hours: 15.
Estimated Total Annual Cost to Public: $0.
Respondent's Obligation: Voluntary.
Legal Authority: Section 744.15, and 744.16 of the EAR.

IV. Request for Comments

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 (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2019–26571 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Oguzhan Aydin, Celepkoy Mahallesi Mikail Cikmazi No: 2/1, Catalca, Istanbul, Turkey; Order Denying Export Privileges

On August 3, 2016, in the U.S. District Court for the District of Columbia, Oguzhan Aydin (''Aydin'') was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) (''IEEPA''). Specifically, Aydin was convicted of violating IEEPA by exporting, causing to be exported, and attempting to export and cause the export of a General Electric CF6–50c2 engine, bearing manufacture's serial number 517621, with the intention of directly or indirectly supplying this item to Iran, and specifically to Mahan Airways,[2] via transshipment through Turkey, without having first obtained the required U.S. Government authorization. Aydin was sentenced to nine (9) months and ten (10) days in prison, three years of supervised release, and an assessment of $100. Aydin also was placed on the U.S. Department of State Debarred List.

The Export Administration Regulations (''EAR'' or ''Regulations'') are administered and enforced by the U.S. Department of Commerce's Bureau of Industry and Security (''BIS'').[3] Section 766.25 of the Regulations provides, in pertinent part, that the ''Director of [BIS's] Office of Exporter Services, in consultation with the Director of [BIS's] Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of . . . the International Emergency Economic Powers Act (50 U.S.C. 1701–1706).'' 15 CFR 766.25(a). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d).[4] In addition, pursuant to Section 750.8 of the Regulations, BIS's Office of Exporter Services may revoke any BIS-issued licenses in which the person had an interest at the time of his/her conviction.[5]

BIS received notice of Aydin's conviction for violating IEEPA and, pursuant to Section 766.25 of the Regulations, provided notice and an opportunity for Aydin to make a written submission to BIS. BIS has received a written submission from Aydin.

Based upon my review of the record, including Aydin's written submission, and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Aydin's export privileges under the Regulations for a period of 10 years from the date of Aydin's conviction. I have also decided to revoke any BIS-issued licenses in which Aydin had an interest at the time of his conviction.

Accordingly, it is hereby *ordered:*

First, from the date of this Order until August 3, 2026, Oguzhan Aydin, with a last known address at Celepkoy Mahallesi Mikail Cikmazi No: 2/1, Catalca, Istanbul, Turkey, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

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[1] Mahan Airways (''Mahan'') has been subject to a BIS-issued temporary denial order (TDO) issued on March 17, 2008, and effective upon publication in the **Federal Register** on March 21, 2008. *See* 73 FR 15,130. The TDO remains in effect against Mahan Airways, having been renewed most recently on June 5, 2019. *See* 84 FR 27,233. Additionally, in October 2011, the Department of the Treasury's Office of Foreign Assets Control designated Mahan as a Specially Designated Global Terrorist pursuant to Executive Order 13,224.

[3] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2019). The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which was extended by successive Presidential Notices, continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA.

[4] *See also* Section 11(h) of the EAA, 50 U.S.C. 4610(h) (Supp. III 2015); Sections 1760(e) and 1768 of ECRA, 50 U.S.C. 4819 and 4826; and note 1, *supra.*

[5] *See* notes 2 and 3, *supra.*

Third, pursuant to Section 1760(e) of the Export Control Reform Act (50 U.S.C. 4820(e) and Sections 766.23 and 766.25 of the Regulations, any other person, firm, corporation, or business organization related to Aydin by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Aydin may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Aydin and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until August 3, 2026.

Issued this 3rd day of December 2019.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2019–26487 Filed 12–9–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Paul Stuart Brunt, 3457 108th Ave SE, Bellevue, WA 98004; Order Denying Export Privileges

On March 1, 2019, in the U.S. District Court for the Western District of Washington, Paul Stuart Brunt (''Brunt'') was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (''AECA''). Brunt was convicted of violating Section 38 of the AECA by knowingly and willfully exporting firearms designated as defense articles on the United States Munitions List from the United States to Turkey and Iraq, without the required U.S. Department of State licenses. Brunt was sentenced to three years of probation, 200 hours of community service, a fine of $20,000, and a $300 assessment.

The Export Administration Regulations (''EAR'' or ''Regulations'') are administered and enforced by the U.S. Department of Commerce's Bureau of Industry and Security (''BIS'').[1] Section 766.25 of the Regulations provides, in pertinent part, that the ''Director of [BIS's] Office of Exporter Services, in consultation with the Director of [BIS's] Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of . . . section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d).[2] In addition, pursuant to Section 750.8 of the Regulations, BIS's Office of Exporter Services may revoke any BIS-issued licenses in which the person had an interest at the time of his/her conviction.[3]

BIS received notice of Brunt's conviction for violating Section 38 of the AECA, and pursuant to Section 766.25 of the Regulations, has provided notice and an opportunity for Brunt to make a written submission to BIS. To date, BIS has not received a written submission from Brunt.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Brunt's export privileges under the Regulations for a period of 10 years from the date of Brunt's conviction. I have also decided to revoke any BIS-issued licenses in which Brunt had an interest at the time of his conviction.

Accordingly, it is hereby *ordered*:

First, from the date of this Order until March 1, 2029, Paul Stuart Brunt, with a last known address of 3457 108th Ave SE, Bellevue, WA 98004, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2019). The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which was extended by successive Presidential Notices, continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA.

[2] *See also* Section 11(h) of the EAA, 50 U.S.C. 4610(h) (Supp. III 2015); Sections 1760(e) and 1768 of ECRA, 50 U.S.C. 4819 and 4826; and note 1, *supra.*

[3] *See* notes 1 and 2, *supra.*

service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Brunt by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Brunt may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Brunt and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until March 1, 2029.

Issued this 3rd day of December, 2019.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2019–26486 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–835]

Dried Tart Cherries From the Republic of Turkey: Final Affirmative Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that dried tart cherries (cherries) from the Republic of Turkey (Turkey) are being, or are likely to be, sold in the United States at less than fair value (LTFV).

DATES: Applicable December 10, 2019.

FOR FURTHER INFORMATION CONTACT: Alex Wood or Alice Maldonado, 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) 482–1959 or (202) 482–4682, respectively.

SUPPLEMENTARY INFORMATION:

Background

This final determination is made in accordance with section 735 of the Tariff Act of 1930, as amended (the Act). The petitioner in this investigation is the Dried Tart Cherry Trade Committee. The mandatory respondents in this investigation are Isik Tarim Urunleri Sanayi ve Ticaret A.S. (Isik Tarim) and Yamanlar Tarim Urunleri (Yamanlar Tarim). Neither of the mandatory respondents responded to our requests for information in this investigation. On September 27, 2019, Commerce published in the **Federal Register** the *Preliminary Determination* and invited interested parties to comment.[1] We received no comments regarding the *Preliminary Determination.*

Period of Investigation

The period of investigation is April 1, 2018 through March 31, 2019.

Scope of the Investigation

The products covered by this investigation are cherries from Turkey. For a complete description of the scope of this investigation, *see* the appendix to this notice.

Methodology—Adverse Facts Available (AFA)

For purposes of this final determination, we relied solely on facts available because neither of the selected mandatory respondents participated in this investigation, pursuant to section 776(a)(2)(A)–(C) of the Act. Further, because the mandatory respondents did not cooperate to the best of their abilities in responding to our requests for information in this investigation, we drew adverse inferences in selecting from among the facts otherwise available, in accordance with section 776(b) of the Act. No interested party submitted comments on the *Preliminary Determination.* Therefore, consistent with the *Preliminary Determination,* we continue to apply adverse facts available to Isik Tarim and Yamanlar Tarim for this final determination, and we made no changes to the estimated dumping margins for the mandatory respondents for the final determination. A detailed discussion of our application of AFA is provided in the *Preliminary Determination* and the accompanying Preliminary Decision Memorandum.[2]

All-Others Rate

As discussed in the *Preliminary Determination,* Commerce calculated the all-others rate as a simple average of the alleged dumping margin(s) from the petition, in accordance with section 735(c)(5)(A) of the Act.[3] We made no changes to the selection of the all-others rate for this final determination.

Final Determination

Commerce determines the following estimated dumping margins:

Company	Weighted-average dumping margins (percent)
Isik Tarim Urunleri Sanayi ve Ticaret A.S.	648.35
Yamanlar Tarim Urunleri	648.35
All Others	541.29

Disclosure

Because Commerce applied AFA to the individually-examined companies, Isik Tarim and Yamanlar Tarim, in this investigation, in accordance with section 776 of the Act, and the applied AFA rate is based solely on the petition, there are no calculations to disclose for this final determination pursuant to 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct CBP to continue the suspension of liquidation of all appropriate entries of subject merchandise, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after September 27, 2019, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register**. Further, Commerce will instruct CBP to require a cash deposit in the amounts shown above.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), Commerce will also instruct CBP to collect a cash deposit equal to the estimated dumping margin as follows: (1) The cash deposit rate listed for the respondents listed in the chart above will be equal to the respondent-specific estimated dumping margin that we have determined in this final determination; (2) if the exporter is not a respondent

[1] *See Dried Tart Cherries from the Republic of Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value,* 84 FR 51112 (September 27, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *Id.* PDM at ''Use of Facts Otherwise Available and Adverse Inferences.''

[3] *See Preliminary Determination,* 84 FR at 51113.

identified above but the producer is, then the cash deposit rate will be equal to the respondent-specific estimated dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

ITC Notification

In accordance with section 735(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Because the final determination in this proceeding is affirmative, in accordance with section 735(b) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of cherries from Turkey no later than 45 days after our final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, Commerce will issue an AD order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Notification Regarding Administrative Protective Orders

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to the APO of their responsibility concerning the destruction 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 violation which is subject to sanction.

Notification to Interested Parties

This determination is issued and published pursuant to sections 735(d) and 777(i) of the Act.

Dated: December 4, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigation

The scope of this investigation covers dried tart cherries, which may also be referred to as, *e.g.,* dried sour cherries or dried red tart cherries. Dried tart cherries may be processed from any variety of tart cherries. Tart cherries are generally classified as *Prunus cerasus.* Types of tart cherries include, but are not limited to, Amarelle, Kutahya, Lutowka, Montmorency, Morello, and Oblacinska. Dried tart cherries are covered by the scope of this investigation regardless of the horticulture method through which the cherries were produced (*e.g.,* organic or not), whether or not they contain any added sugar or other sweetening matter, whether or not they are coated in oil or rice flour, whether infused or not infused, and regardless of the infusion ingredients, including sugar, sucrose, fruit juice, and any other infusion ingredients. The scope includes partially rehydrated dried tart cherries that retain the character of dried fruit. The subject merchandise covers all shapes, sizes, and colors of dried tart cherries, whether pitted or unpitted, and whether whole, chopped, minced, crumbled, broken, or otherwise reduced in size. The scope covers dried tart cherries in all types of packaging, regardless of the size or packaging material.

Included in the scope of this investigation are dried tart cherries that otherwise meet the definition above that are packaged with non-subject products, including, but not limited to, mixtures of dried fruits and mixtures of dried fruits and nuts, where the smallest individual packaging unit of any such product contains a majority (*i.e.,* 50 percent or more) of dried tart cherries by dry net weight. Only the dried tart cherry components of such products are covered by this investigation; the scope does not include the non-subject components of such products.

Included in the scope of this investigation are dried tart cherries that have been further processed in a third country, including but not limited to processing by stabilizing, preserving, sweetening, adding oil or syrup, coating, chopping, mincing, crumbling, packaging with non-subject products, or other packaging, 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 dried tart cherries.

Excluded from the scope of this investigation are dried tart cherries that have been incorporated as an ingredient in finished bakery and confectionary items (cakes, cookies, candy, granola bars, *etc.*).

The subject merchandise is currently classifiable under 0813.40.3000 of the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise may also enter under subheadings 0813.40.9000, 0813.50.0020, 0813.50.0060, 2006.00.2000, 2006.00.5000, and 2008.60.0060. The HTSUS subheadings set forth above are provided for convenience and U.S. customs purposes only. The written description of the scope is dispositive.

[FR Doc. 2019–26551 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–836]

Dried Tart Cherries From the Republic of Turkey: Final Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of dried tart cherries (cherries) from the Republic of Turkey (Turkey).

DATES: Applicable December 10, 2019.

FOR FURTHER INFORMATION CONTACT: Ajay Menon, 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) 482–1993.

SUPPLEMENTARY INFORMATION:

Background

This final determination is made in accordance with section 705 of the Tariff Act of 1930, as amended (the Act). The petitioner in this investigation is the Dried Tart Cherry Trade Committee.[1] The mandatory respondents in this investigation are Isik Tarim Urunleri Sanayi ve Ticaret A.S. (Isik Tarim) and Yamanlar Tarim Urunleri (Yamanlar Tarim). Neither the mandatory respondents, nor the Government of Turkey, responded to our requests for information in this investigation. On September 27, 2019, Commerce published in the **Federal Register** the *Preliminary Determination* and invited interested parties to comment.[2] We received no comments

[1] *See* Petitioner's Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties: Dried Tart Cherries from the Republic of Turkey,'' dated April 23, 2019.

[2] *See Dried Tart Cherries from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination,* 84 FR 51109 (September 27, 2019) (*Preliminary Determination*), and

regarding the *Preliminary Determination.*

Period of Investigation

The period of investigation is January 1, 2018 through December 31, 2018.

Scope of the Investigation

The products covered by this investigation are cherries from Turkey. For a complete description of the scope of this investigation, *see* the appendix to this notice.

Analysis of Subsidy Programs—Adverse Facts Available (AFA)

For purposes of this final determination, we relied solely on facts available, because neither the Government of Turkey, nor either of the selected mandatory respondents, participated in this investigation. Further, because the mandatory respondents and the Government of Turkey did not cooperate to the best of their abilities in responding to our requests for information in this investigation, we drew adverse inferences in selecting from among the facts otherwise available, in accordance with sections 776(a)–(b) of the Act. Therefore, consistent with the *Preliminary Determination,* we continue to apply AFA to Isik Tarim and Yamanlar Tarim. No interested party submitted comments on the *Preliminary Determination.* Thus, we made no changes to the subsidy rates for the mandatory respondents for the final determination. A detailed discussion of our application of AFA is provided in the *Preliminary Determination* and the accompanying Preliminary Decision Memorandum.[3]

All-Others Rate

As discussed in the *Preliminary Determination,* Commerce based the selection of the all-others rate on the countervailable subsidy rate established for the mandatory respondents, in accordance with section 705(c)(5)(A)(ii) of the Act.[4] We made no changes to the selection of the all-others rate for this final determination.

Final Determination

Commerce determines that the following estimated net countervailable subsidy rates exist:

Company	Subsidy rate (percent)
Isik Tarim Urunleri Sanayi ve Ticaret A.S.	204.93
Yamanlar Tarim Urunleri	204.93
All-Others	204.93

Disclosure

The subsidy rate calculations in the *Preliminary Determination* were based on AFA.[5] As noted above, there are no changes to the calculations. Thus, no additional disclosure is necessary for this final determination.

Continuation of Suspension of Liquidation

As a result of our *Preliminary Determination* and pursuant to sections 703(d)(1)(B) and (d)(2) of the Act, Commerce instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of the *Preliminary Determination* in the **Federal Register**.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a countervailing duty (CVD) order, continue the suspension of liquidation under section 706(a) of the Act, and require a cash deposit of estimated countervailing duties for such entries of subject merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Because the final determination in this proceeding is affirmative, in accordance with section 705(b) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of cherries from Turkey no later than 45 days after our final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, Commerce will issue a CVD order directing CBP to assess, upon further instruction by Commerce, countervailing duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Notification Regarding APOs

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to the APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act.

Dated: December 4, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigation

The scope of this investigation covers dried tart cherries, which may also be referred to as, *e.g.,* dried sour cherries or dried red tart cherries. Dried tart cherries may be processed from any variety of tart cherries. Tart cherries are generally classified as *Prunus cerasus.* Types of tart cherries include, but are not limited to, Amarelle, Kutahya, Lutowka, Montmorency, Morello, and Oblacinska. Dried tart cherries are covered by the scope of this investigation regardless of the horticulture method through which the cherries were produced (*e.g.,* organic or not), whether or not they contain any added sugar or other sweetening matter, whether or not they are coated in oil or rice flour, whether infused or not infused, and regardless of the infusion ingredients, including sugar,

accompanying Preliminary Decision Memorandum (PDM).

[3] *Id.,* PDM at ''Use of Facts Otherwise Available and Adverse Inferences.''

[4] *See Preliminary Determination,* 84 FR at 51110.

[5] *Id.,* PDM at Appendix—''AFA Rate Calculation.''

sucrose, fruit juice, and any other infusion ingredients. The scope includes partially rehydrated dried tart cherries that retain the character of dried fruit. The subject merchandise covers all shapes, sizes, and colors of dried tart cherries, whether pitted or unpitted, and whether whole, chopped, minced, crumbled, broken, or otherwise reduced in size. The scope covers dried tart cherries in all types of packaging, regardless of the size or packaging material.

Included in the scope of this investigation are dried tart cherries that otherwise meet the definition above that are packaged with non-subject products, including, but not limited to, mixtures of dried fruits and mixtures of dried fruits and nuts, where the smallest individual packaging unit of any such product contains a majority (*i.e.,* 50 percent or more) of dried tart cherries by dry net weight. Only the dried tart cherry components of such products are covered by this investigation; the scope does not include the non-subject components of such products.

Included in the scope of this investigation are dried tart cherries that have been further processed in a third country, including but not limited to processing by stabilizing, preserving, sweetening, adding oil or syrup, coating, chopping, mincing, crumbling, packaging with non-subject products, or other packaging, 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 dried tart cherries.

Excluded from the scope of this investigation are dried tart cherries that have been incorporated as an ingredient in finished bakery and confectionary items (cakes, cookies, candy, granola bars, *etc.*).

The subject merchandise is currently classifiable under 0813.40.3000 of the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise may also enter under subheadings 0813.40.9000, 0813.50.0020, 0813.50.0060, 2006.00.2000, 2006.00.5000, and 2008.60.0060. The HTSUS subheadings set forth above are provided for convenience and U.S. customs purposes only. The written description of the scope is dispositive.

[FR Doc. 2019–26552 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Alaska Council Cooperative Annual Reports.

OMB Control Number: 0648–0678.

Form Number(s): None.

Type of Request: Regular.

Number of Respondents: 19.

Average Hours Per Response: Alaska Crab Rationalization Program Cooperative Annual Report, 47 hours; Annual Rockfish Cooperative Report, 37 hours; Annual Amendment 80 Cooperative Report, 18 hours; Amendment 80 Halibut Prohibited Species Catch (PSC) Management Plan, 12.5 hours; Amendment 80 Halibut Bycatch Avoidance Progress Report, 12.5 hours; American Fisheries Act (AFA) Catcher Vessel Intercooperative Agreement, 48 hours; American Fisheries Act Annual Catcher Vessel Intercooperative Report, 40 hours; American Fisheries Act Cooperative Annual Report, 16 hours.

Burden Hours: 695.

Needs and Uses: The North Pacific Fishery Management Council (Council) has developed several cooperative programs as options in larger catch share programs for the federally managed fisheries off Alaska. As part of these cooperative programs, the Council has either recommended that the National Marine Fisheries Service (NMFS) require the cooperative managers to submit an annual written report detailing various activities of the cooperative, or the Council has requested that cooperative managers voluntarily submit an annual report to the Council. These reports are intended to be a resource for the Council and the public to track the effectiveness of the cooperative and its ability to meet the Council's goals. Additionally, they are a tool for the cooperatives to provide feedback on a catch share program and how the cooperative element is functioning.

In general, the cooperative managers present the cooperative reports during the April Council meeting. Regulations do not require cooperative managers to present cooperative reports to the Council; however, they are encouraged to do so, and this has been common practice for many cooperative representatives. Public dissemination of the annual cooperative reports and presentation of an overview of the reports at the April Council meeting each year provides stakeholders and members of the public the opportunity to provide public comment to the Council about the cooperatives and the catch share programs.

Some of the cooperative annual reports are required in Federal regulation and others are requested by the Council as a voluntary annual submission. This information collection covers both the mandatory and voluntary components of the cooperative annual reports.

This information collection contains the following reports.

- The Alaska Crab Rationalization Program Cooperative Annual Report allows the Council to determine if the cooperatives are taking adequate action to facilitate the transfer of quota share (QS) to active participants and control QS lease rates, or if potential future regulatory action may be needed to address these concerns. This report is voluntary.
- The Annual Rockfish Cooperative Report provides information to the Council and NMFS about how the catch share program and its associated cooperative elements are functioning. This is particularly important as the Council is evaluating reauthorization of the Rockfish Program in 2019 and 2020. This report is mandatory.
- The Annual Amendment 80 Cooperative Report provides information to the Council and NMFS about how the catch share program is functioning, and if potential future changes may be needed. This report is mandatory.
- The Amendment 80 Halibut Prohibited Species Catch (PSC) Management Plan informs the Council of an Amendment 80 cooperative's plan to use voluntary, non-regulatory methods to avoid halibut bycatch in the Bering Sea and Aleutian Islands (BSAI) groundfish fisheries. This report is voluntary.
- The Amendment 80 Halibut Bycatch Avoidance Progress Report allows each sector in the BSAI groundfish fisheries to inform the Council of its progress on voluntary, non-regulatory methods used within its fishery cooperatives to avoid halibut bycatch in the BSAI groundfish fisheries. This report is voluntary.
- The American Fisheries Act (AFA) Catcher Vessel Inter-cooperative Agreement provides information to NMFS, the Council, and the public about inter-cooperative fishery allocations, PSC allocations, transfers of allocations and PSC, monitoring methods, and bycatch reduction methods. This report is voluntary.
- The American Fisheries Act Annual Catcher Vessel Inter-cooperative Report provides detailed information about how sideboard limits and PSC are being used to determine if program objectives are being satisfactorily met; provides the Council and the public with a simple means of evaluating the AFA catcher vessel fleets' aggregate fishing performance under the AFA regulations;

and provides a broader understanding of catcher vessel cooperative activities. This report is voluntary.

• The American Fisheries Act Cooperative Annual Report provides information to the Council about how each cooperative allocated pollock, other groundfish species, and prohibited species among the vessels in the cooperative; the catch of these species by area by each vessel in the cooperative; information about how the cooperative monitored fishing by its members; and a description of any actions taken by the cooperative to penalize vessels that exceeded the catch and prohibited species catch allocations made to the vessel by the cooperative. The purpose of this report is to provide the Council with information about the on-going operations and performance of the cooperatives on which to base its decisions about management of the Bering Sea pollock fishery. This report is mandatory.

Affected Public: Businesses or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Reports are voluntary or mandatory as specified in each report's description above.

This information collection request may be viewed at *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2019–26572 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XV143]

Fisheries of the Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of SEDAR 62 Assessment Webinar VI for Gulf of Mexico gray triggerfish.

SUMMARY: The SEDAR 62 stock assessment process for Gulf of Mexico gray triggerfish will consist of an In-person Workshop, and a series of data and assessment webinars. See **SUPPLEMENTARY INFORMATION.**

DATES: The SEDAR 62 Assessment Webinar VI will be held Janaury 13, 2020, from 10 a.m. to 12 p.m., Eastern Time.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net*

SUPPLEMENTARY INFORMATION:

The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop, (2) a series of assessment webinars, and (3) A Review Workshop. The product of the Data Workshop is a report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment webinars produce a report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The product of the Review Workshop is an Assessment Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the Assessment Webinar are as follows:

1. Using datasets and initial assessment analysis recommended from the in-person workshop, panelists will employ assessment models to evaluate stock status, estimate population benchmarks and management criteria, and project future conditions.

2. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice 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

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 5, 2019.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–26590 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XV142]

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting (webinar).

SUMMARY: The Pacific Fishery Management Council (Pacific Council)

will host a webinar meeting of the Area 2A Pacific halibut governmental management entities. This meeting is open to the public.

DATES: The webinar meeting will be held on Tuesday, January 7, 2020, from 10 a.m. until 2 p.m. or when business day for the day is completed.

ADDRESSES: The meeting will be held via webinar. A public listening station is available at the Pacific Council office (address below). To attend the webinar (1) join the meeting by visiting this link *https://www.gotomeeting.com,* click ''Join'' at the top right corner, (2) enter the Webinar ID: 398–952–709, and (3) enter your name and email address (required). After logging in to the webinar, please (1) dial this TOLL number 1 (312) 757–3121 (not a toll-free number), (2) enter the attendee phone audio access code 398–952–709, and (3) then enter your audio phone pin (shown after joining the webinar). NOTE: We have disabled Mic/Speakers as an option and require all participants to use a telephone or cell phone to participate. Technical Information and system requirements: PC-based attendees are required to use Windows® 7–10, 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 *https://www.gotomeeting.com/meeting/ipad-iphone-android-apps*). You may send an email to Mr. Kris Kleinschmidt at *Kris.Kleinschmidt@noaa.gov* or contact him at (503) 820–2280, extension 412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Ehlke, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: The primary purpose of the Area 2A Pacific halibut manager's meeting is to prepare and develop recommendations for the 2020 International Pacific Halibut Commission's (IPHC) annual meeting in Anchorage, AK from February 3 through February 7. Recommendations generated from the meeting will be communicated to the IPHC by the Pacific Council's representative, Mr. Phil Anderson. Attendees may also address other topics 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 posted on the Pacific Council website prior to 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 this meeting. 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

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt, (503) 820–2412, at least 10 business days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 5, 2019.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–26589 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XV145]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of scheduled SEDAR 60 South Atlantic Red Porgy assessment webinar I.

SUMMARY: The SEDAR 60 assessment of the South Atlantic stock of Red Porgy will consist of a data webinar, an in-person workshop, and a series assessment webinars.

DATES: The SEDAR 60 Red Porgy Assessment Webinar I has been scheduled for Monday, January 13, 2020, from 10 a.m. to 1 p.m., Eastern Time.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/5337919349411310093*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366; email: *Kathleen.Howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the SEDAR 60 Red Porgy Assessment webinar I are as follows:

- Continue work on model development if necessary.
- Recommend base model approach if necessary.

• Recommend and/or review continuity, sensitivities, and uncertainty evaluations.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice 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

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 5, 2019.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–26591 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV147

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will convene a meeting of the Southern Resident Killer Whale Workgroup (Workgroup).

DATES: The meeting will be held Wednesday, January 8 through Thursday, January 9, 2020. The meeting will be held from 10 a.m. to 5 p.m., Pacific Standard Time (PST) on January 8. The meeting will continue on January 9 at 9 a.m. (PST) and will end at 2 p.m. The meeting times are an estimate; the meetings will adjourn when business for the day is complete.

ADDRESSES: The meeting will be held in the Cedars Room, Embassy Suites by Hilton Portland Airport Hotel, 7900 NE 82nd Avenue, Portland, OR 97220; telephone: (503) 460–3000.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Ehlke, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to discuss data needs, document development, work plans, and progress made on assigned tasks. The Workgroup may also discuss and prepare for future Workgroup and Pacific Council meetings. This is a public meeting and not a public hearing. Public comments will be taken at the discretion of the Workgroup co-chairs as time allows.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. 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

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov,* (503) 820–2412) at least 10 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 5, 2019.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–26592 Filed 12–9–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF ENERGY

[EERE–2018–BT–DET–0014]

Final Determination Regarding Energy Efficiency Improvements in the 2018 International Energy Conservation Code (IECC)

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

ACTION: Notice of determination.

SUMMARY: The U.S. Department of Energy (DOE) has reviewed the 2018 edition of the International Energy Conservation Code (IECC) and determined the updated edition would improve energy efficiency in buildings subject to the code compared to the 2015 edition. DOE analysis indicates that buildings meeting the 2018 IECC (as compared with buildings meeting the 2015 IECC) would result in national site energy savings of 1.68 percent, national source energy savings of 1.91 percent, and national energy cost savings of approximately 1.97 percent of residential building energy consumption. Upon publication of this affirmative determination, each State is required by statute to certify that it has reviewed the provisions of its residential building code regarding energy efficiency, and made a determination as to whether to update its code to meet or exceed the 2018 IECC. Additionally, this notice provides guidance on state code review processes and associated certifications.

DATES: Certification statements provided by States shall be submitted by December 10, 2021.

ADDRESSES: A copy of the final analysis, as well as links to the Federal docket and public comments received, are available at: *https://www.energycodes.gov/development/determinations.*

Certification Statements must be addressed to the Building Technologies Office—Building Energy Codes Program Manager, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, EE–5B, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Jeremiah Williams; U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, EE–5B, Washington, DC 20585; (202) 441–1288; *Jeremiah.Williams@ee.doe.gov.* For legal issues, please contact Matthew Ring; U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue SW, GC–33, Washington, DC 20585; (202) 586–2555; *Matthew.Ring@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Title III of the Energy Conservation and Production Act (ECPA), as amended, establishes requirements for building energy conservation standards, which are administered by the DOE Building Energy Codes Program. (42 U.S.C. 6831 *et seq.*) Section 304(a)(5)(A), as amended, of ECPA provides that whenever the 1992 CABO Model Energy Code, or any successor to that code, is revised, the Secretary of Energy (Secretary) must make a determination, not later than 12 months after such revision, whether the revised code would improve energy efficiency in residential buildings, and must publish notice of such determination in the **Federal Register**. (42 U.S.C. 6833(a)(5)(A)) If the Secretary determines that the revision of the CABO Model Energy Code, or any successor thereof, improves the level of energy efficiency in residential buildings then, not later than two years after the date of the publication of such affirmative determination, each State is required to certify that it has reviewed its residential building code regarding energy efficiency, and made a determination as to whether it is appropriate to revise its code to meet or exceed the provisions of the successor code. (42 U.S.C. 6833(a)(5)(B))

The International Energy Conservation Code (IECC) is the contemporary successor to the CABO Model Energy Code specified in ECPA. The IECC is revised every three years through an established code development and consensus process administered by the International Code Council (ICC). Code change proposals may be submitted by any interested party, and are evaluated through a series of public hearings. As part of the ICC process, any interested party may submit proposals, as well as written comments or suggested changes to any proposal, and make arguments before a committee of experts assembled by the ICC. Proposals are presented to interested parties, and ultimately decided by a vote by the ICC Governmental Member Representatives, with the collection of accepted proposals forming the revised edition of the IECC. More information on the ICC code development process is available at: *https://www.iccsafe.org/codes-tech-support/codes/code-development-process/code-development-2/.*

The ICC published the most recent revision of the IECC, the 2018 edition of the IECC (2018 IECC or 2018 edition), on August 31, 2017, triggering the statutorily required DOE review process. To meet its statutory obligation, DOE conducted a preliminary analysis to quantify the expected energy savings associated with the 2018 IECC relative to the 2015 edition. Notice of this preliminary analysis was published in the **Federal Register** on May 2, 2019 (84 FR 18833), and is available at: *https://www.regulations.gov/docket?D=EERE-2018-BT-DET-0014.*

DOE reviewed the 2018 IECC to identify changes that have a direct impact on energy efficiency, and which could be reasonably quantified in estimating national average savings impacts. In total, 47 individual changes were identified, and of these changes:

- 11 were expected to reduce energy use;
- 3 were expected to increase energy use, and;
- 33 were considered administrative or not energy related.

A more detailed discussion of each of the 47 changes may be found in the final energy savings analysis, which is available at: *https://www.energycodes.gov/development/determinations.*

In its preliminary analysis, DOE found that many of the code changes are anticipated to have a neutral impact on energy efficiency, while a small number of code changes are anticipated to yield improved energy efficiency, and a smaller number of code changes are anticipated to be detrimental to energy efficiency. DOE's preliminary analysis identified two key changes that compose the bulk of the energy savings associated with the updated code:

- RE31 (Fenestration): Lowers (improves) fenestration U-factors in climate zones 3 through 8, and;
- RE127 (Lighting): Increases high-efficacy lighting from 75% to 90% of permanently installed fixtures in all homes.

These changes are expected to have a significant and measurable impact on energy efficiency in residential buildings because they increase energy savings, and impact a significant fraction of new homes. Overall, DOE's preliminary analysis found that the revisions in the 2018 IECC will yield annual aggregated site energy, source energy, and energy cost savings of 1.68 percent, 1.91 percent and 1.97 percent, respectively.

Together, the key impacts identified above are expected to result in life-cycle cost savings ranging from a low of $398 in climate zone 1 to a high of $1071 in climate zone 8. Expected payback ranges from 0.0 years (immediate payback) in climate zones 1 and 2 to 1.8 years in climate zone 3. National average savings are $480 with a payback of 1.1 years.

II. Public Participation

DOE accepted public comments on the Notice of Preliminary Determination for the 2018 IECC until June 3, 2019, and received submissions from a total of three commenters. DOE received responsive comments from two commenters. DOE received a comment from a third commenter; however, this comment was not responsive because it was outside the scope of this determination. Responsive public comments and associated DOE answers are described below.

Responsible Energy Codes Alliance (RECA)

Comment: RECA commented that it agrees with DOE's affirmative determination, supports DOE's dual qualitative/quantitative approach to assessing the 2018 IECC, and agrees that the improvements in fenestration efficiency and lighting efficiency will likely have the most directly positive impact on energy conservation. RECA also agrees with DOE's split qualitative assessment of the Energy Rating Index (ERI) changes, noting that higher thresholds will reduce energy efficiency while enhanced envelope backstops will help maintain or increase energy efficiency.

RECA also commented that the consideration of costs and cost effectiveness metrics are not referenced in 42 U.S.C. 6833(a)(5)(A), and suggests they are therefore not appropriate to include in either the preliminary or final determination. RECA further noted that inclusion of cost information in the preliminary determination departs from the precedent of previous determinations. RECA urged DOE to either eliminate the cost discussion from the final determination or, at a minimum, clarify that the cost effectiveness and payback information is provided for informational purposes and does not play a role in the determination. RECA noted that DOE's work to provide technical assistance, including cost effectiveness information to states and local jurisdictions, is part of its statutory directive in 42 U.S.C. 6833(d), but that such information should be provided through channels other than this determination.

Response: DOE notes that energy savings is the deciding factor in making its preliminary and final determinations. Cost and payback information is included for informational purposes only. DOE also intends to continue to conduct comprehensive cost-effectiveness analysis as a state technical assistance function in the future.

Edison Electric Institute (EEI)

Comment: EEI commented that keeping the site-source conversion factor used in the preliminary analysis static going forward ignores regional variations, and ignores overall trends from a previous DOE report that gives alternative, generally lower, ratios based on a methodology that is responsive to future deployment of renewable electricity generation. EEI indicated that national source factors for electricity should decline over a 30-year period, or a projected value representing the 2030 or 2040 timeframe should be selected, to account for the increased prevalence of renewable energy on the utility grid.

Response: DOE acknowledges that the primary energy sources for electricity generation are changing and agrees in principle that renewable energy will likely result in lower site-source ratios in the future. However, DOE's determination methodology is based simply on a comparison of the first-year energy cost savings of the 2018 IECC (relative to the previous 2015 IECC). The calculation relies on current factors and does not make projections beyond the first year, as would be necessary to apply the site-source conversion factors suggested by the comment. The out-year approach would also further introduce risk associated with future uncertainties regarding fuel prices, the shares and distribution of heating fuels among new residences, the regional distribution of new residences, or the mix of primary energy sources for electricity generation. DOE therefore elects not to incorporate the suggested change, although it notes that declining factors may be appropriate for other forms of analysis where building energy code impacts are projected into the future or assessed relative to changing grid conditions.

III. Determination Statement

Residential buildings meeting the 2018 IECC (compared to the previous 2015 IECC edition) are expected to incur the following savings on a weighted national average basis:

- 1.68 percent of annual *site energy;*
- 1.91 percent of annual *source energy,* and;
- 1.97 percent of annual *energy costs.*

DOE has rendered the conclusion that the 2018 IECC will improve energy efficiency in residential buildings, and, therefore, receives an affirmative determination under Section 304(a) of ECPA.

IV. State Certification

Based on today's determination, each State is required to review the provisions of its residential building code regarding energy efficiency, and determine whether it is appropriate for such state to revise its building code to meet or exceed the energy efficiency provisions of the 2018 IECC. (42 U.S.C. 6833(a)(5)(B)) This action must be made not later than 2 years from the date of publication of a Notice of Determination, unless an extension is provided.

A. State Review and Update

The State determination must be: (1) Made after public notice and hearing; (2) in writing; (3) based upon findings and upon the evidence presented at the hearing; and (4) made available to the public. (42 U.S.C. 6833(a)(2)) States have discretion with regard to the hearing procedures they use, subject to providing an adequate opportunity for members of the public to be heard and to present relevant information. The Department recommends publication of any notice of public hearing through appropriate and prominent media outlets, such as in a newspaper of general circulation. States should also be aware that this determination does not apply to IECC chapters specific to nonresidential buildings,[1] as defined in the IECC. Therefore, States should certify their evaluations of their State building codes for residential buildings with respect to all provisions of the IECC, except for those chapters not affecting residential buildings. Because state codes are based on a variety of model code editions, DOE encourages States to consider the energy efficiency improvements of the 2018 IECC, as well as other recent editions of the IECC, which may also represent a significant energy and cost savings opportunity. DOE determinations regarding earlier editions of the IECC are available on the DOE Building Energy Codes Program website.[2] Further national and state analysis is also available.[3]

B. State Certification Statements

State certifications are to be sent to the address provided in the **ADDRESSES** section, or may be submitted to *BuildingEnergyCodes@ee.doe.gov,* and must be submitted in accordance with the deadline identified in the **DATES** section. If a State makes a determination that it is not appropriate to revise the energy efficiency provisions of its residential building code, the State must submit to the Secretary, in writing, the reasons for this determination, which shall be made available to the public. (42 U.S.C. 6833(a)(4))

The DOE Building Energy Codes Program tracks and reports State code adoption and certifications.[4] Once a State has adopted an updated residential code, DOE typically provides software, training, and support for the new code, as long as the new code is based on the national model code (*i.e.,* the 2018 IECC). DOE has issued previous guidance on how it intends to respond to technical assistance requests related to implementation resources, such as building energy code compliance software. (79 FR 15112) DOE also recognizes that some States develop their own codes that are only loosely related to the national model codes, and DOE does not typically provide technical support for those codes. DOE does not prescribe how each State adopts and enforces its energy codes.

Requests for Extensions

Section 304(c) of ECPA requires that the Secretary permit an extension of the deadline for complying with the certification requirements described above, if a State can demonstrate that it has made a good faith effort to comply with such requirements, and that it has made significant progress toward meeting its certification obligations. (42 U.S.C. 6833(c)) Such demonstrations could include one or both of the following: (1) A substantive plan for response to the requirements stated in Section 304; or (2) a statement that the State has appropriated or requested funds (within State funding procedures) to implement a plan that would respond to the requirements of Section 304 of ECPA. This list is not exhaustive.

Requests are to be sent to the address provided in the **ADDRESSES** section, or may be submitted to *BuildingEnergyCodes@ee.doe.gov.*

Signed in Washington, DC, on November 20, 2019.

Alexander N. Fitzsimmons,

Acting Deputy Assistant Secretary for Energy Efficiency, Office of Energy Efficiency and Renewable Energy.

[FR Doc. 2019–26550 Filed 12–9–19; 8:45 am]

BILLING CODE 6450–01–P

[1] For information regarding nonresidential buildings based on ANSI/ASHRAE/IES Standard 90.1 see *https://www.energycodes.gov/development/determinations.*

[2] Available at *http://www.energycodes.gov/regulations/determinations/previous.*

[3] Available at *http://www.energycodes.gov/development/residential/iecc_analysis.*

[4] Available at *http://www.energycodes.gov/adoption/states.*

DEPARTMENT OF ENERGY

[OE Docket No. EA–480]

Application To Export Electric Energy; Engelhart CTP (US) LLC

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of application.

SUMMARY: Engelhart CTP (US) LLC (Applicant or ECTP) has applied for authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before January 9, 2020.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed to: Office of Electricity, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Electricity.Exports@hq.doe.gov,* or by facsimile to (202) 586–8008.

SUPPLEMENTARY INFORMATION: The Department of Energy (DOE) regulates exports of electricity from the United States to a foreign country, pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b) and 7172(f)). Such exports require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)).

On November 20, 2019, ECTP filed an application with DOE (Application or App.) to transmit electric energy from the United States to Canada. ECTP is a single-member limited liability company. ECTP has requested an electricity export authorization with a 5-year term using existing international transmission facilities.

In its application, the Applicant states that it is a power marketer that does not own or operate an integrated transmission or distributed system . . .''. App. at 4.The electric energy that the Applicant proposes to export to Canada ''would be surplus to the needs of the relevant transmission or distribution system...'' App. at 4. The existing international transmission facilities to be utilized by the Applicant have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214). Five (5) copies of such comments, protests, or motions to intervene should be sent to the address provided above on or before the date listed above.

Comments and other filings concerning ECTP's application to export electric energy to Canada should be clearly marked with OE Docket No. EA–480. An additional copy is to be provided directly to Changjae Lee, Engelhart CTP (US) LLC, 400 Atlantic St. 11th Floor, Stamford, CT 06901 and Jennifer Brough, Locke Lord LLP, 701 8th St. NW Suite 700, Washington, DC 20001.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE determines that the proposed action will not have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program website at *http://energy.gov/node/11845,* or by emailing Matthew Aronoff at *matthew.aronoff@hq.doe.gov.*

Signed in Washington, DC, on December 2, 2019.

Christopher Lawrence,

Management and Program Analyst, Transmission Permitting and Technical Assistance, Office of Electricity.

[FR Doc. 2019–26549 Filed 12–9–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Draft Environmental Assessment for the Commercial Disposal of Defense Waste Processing Facility Recycle Wastewater From the Savannah River Site

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Notice of availability.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of its *Draft Environmental Assessment for the Commercial Disposal of Defense Waste Processing Facility Recycle Wastewater from the Savannah River Site* (DOE/EA–2115) (Draft SRS DWPF Recycle Wastewater EA). The Draft SRS DWPF Recycle Wastewater EA evaluates the potential impacts from a proposed action to retrieve, stabilize, and dispose of up to 10,000 gallons of Defense Waste Processing Facility (DWPF) recycle wastewater from Savannah River Site (SRS) at a commercial low-level radioactive waste (LLW) disposal facility located outside of South Carolina, licensed by either the Nuclear Regulatory Commission (NRC) or an Agreement State under NRC's regulations regarding licensing requirements for land disposal of radioactive waste. If implemented, this proposal would provide alternative treatment and disposal options for up to 10,000 gallons of DWPF recycle wastewater through the use of existing, permitted, off-site commercial facilities. DOE invites public comments on the Draft SRS DWPF Recycle Wastewater EA.

DATES: The 30-day public comment period extends from the date of publication of this notice in the **Federal Register** through January 9, 2020. Only comments received through one of the methods below will be accepted. DOE will consider all comments received or postmarked by January 9, 2020. DOE will hold an informational meeting to discuss the Draft SRS DWPF Recycle Wastewater EA on Tuesday, December 17, 2019 (5:00–6:30 p.m. ET) at the Augusta Marriott at the Convention Center, 2 Tenth Street, Augusta, Georgia, 30901. The meeting will consist of a poster session from 5:00 p.m. to 6:00 p.m. ET, followed by a presentation from 6:00 to 6:30 p.m. ET. DOE will also hold an informational WebEx on December 19, 2019 at 2 p.m. ET to provide an overview of the Draft SRS DWPF Recycle Wastewater EA. This WebEx can be accessed at: *https://doe.webex.com/doe/j.php?MTID=mde89cd8501ec09cb5732714dd60174fe.* The Draft SRS DWPF Recycle Wastewater EA is available at: *https://www.energy.gov/nepa/doe-environmental-assessments.*

ADDRESSES: To request a printed copy of the Draft SRS DWPF Recycle Wastewater EA, or to be placed on the SRS DWPF Recycle Wastewater EA mailing list, please submit your request to James Joyce, NEPA Document Manager, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (301) 903–2151. Email: *DWPFEA@em.doe.gov.* DOE invites Federal agencies, state and local governments, Native American tribes, industry, non-governmental organizations, and members of the general public to submit comments on DOE's Draft SRS DWPF Recycle Wastewater EA. Please direct written comments on the Draft DWPF SRS Recycle Wastewater EA to:

(a) *Email: DWPFEA@em.doe.gov.* Please submit comments in Microsoft™ Word or PDF file format and avoid the use of encryption.

(b) *Mail:* James Joyce, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585.

Because your comments will be made public, you are solely responsible for ensuring that your comments do not include any confidential information that you or a third party may not wish to be posted.

FOR FURTHER INFORMATION CONTACT: For information related to this EA, please contact James Joyce, U.S. Department of Energy, Office of Environmental Management, Office of Waste and Materials Management (EM–4.2), 1000 Independence Avenue SW, Washington, DC 20585. Email: *DWPFEA@em.doe.gov.* Telephone: (301) 903–2151. For information related to DOE's high-level radioactive waste (HLW) interpretation, please contact Theresa Kliczewski, U.S. Department of Energy, Office of Environmental Management, Office of Waste and Materials Management (EM–4.2), 1000 Independence Avenue SW, Washington, DC 20585. Email: *Theresa.Kliczewski@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Savannah River Site (SRS) occupies approximately 300 square miles primarily in Aiken and Barnwell counties in South Carolina. Over the years, a primary SRS mission has been the production of special radioactive isotopes to support national defense programs. More recently, the SRS mission has also emphasized waste management, environmental restoration, and the decontamination and decommissioning of facilities that are no longer needed for SRS's traditional defense activities. SRS generated large quantities of liquid radioactive waste as a result of its nuclear materials production mission. This liquid radioactive waste has historically been managed as high-level radioactive waste (HLW). The waste was placed into underground storage tanks at SRS and consists primarily of three physical forms: Sludge, saltcake, and liquid supernatant. The sludge portion in the underground tanks is being transferred on-site to the Defense Waste Processing Facility (DWPF) for vitrification in borosilicate glass to immobilize the radioactive constituents, as described in the *Final Supplemental Environmental Impact Statement—Defense Waste Processing Facility* (DOE/EIS–0082–S; DWPF SEIS) and subsequent Record of Decision (ROD) (April 12, 1995, 60 FR 18589). The resulting vitrified waste form is poured as molten glass into production canisters where it cools into a solid glass-waste and is securely stored at SRS until DOE establishes a final disposition path.

DWPF operations generate recycle wastewater. The DWPF recycle wastewater is a combination of several dilute liquid waste streams consisting primarily of condensates from the vitrification processes. Other components of the DWPF recycle wastewater include process samples, sample line flushes, sump flushes, and cleaning solutions from the decontamination and filter dissolution processes. Currently, the DWPF recycle wastewater is returned to the tank farm for volume reduction by evaporation or is beneficially reused in salt dissolution or sludge washing.

To analyze capabilities of a potential alternative treatment and disposal method at the end of the liquid waste mission life, DOE is proposing to dispose of up to 10,000 gallons of stabilized DWPF recycle wastewater from the SRS H-Area Tank Farm at a commercial low-level radioactive waste (LLW) facility outside of South Carolina, licensed by either the U.S. Nuclear Regulatory Commission (NRC) or an Agreement State [1] under 10 CFR part 61.

On October 10, 2018, DOE published a notice in the **Federal Register** requesting public comment on its interpretation of the definition of the statutory term, ''high-level radioactive waste,'' as set forth in the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) and the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101 *et seq.*) (83 FR 50909). In that notice, DOE explained the history and basis for its interpretation to classify the waste based on its radiological contents and not on the origin of the waste. Subsequently, on June 10, 2019, DOE published a supplemental notice in the **Federal Register** that provided additional explanation of DOE's interpretation as informed by public review and comment and further consideration by DOE (84 FR 26835). DOE revised its interpretation after consideration of public comments, which included comments from the NRC, affected states and Native American tribes, and stakeholders, in order to clarify its meaning and import. This interpretation intends to facilitate the safe disposal of defense reprocessing waste if the waste meets either of the following two criteria:

1. Does not exceed concentration limits for Class C LLW as set out in 10 CFR 61.55 and meets the performance objectives of a disposal facility, or

2. Does not require disposal in a deep geologic repository and meets the performance objectives of a disposal facility as demonstrated through a performance assessment conducted in accordance with applicable requirements.

NRC's performance objectives for commercial LLW disposal facilities are specified in 10 CFR part 61, subpart C, ''Performance Objectives.'' Performance objectives are the quantitative radiological standards set by the NRC or DOE to ensure protection of the health and safety of individuals and the environment during operation, and after permanent closure of the disposal facility. Performance assessments quantitatively evaluate a disposal facility's ability to protect human health and the environment by evaluating potential radiological human exposure after disposal facility closure. Performance assessments measure and evaluate risk by analyzing the long-term evolution of the waste forms and engineered features and the effect such changes could have on the performance of a waste disposal system and the surrounding environment.

As stated in the supplemental notice, DOE will continue its current practice of managing all its defense reprocessing wastes as if they were HLW unless and until a specific waste is determined to be another category of waste based on detailed assessments of its characteristics and an evaluation of potential disposal pathways.[2]

On June 10, 2019, DOE published a notice in the **Federal Register** (84 FR 26847) announcing its intent to prepare an EA to analyze the potential impacts of disposing of up to 10,000 gallons of stabilized DWPF recycle wastewater from the SRS H-Tank Farm at a commercial LLW disposal facility located outside of South Carolina licensed by either the NRC or an Agreement State under 10 CFR part 61. The Draft SRS DWPF Recycle Wastewater EA was prepared in accordance with the Council on Environmental Quality regulations and DOE National Environmental Policy Act (NEPA) implementing procedures at 40

[1] Congress authorized the NRC to enter into Agreements with states that allow the states to assume, and the NRC to discontinue, regulatory authority over source, byproduct, and small quantities of special nuclear material. The states, known as Agreement States, can then regulate byproduct, source, and small quantities of special nuclear materials that are covered in the Agreement, using its own legislation, regulations, or other legally binding provisions. (Section 274b of the Atomic Energy Act of 1954, as amended).

[2] DOE's HLW interpretation would not affect practices for the management of other reprocessing waste at SRS, which include stabilization and disposal of treated liquid radioactive waste at the Saltstone Disposal Facility and F and H farm tank closures as non-HLW under Section 3116 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375).

CFR parts 1500–1508 and 10 CFR part 1021, respectively.

Purpose and Need for Action

DOE's purpose and need for action is to analyze capabilities for alternative treatment and disposal options for DWPF recycle wastewater through the use of existing, permitted, off-site commercial facilities. When DOE prepared the 1994 DWPF SEIS and the *Savannah River Site Salt Processing Alternatives Final Supplemental Environmental Impact Statement* (DOE/EIS–082–S2), DOE did not analyze the potential environmental impacts associated with potential commercial treatment and disposal options for DWPF recycle wastewater. DOE now proposes to use commercial LLW disposal facilities for up to 10,000 gallons of DWPF recycle wastewater to inform planning activities on treatment and disposal options for completion of the tank closure program. Any proposal to dispose of more than 10,000 gallons of DWPF recycle wastewater would be evaluated in a separate NEPA review. Treatment and/or disposal of this waste at a commercial LLW facility would inform planning activities for the three years between the completion of the Salt Waste Processing Facility (SWPF) mission (estimated 2031) and DWPF mission completion (estimated 2034). During this period, DOE will not have the option of returning DWPF recycle wastewater to SWPF for processing because SWPF will have completed its mission of treating salt waste from the tank farms and will undergo closure.

Proposed Action and Alternatives

DOE's proposed action is to dispose of up to 10,000 gallons of stabilized (*e.g.,* grouted [3]) DWPF recycle wastewater from the SRS H-Area Tank Farm at a commercial LLW facility outside of South Carolina, licensed by either the NRC or an Agreement State under 10 CFR part 61. Prior to a disposal decision, DOE would characterize the DWPF recycle wastewater to determine whether it meets DOE's HLW interpretation for disposal as non-HLW. As part of this process, DOE would determine and verify with the licensee of the commercial LLW disposal facility that the stabilized waste meets the facility's waste acceptance criteria and all other requirements of the disposal facility, including any applicable regulatory requirements (*e.g.,* the *Resource Conservation and Recovery Act* [42 U.S.C. 6901]) for treatment of the waste prior to disposal and applicable U.S. Department of Transportation (USDOT) requirements for packaging and transportation from SRS to the commercial facility.

DOE has identified three action alternatives for the proposed action:

• Alternative 1 would deploy a treatment capability at SRS to stabilize up to 10,000 gallons of DWPF recycle wastewater and then transport the grouted waste form to a licensed commercial disposal facility, either the Waste Control Specialists (WCS) site near Andrews, Texas (if determined to be Class A, B or C LLW) [4] and/or the Energy*Solutions* site near Clive, Utah (if determined to be Class A LLW),[5] depending upon waste content and facility waste acceptance criteria.

• Alternative 2 would transport up to 10,000 gallons of DWPF recycle wastewater to a licensed commercial disposal facility, either the WCS site and/or the Energy*Solutions* site, with the capability to stabilize and dispose of the final waste form.

• Alternative 3 would transport up to 10,000 gallons of DWPF recycle wastewater to a permitted and licensed commercial treatment facility with the capability to stabilize the liquid into a stabilized waste form, and then transport the final waste form to a licensed commercial disposal facility, either the WCS site and/or the Energy*Solutions* site, depending upon waste content and facility waste acceptance criteria.

The Draft SRS DWPF Recycle Wastewater EA also analyzed a no action alternative under which the up to 10,000 gallons of DWPF recycle wastewater would remain in the SRS liquid waste system.

NEPA Process

All comments on the Draft SRS DWPF Recycle Wastewater EA received during the public comment period will be considered in preparation of the Final SRS DWPF Recycle Wastewater EA. Following the public comment period, and based on the Final SRS DWPF Recycle Wastewater EA and consideration of all comments received, DOE will either issue a Finding of No Significant Impact (FONSI) or announce its intent to prepare an environmental impact statement (EIS). If DOE determines that a FONSI is appropriate, both the Final EA and FONSI will be made available to the public. If DOE determines that an EIS is needed, either during preparation of the Final SRS DWPF Recycle Wastewater EA or after completing the EA, DOE would issue in the **Federal Register** a Notice of Intent to prepare an EIS. Consultations with other agencies (*e.g.,* State Historic Preservation Officer, U.S. Fish and Wildlife Service) were not required or undertaken in connection with the Draft SRS DWPF Recycle Wastewater EA. As required under DOE's NEPA implementing procedures (10 CFR 1021.301(c)), the following agencies were individually notified of the preparation of this EA: U.S. Environmental Protection Agency; South Carolina Department of Health and Environmental Control; Texas Commission on Environmental Quality; and Utah Department of Environmental Quality.

Signed at Washington, DC, on December 4, 2019.

Elizabeth A. Connell,

Associate Principal Deputy Assistant Secretary for Regulatory and Policy Affairs, Office of Environmental Management, U.S. Department of Energy.

[FR Doc. 2019–26555 Filed 12–9–19; 8:45 am]

BILLING CODE 6450–01–P

[3] Grout is a proven safe and effective technology that continues to be used by DOE and other national and international parties to stabilize radioactive wastes, including certain tank wastes, for disposal. Use of stabilization agents for this purpose is consistent with the *NRC's Concentration Averaging and Encapsulation Branch Technical Position, Revision 1, Volume 1,* February 2015 (*https://www.nrc.gov/docs/ML1225/ML12254B065.pdf*), which allows mixing of nonradioactive constituents with radioactive waste (*e.g.,* solidification, encapsulation, or additives used in thermal processing) provided the mixing has a purpose other than reducing the waste classification, such as waste stabilization or process control. Furthermore, the addition of stabilization agents to the waste prior to disposal is often necessary to meet the NRC requirements in 10 CFR 61.56, ''Waste Characteristics'' (*e.g.,* to ensure stability of the waste form).

[4] WCS is licensed by the Texas Commission on Environmental Quality for the disposal of Class A, B, and C LLW that meets specified waste acceptance criteria. Disposal of the stabilized waste at the WCS site would be conducted in accordance with the facility's operating license (Radioactive Material License No. CN600616890/RN101702439).

[5] Energy*Solutions* is licensed by the Utah Department of Environmental Quality for the disposal of Class A LLW that meets specified waste acceptance criteria. Disposal of the stabilized waste at the Energy*Solutions* site would be conducted in accordance with the facility's operating license (Radioactive Material License No. UT 2300249).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG20–56–000.

Applicants: Crooked Run Solar, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Crooked Run Solar, LLC.

Filed Date: 12/4/19.
Accession Number: 20191204–5119.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: EG20–57–000.
Applicants: Cubico Crooked Run Lessee, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Cubico Crooked Run Lessee, LLC.
Filed Date: 12/4/19.
Accession Number: 20191204–5137.
Comments Due: 5 p.m. ET 12/26/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2768–003.
Applicants: Empire Generating Co, LLC.
Description: Notice of Non-Material Change in Status of Empire Generating Co, LLC.
Filed Date: 12/4/19.
Accession Number: 20191204–5136.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: ER20–57–001; ER20–339–001; ER20–58–001; ER19–115–001; ER20–59–001; ER20–27–001; ER16–2019–002; ER17–1607–001; ER17–1608–001; ER17–318–001; ER16–2520–001; ER19–8–001; ER19–119–001; ER19–2476–001; ER18–97–001; ER20–422–001.
Applicants: GA Solar 3, LLC, Twiggs County Solar, LLC, FL Solar 4, LLC, FL Solar 5, LLC, AZ Solar 1, LLC, Wright Solar Park LLC, Five Points Solar Park LLC, Sunray Energy 2, LLC, Sunray Energy 3 LLC, Three Peaks Power, LLC, Grand View PV Solar Two LLC, Sweetwater Solar, LLC, Techren Solar I LLC, Techren Solar II LLC, MS Solar 3, LLC, FL Solar 1, LLC.
Description: Notice of Non-Material Change in Status of GA Solar 3, LLC, et al.
Filed Date: 12/4/19.
Accession Number: 20191204–5151.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: ER20–509–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: ISA and ICSA SA Nos. 5245 and 5250; Queue No. AB2–067/AC1–044/AD2–189 to be effective 5/13/2019.
Filed Date: 12/3/19.
Accession Number: 20191203–5184.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: ER20–510–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–12–04_SA 3378 NIPSCO-Poplar Wind Project GIA (J883) to be effective 11/19/2019.
Filed Date: 12/4/19.
Accession Number: 20191204–5000.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: ER20–511–000.
Applicants: Wilderness Line Holdings, LLC.
Description: Baseline eTariff Filing: Open Access Transmission Tariff Baseline Filing to be effective 12/5/2019.
Filed Date: 12/4/19.
Accession Number: 20191204–5099.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: ER20–512–000.
Applicants: Click Energy LLC.
Description: Baseline eTariff Filing: Click Energy MBR Application Filing to be effective 1/3/2020.
Filed Date: 12/4/19.
Accession Number: 20191204–5101.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: ER20–513–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: LGIA Aurora Solar LLC, Camino Solar SA No. 237 to be effective 12/5/2019.
Filed Date: 12/4/19.
Accession Number: 20191204–5113.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: ER20–514–000.
Applicants: Midcontinent Independent System Operator, Inc., Otter Tail Power Company.
Description: § 205(d) Rate Filing: 2019–12–04_SA 3384 OTP-Dakota Range III FSA (J488) Hankinson-Wahpeton to be effective 2/3/2020.
Filed Date: 12/4/19.
Accession Number: 20191204–5150.
Comments Due: 5 p.m. ET 12/26/19.

Docket Numbers: ER20–515–000.
Applicants: Midcontinent Independent System Operator, Inc., Otter Tail Power Company.
Description: § 205(d) Rate Filing: 2019–12–04_SA 3385 OTP-Deuel Harvest FSA (J526) Hankinson-Wahpeton to be effective 2/3/2020.
Filed Date: 12/4/19.
Accession Number: 20191204–5152.
Comments Due: 5 p.m. ET 12/26/19.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH20–4–000.
Applicants: Unison Energy, LLC, AIM Universal Holdings, LLC, Hunt Companies, Inc.
Description: Unison Energy, LLC, et al. submits FERC–65A Notice of Change in Fact to Exemption Notification.
Filed Date: 12/3/19.
Accession Number: 20191203–5264.
Comments Due: 5 p.m. ET 12/24/19.

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: December 4, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26524 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–17–000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

Take notice that on November 25, 2019, Northern Natural Gas Company (Northern Natural), 1111 South 103rd Street, Omaha, Nebraska 68124, filed in the above referenced docket, a prior notice request pursuant to sections 157.205 and 157.208 of the Commission's regulations under the Natural Gas Act (NGA) and Northern Natural's blanket certificate issued in Docket No. CP82–401–000, for authorization to install and operate (1) 7.4-mile-long, 8-inch-diamter branch line loop located in Juneau County, Wisconsin; (2) an addition electric motor-driven 800–HP reciprocating compressor unit at its existing Spring Green CS in Sauk County, Wisconsin; and (3) branch line take-off regulation, including appurtenances in Salk County, Wisconsin (New Lisbon 2020 Expansion Project). The project will allow Northern Natural to transport an incremental 15,180 dekatherms per day of service for Wisconsin Power and Light Company, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

The filing may also be viewed on the web at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions regarding this prior notice request should be directed to Michael T. Loeffler, Senior Director, Certificates and External Affairs, Northern Natural Gas Company, 1111 South 103rd Street, Omaha, Nebraska 68124, at (402) 398–7103.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's website (*http://www.ferc.gov*) under the ''e-Filing'' link.

Dated: December 4, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–26531 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1591–000.
Applicants: Golden Pass Pipeline LLC.
Description: Report Filing: 2019 Penalty Revenue and Costs Report of Golden Pass Pipeline.
Filed Date: 12/2/19.
Accession Number: 20191202–5045.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–210–001.
Applicants: Rockies Express Pipeline LLC.
Description: Tariff Amendment: Amendment to RP20–210 to be effective 11/6/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5081.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–214–001.
Applicants: Rockies Express Pipeline LLC.
Description: Tariff Amendment: Amendment to RP20–214 to be effective 11/7/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5082.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–225–001.
Applicants: Rockies Express Pipeline LLC.
Description: Tariff Amendment: Amendment to RP20–225 to be effective 11/12/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5084.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–289–001.
Applicants: NEXUS Gas Transmission, LLC.
Description: Tariff Amendment: Negotiated Rates Amendment NJR and DTE—eff 12–1–19 to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5122.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–294–000.
Applicants: Rover Pipeline LLC.
Description: § 4(d) Rate Filing: Summary of Negotiated Rate Capacity Release Agreements on 12–2–19 to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5001.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–295–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Capacity Release Agreements—12/1/2019 to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5046.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–296–000.
Applicants: Gulf South Pipeline Company, LP.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (JERA 46435 to EDF 51808) to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5061.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–297–000.
Applicants: Gulf South Pipeline Company, LP.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmts (Atlanta Gas 8438 to various shippers eff 12–1–2019) to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5056.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–298–000.
Applicants: Gulf South Pipeline Company, LP.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Constellation 51811 to Exelon 51846) to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5057.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–299–000.
Applicants: UGI Sunbury, LLC.
Description: Operational Purchases and Sales Report of UGI Sunbury, LLC under RP20–299.
Filed Date: 12/2/19.
Accession Number: 20191202–5058.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–300–000.
Applicants: Gulf South Pipeline Company, LP.
Description: § 4(d) Rate Filing: Amendment to Neg Rate Agmt (Colorado Bend 46280) to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5059.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–301–000.
Applicants: Gulf South Pipeline Company, LP.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmts (Aethon 50488, 37657 to Scona 51862, 51868) to be effective 12/1/2019.
Filed Date: 12/2/19.

Accession Number: 20191202–5060.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–302–000.
Applicants: Texas Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (JERA 37702 to EDF 38350) to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5062.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–303–000.
Applicants: ANR Storage Company.
Description: § 4(d) Rate Filing: Market-Based Rate Implementation to be effective 1/1/2020.
Filed Date: 12/2/19.
Accession Number: 20191202–5088.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–304–000.
Applicants: Gulf South Pipeline Company, LP.
Description: § 4(d) Rate Filing: Amendments to Certain Coastal Bend Agreements eff 12–1–2019 to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5090.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–305–000.
Applicants: Millennium Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Agmts Updates to be effective 12/15/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5113.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–306–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: § 4(d) Rate Filing: Volume No. 2—EQT Energy, LLC SP341108 & SP344403 to be effective 1/1/2020.
Filed Date: 12/2/19.
Accession Number: 20191202–5115.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: RP20–307–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: Neg Rate 2019–12–2 Encana to be effective 12/1/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5119.
Comments Due: 5 p.m. ET 12/16/19.

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 date(s). 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: December 3, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26515 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP20–308–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate—BP Canada 860363 eff 12–3–2019 to be effective 12/3/2019
Filed Date: 12/3/19
Accession Number: 20191203–5001
Comments Due: 5 p.m. ET 12/16/19

Docket Numbers: RP20–309–000
Applicants: Northwest Pipeline LLC
Description: § 4(d) Rate Filing: Miscellaneous and Housekeeping Filing—Fall 2019 to be effective 12/20/2019
Filed Date: 12/3/19
Accession Number: 20191203–5038
Comments Due: 5 p.m. ET 12/16/19

Docket Numbers: RP20–310–000
Applicants: Rockies Express Pipeline LLC
Description: § 4(d) Rate Filing: RP20–198 Clean-Up filing to be effective 11/1/2019
Filed Date: 12/3/19
Accession Number: 20191203–5112
Comments Due: 5 p.m. ET 12/16/19

Docket Numbers: RP20–311–000
Applicants: Gulf South Pipeline Company, LP
Description: Compliance filing Compliance Tariff Filing (CP19–490) re Gulf Crossing Acquisition to be effective 1/1/2020
Filed Date: 12/3/19
Accession Number: 20191203–5127
Comments Due: 5 p.m. ET 12/16/19

Docket Numbers: RP20–312–000
Applicants: Gulf South Pipeline Company, LP
Description: § 4(d) Rate Filing: Gulf South-Gulf Crossing Acquisition Neg Rate & NC Agmts Filing to be effective 1/1/2020
Filed Date: 12/3/19
Accession Number: 20191203–5130
Comments Due: 5 p.m. ET 12/16/19

Docket Numbers: RP20–313–000
Applicants: Gulf Crossing Pipeline Company LLC
Description: Tariff Cancellation: Cancel Tariff to be effective 1/1/2020
Filed Date: 12/3/19
Accession Number: 20191203–5138
Comments Due: 5 p.m. ET 12/16/19

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: December 4, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26525 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX19–1–000]

Mountain Breeze Wind, LLC; Notice of Filing

Take notice that on November 27, 2019, Cedar Creek Wind Energy, LLC, Cedar Creek II, LLC, and Mountain Breeze Wind, LLC (collectively, the Parties), submitted a proposed Firm Transmission Service Agreement and Interconnection Agreement (the Agreements) among the Parties. These Agreements supersede those proposed by the Parties in earlier pleadings submitted between June 19, 2019 and July 26, 2019, in accordance with Ordering Paragraph (C) of the Federal Energy Regulatory Commission's Proposed Order Directing the Provision of Interconnection and Transmission Services issued March 21, 2109 in the above-referenced docket.[1]

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on December 18, 2019.

Dated: December 3, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26517 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

[1] *Mountain Breeze Wind, LLC,* 166 FERC ¶ 61,200 (2019).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14742–001]

Ute Indian Tribe Notice of Successive Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On August 30, 2019, Ute Indian Tribe filed an application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Ute Pumped Storage Project (Ute Project or project) adjacent to the Bureau of Reclamation's Flaming Gorge Reservoir, in Daggett County, Utah. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) An intake and discharge structure at one of seven locations in Flaming Gorge Reservoir; (2) an underground tailrace between the reservoir intake/outlet structure and the powerhouse; (3) pump-turbine units in an underground powerhouse with generation capacity of between 500 to 1,000 megawatts; (4) a penstock between the powerhouse and the upper reservoir; (5) a dam at one of seven locations forming the upper reservoir; (6) an upper reservoir at one of seven locations with a capacity between 5,000 and 10,000 acre-feet, at an elevation between 6,800 and 7,500 feet above mean sea level; (7) a transmission line from the powerhouse to the nearest major transmission interconnection; and (8) appurtenant facilities. The estimated annual generation of the Ute Project would be between 400 and 850 gigawatt-hours.

Applicant Contact: Luke Duncan, Chairman, Ute Tribal Business Committee, Ute Indian Tribe, PO Box 190, Fort Duchesne, UT 84026; phone: (435) 722–5141.

FERC Contact: Evan Williams; phone: (202) 502–8462.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–14742–001.

More information about this project, including a copy of the application, can be viewed or printed on the eLibrary link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14742) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 4, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–26530 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR20–5–000]

Notice of Complaint; NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC, Phillip 66 Company

Take notice that on December 3, 2019, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission),[1] section 343.2 of the Procedural Rules Applicable to Oil Pipeline Proceedings,[2] and sections 1(4), 1(5), 1(6), 2, 3(1), 6, 8, 9, 13 and 16 of the Interstate Commerce Act (ICA),[3] NGL Supply Wholesale, LLC (Complainant or NGL) filed a complaint against Phillips 66 Pipeline LLC (Phillips Pipeline) and Phillip 66 Company (P66) (jointly, Respondents), challenging the prorationing policies of Phillips Pipeline and asserting that

[1] 18 CFR 385.206.

[2] 18 CFR 343.2.

[3] 49 U.S.C. App. 1(4), 1(5), 1(6), 2, 3(1), 6, 8, 9, 13 and 16.

other policies are unjust and unreasonable. Complainants also asserts that the conduct of Phillips Pipeline and P66 discriminates against NGL and provides an unlawful preference to P66 concerning access to pipeline capacity, all as more fully explained in the complaint.

Complainants certify that copies of the complaint were served on the contacts listed for Respondents on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the eLibrary link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on January 2, 2020.

Dated: December 4, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–26528 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–512–000]

Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization; Click Energy LLC

This is a supplemental notice in the above-referenced proceeding of Click Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 24, 2019.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 4, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26526 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2839–015]

Village of Lyndonville Electric; Notice of Technical Meeting

a. *Date and Time of Meeting:* December 17, 2019 at 2:00 p.m. Eastern Standard Time.

b. *Place:* Telephone conference.

c. *FERC Contact:* Amanda Gill at *amanda.gill@ferc.gov,* or (202) 502–6773.

d. *Purpose of Meeting:* Commission Staff is hosting a technical meeting to discuss comments on the Environmental Assessment and Draft Programmatic Agreement filed by the Vermont State Historic Preservation Office on September 27, 2019.

e. A map of the proposed project boundary, which is coincident with the area of potential effects, is attached to aid in discussion.

f. A summary of the meeting will be prepared and filed in the Commission's public file for the project.

g. All local, state, and federal agencies, Indian tribes, and other interested parties are invited to participate by phone. Please call Amanda Gill at (202) 502–6773 by December 16, 2019, to RSVP and to receive specific instructions on how to participate.

Dated: December 4, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–26529 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC20–21–000.

Applicants: Golden Fields Solar II, LLC, Golden Fields Solar III, LLC, Golden Fields Solar IV, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act, et al. of Golden Fields Solar II, LLC, et al.
Filed Date: 12/3/19.
Accession Number: 20191203–5102.
Comments Due: 5 p.m. ET 12/24/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–3285–003; ER10–3177–001; ER17–177–002; ER17–991–008; ER10–3181–004.
Applicants: UGI Utilities Inc., UGI Energy Services, LLC, UGI Development Company, Hunlock Energy, LLC.
Description: Updated Triennial Market Power Analysis for the Northeast Region and Notice of Non-Material Change in Status of the UGI MBR Companies.
Filed Date: 12/2/19.
Accession Number: 20191202–5147.
Comments Due: 5 p.m. ET 1/31/20.

Docket Numbers: ER19–90–005.
Applicants: Clean Energy Future—Lordstown, LLC.
Description: Compliance filing: Settlement Compliance Filing to be effective 12/1/2018.
Filed Date: 12/3/19.
Accession Number: 20191203–5039.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: ER19–1553–000.
Applicants: Southern California Edison Company.
Description: Annual Formula Transmission Rate Update Filing (TO2020) of Southern California Edison Company.
Filed Date: 11/22/19.
Accession Number: 20191122–5139.
Comments Due: 5 p.m. ET 12/13/19.

Docket Numbers: ER20–503–000.
Applicants: San Diego Gas & Electric Company.
Description: Second Annual Informational Filing [Cycle 2] of Fifth Transmission Owner Rate Formula rate mechanism of San Diego Gas & Electric Company.
Filed Date: 12/2/19.
Accession Number: 20191202–5148.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–504–000.
Applicants: AL Mesquite Marketing, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 12/4/2019.
Filed Date: 12/3/19.
Accession Number: 20191203–5036.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: ER20–505–000.
Applicants: Deseret Generation & Transmission Co-operative, Inc.
Description: § 205(d) Rate Filing: 2019 RIA Annual Update to be effective 7/1/2019.
Filed Date: 12/3/19.
Accession Number: 20191203–5037.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: ER20–506–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3293R1 Thunderhead Wind Energy GIA to be effective 11/8/2019.
Filed Date: 12/3/19.
Accession Number: 20191203–5045.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: ER20–507–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–12–03_SA 3379 NIPSCO-Meadow Lake Solar Park GIA (J913) to be effective 11/18/2019.
Filed Date: 12/3/19.
Accession Number: 20191203–5077.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: ER20–508–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–12–03_SA 2853 2nd Rev Certificate of Concurrence IMTCO–NIPSCO Agreement to be effective 10/21/2019.
Filed Date: 12/3/19.
Accession Number: 20191203–5122.
Comments Due: 5 p.m. ET 12/24/19.

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: December 3, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26518 Filed 12–9–19; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

TIME AND DATE: 2:00 p.m. on Thursday, December 12, 2019.

PLACE: The meeting will be held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

This Board meeting will be Webcast live via the internet and subsequently made available on-demand approximately one week after the event. Visit *http://fdic.windrosemedia.com* to view the live event. Visit *http://fdic.windrosemedia.com/ index.php?category=FDIC+Board+Meetings* after the meeting. If you need any technical assistance, please visit our Video Help page at: *https://www.fdic.gov/video.html.*

The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call 703–562–2404 (Voice) or 703–649–4354 (Video Phone) to make necessary arrangements.

STATUS: Open.

MATTERS TO BE CONSIDERED: Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Memorandum and resolution re: Final Rule: Removal of Regulations Transferred from the Former Office of Thrift Supervision, part 390, subpart R—Regulatory Reporting Standards.

Memorandum and resolution re: Final Rule: Removal of Transferred OTS Regulations Regarding Accounting Requirements for State Savings Associations [part 390 subpart T].

Memorandum and resolution re: Final Rule: Removal of Transferred OTS Regulations Regarding Certain Regulations for the Operations of State Savings Associations and Conforming Amendments to Other Regulations [part 390 subpart S].

Memorandum and resolution re: Rescission of Certain Statements of Policy.

Memorandum and resolution re: Designated Reserve Ratio for 2020.

Memorandum re: Update of Projected Deposit Insurance Fund Losses, Income, and Reserve Ratios.

Summary report of actions taken pursuant to authority delegated by the Board of Directors.

Discussion Agenda

Memorandum and resolution re: Notice of Proposed Rulemaking on Revisions to the Community Reinvestment Act Regulations.

Memorandum and resolution re: Notice of Proposed Rulemaking on Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions.

Memorandum and resolution re: Proposed 2020 FDIC Operating Budget.

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at 202–898–7043.

Dated at Washington, DC, on December 5, 2019.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–26647 Filed 12–6–19; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2019–N–8]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: 60-Day notice of submission of information collection for approval from Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Housing Finance Agency (FHFA) is seeking public comments concerning an information collection known as the ''National Survey of Mortgage Originations'' (NSMO), which has been assigned control number 2590–0012 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on April 30, 2020.

DATES: Interested persons may submit comments on or before February 10, 2020.

ADDRESSES: Submit comments to FHFA, identified by ''Proposed Collection; Comment Request: 'National Survey of Mortgage Originations, (No. 2019–N–8' '' by any of the following methods:

- *Agency Website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by *email* to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency.
- *Mail/Hand Delivery:* Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219, ATTENTION: Proposed Collection; Comment Request: ''National Survey of Mortgage Originations, (No. 2019–N–8).''

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic comment docket for this PRA Notice also located on the FHFA website.

FOR FURTHER INFORMATION CONTACT: Saty Patrabansh, Manager, National Mortgage Database Program, *Saty.Patrabansh@fhfa.gov,* (202) 649–3213; or Eric Raudenbush, Associate General Counsel, *Eric.Raudenbush@fhfa.gov,* (202) 649–3084, (these are not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

A. Need For and Use of the Information Collection

The NSMO is a recurring quarterly survey of individuals who have recently obtained a loan secured by a first mortgage on single-family residential property. The survey questionnaire is sent to a representative sample of approximately 6,000 recent mortgage borrowers each calendar quarter and typically consists of about 95 multiple choice and short answer questions designed to obtain information about borrowers' experiences in choosing and in taking out a mortgage.[1] The questionnaire may be completed either on paper (in English only) or electronically online (in either English or Spanish). FHFA is also seeking clearance to pretest future iterations of the survey questionnaire and related materials from time to time through the use of focus groups. A copy of the survey questionnaire sent out in the fourth quarter of 2019 appears at the end of this notice.[2]

The NSMO is a component of the ''National Mortgage Database'' (NMDB) Program which is a joint effort of FHFA and the Consumer Financial Protection Bureau (CFPB). The NMDB Program is designed to satisfy the Congressionally-mandated requirements of section 1324(c) of the Federal Housing Enterprises Financial Safety and Soundness Act.[3] Section 1324(c) requires that FHFA conduct a monthly survey to collect data on the characteristics of individual prime and subprime mortgages, and on the borrowers and properties associated with those mortgages, in order to enable it to prepare a detailed annual report on the mortgage market activities of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) for review by the appropriate Congressional oversight committees. Section 1324(c) also authorizes and requires FHFA to compile a database of otherwise unavailable residential mortgage market information and to make that information available to the public in a timely fashion.

As a means of fulfilling those and other statutory requirements, as well as to support policymaking and research regarding the residential mortgage markets, FHFA and CFPB jointly established the NMDB Program in 2012. The Program is designed to provide comprehensive information about the U.S. mortgage market and has three primary components: (1) The NMDB; (2) the NSMO; and (3) the American Survey of Mortgage Borrowers (ASMB).

The NMDB is a de-identified loan-level database of closed-end first-lien residential mortgage loans that is representative of the market as a whole, contains detailed loan-level information on the terms and performance of the mortgages and the characteristics of the associated borrowers and properties, is continually updated, has an historical component dating back to 1998, and provides a sampling frame for surveys to collect additional information. The core data in the NMDB are drawn from a random 1-in-20 sample of all closed-end first-lien mortgage files outstanding at any time between January 1998 and the present in the files of Experian, one of the three national credit repositories. A random 1-in-20 sample of mortgages

[1] The NSMO questionnaire sent out in the fourth quarter of 2019 contained 94 questions.

[2] In addition, copies of the questionnaire in both English and Spanish can be accessed online at: *http://www.fhfa.gov/Homeownersbuyer/Pages/National-Survey-of-Mortgage-Originations.aspx.*

[3] 12 U.S.C. 4544(c).

newly reported to Experian is added each quarter.

The NMDB draws additional information on mortgages in the NMDB datasets from other existing sources, including the Home Mortgage Disclosure Act (HMDA) data that are maintained by the Federal Financial Institutions Examination Council (FFIEC), property valuation models, and data files maintained by Fannie Mae and Freddie Mac and by federal agencies. FHFA also obtains data from the ASMB, which solicits information on borrowers' experience with maintaining their existing mortgages, including their experience maintaining mortgages under financial stress, their experience in soliciting financial assistance, their success in accessing federally-sponsored programs designed to assist them, and, where applicable, any challenges they may have had in terminating a mortgage loan.[4]

While the ASMB focuses on borrowers' experience with maintaining existing mortgages, the NSMO solicits information on newly-originated mortgages and the borrowers' experiences with the mortgage origination process. It was developed to complement the NMDB by providing critical and timely information—not available from existing sources—on the range of nontraditional and subprime mortgage products being offered, the methods by which these mortgages are being marketed, and the characteristics of borrowers for these types of loans. In particular, the survey questionnaire is designed to elicit directly from mortgage borrowers information on the characteristics of the borrowers and on their experiences in finding and obtaining a mortgage loan, including: Their mortgage shopping behavior; their mortgage closing experiences; their expectations regarding house price appreciation; and critical financial and other life events affecting their households, such as unemployment, large medical expenses, or divorce. The survey questions do not focus on the terms of the borrowers' mortgage loans because these fields are available in the Experian data. However, the NSMO collects a limited amount of information on each respondent's mortgage to verify that the Experian records and survey responses pertain to the same mortgage.

Each wave of the NSMO is sent to the primary borrowers on about 6,000 mortgage loans, which are drawn from a simple random sample of the 80,000 to 100,000 newly originated mortgage loans that are added to the National Mortgage Database from the Experian files each quarter (at present, this represents an approximately 1-in-15 sample of loans added to the National Mortgage Database and an approximately 1-in-300 sample of all mortgage loan originations). By contract with FHFA, the conduct of the NSMO is administered through Experian, which has subcontracted the survey administration through a competitive process to Westat, a nationally-recognized survey vendor.[5] Westat also carries out the pre-testing of the survey materials.

B. Need For and Use of the Information Collection

FHFA views the NMDB Program as a whole, including the NSMO, as the monthly ''survey'' that is required by section 1324 of the Safety and Soundness Act. Core inputs to the NMDB, such as a regular refresh of the Experian data, occur monthly, though NSMO itself does not. In combination with the other information in the NMDB, the information obtained through the NSMO is used to prepare the report to Congress on the mortgage market activities of Fannie Mae and Freddie Mac that FHFA is required to submit under section 1324, as well as for research and analysis by FHFA and CFPB in support of their regulatory and supervisory responsibilities related to the residential mortgage markets. The NSMO is especially critical in ensuring that the NMDB contains uniquely comprehensive information on the range of nontraditional and subprime mortgage products being offered, the methods by which these mortgages are being marketed and the characteristics—and particularly the creditworthiness—of borrowers for these types of loans. In November 2018, FHFA and the CFPB released a loan-level dataset collected through the NSMO for public use.[6] The information provides a resource for research and analysis by federal agencies, by Fannie Mae and Freddie Mac, and by academics and other interested parties outside of the government.

FHFA is also seeking OMB approval to continue to conduct cognitive pre-testing of the survey materials. The Agency uses information collected through that process to assist in drafting and modifying the survey questions and instructions, as well as the related communications, to read in the way that will be most readily understood by the survey respondents and that will be most likely to elicit usable responses. Such information is also used to help the Agency decide on how best to organize and format the survey questionnaires.

The OMB control number for this information collection is 2590–0012. The current clearance for the information collection expires on April 30, 2020.

C. Burden Estimate

FHFA has analyzed the hour burden on members of the public associated with conducting the survey (12,000 hours) and with pre-testing the survey materials (50 hours) and estimates the total annual hour burden imposed on the public by this information collection to be 12,050 hours. The estimate for each phase of the collection was calculated as follows:

I. Conducting the Survey

FHFA estimates that the NSMO questionnaire will be sent to 24,000 recipients annually (6,000 recipients per quarterly survey × 4 calendar quarters). Although, based on historical experience, the Agency expects that only 20 to 30 percent of those surveys will be returned, it has assumed that all of the surveys will be returned for purposes of this burden calculation. Based on the reported experience of respondents to prior NSMO questionnaires, FHFA estimates that it will take each respondent 30 minutes to complete the survey, including the gathering of necessary materials to respond to the questions. This results in a total annual burden estimate of 12,000 hours for the survey phase of this collection (24,000 respondents × 30 minutes per respondent = 12,000 hours annually).

II. Pre-Testing the Materials

FHFA estimates that it will pre-test the survey materials with 50 cognitive testing participants annually. The estimated participation time for each participant is one hour, resulting in a total annual burden estimate of 50 hours for the pre-testing phase of the collection (50 participants × 1 hour per participant = 50 hours annually).

D. Comment Request

FHFA requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of FHFA functions,

[4] OMB has assigned the ASMB control no. 2590–0015, which expired on July 31, 2019.

[5] The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, requires that the survey process, because it utilizes borrower names and addresses drawn from credit reporting agency records, must be administered through Experian in order to maintain consumer privacy.

[6] The November 2018 NSMO public use dataset (which was updated to correct some minor errors in February 2019) can be accessed here: *https://www.fhfa.gov/DataTools/Downloads/Pages/NMDB_Data_Sets.aspx.*

including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) 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.

Dated: December 4, 2019.

Kevin Winkler,

Chief Information Officer, Federal Housing Finance Agency.

BILLING CODE 8070–01–P

Improving Mortgages in America

National Survey of Mortgage Originations

We are conducting this survey of people who have taken out or co-signed for a mortgage loan to purchase a housing property or to refinance or modify an existing loan.

Learning directly from borrowers like you about your mortgage experiences will help us improve lending practices and the mortgage process for future borrowers like you. It is important to get the perspective of all borrowers for making government policies.

You can mail back the paper survey in the enclosed business reply envelope or complete the survey online. The online version may be easier to complete, because it skips any questions that do not apply to you. Online responses are also processed more quickly making it less likely that you will receive reminders to complete this survey. We appreciate your help either way.

To complete the survey online, in English or Spanish

Go to: www.NSMOsurvey.com

Enter the unique access code provided in the letter we sent you.

Esta encuesta está disponible en español en línea

Visite al sitio web ***www.NSMOsurvey.com***

Inicie la sesión con su número PIN único de la encuesta que se encuentra en la carta adjunta.

ABOUT THE SPONSORS: The **Federal Housing Finance Agency** and the **Consumer Financial Protection Bureau** are working together to sponsor this survey. We are doing this because both agencies are concerned with improving the safety of the U.S. housing finance system and making sure all consumers have better access to mortgages. Thanks so much for helping us assist future borrowers.

You can find more information on our websites - **www.fhfa.gov/nsmo** and **www.consumerfinance.gov**

Your answers to this survey will help us as we improve the safety of the U.S. housing finance system and help to ensure that people have access to funds needed to build or improve housing.

We look forward to hearing from you.

Privacy Act Notice: In accordance with the Privacy Act, as amended (5 U.S.C. § 552a), the following notice is provided. The information requested on this Survey is collected pursuant to 12 U.S.C. 4544 for the purposes of gathering information for the National Mortgage Database. Routine uses which may be made of the collected information can be found in the Federal Housing Finance Agency's System of Records Notice (SORN) FHFA-21 National Mortgage Database. Providing the requested information is voluntary. Submission of the survey authorizes FHFA to collect the information provided and to disclose it as set forth in the referenced SORN.

Paperwork Reduction Act Statement: 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 Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

OMB No. 2590-0012
Expires 4/30/2020

1. Did you take out or co-sign for a mortgage loan sometime in the last couple of years including a purchase or any refinance/modification of an existing loan?

- ☐ Yes
- ☐ No → **Skip to 72 on page 7**

2. When did you take out this mortgage? If you took out or co-signed for more than one mortgage, please refer to your experience with the most recent refinance, modification, or new mortgage.

______ / ______
month year

3. Did we mail this survey to the address of the property you financed with this mortgage?

☐ Yes ☐ No

4. Who signed or co-signed for this mortgage? *Mark all that apply.*

- ☐ I signed
- ☐ Spouse/partner including a former spouse/partner
- ☐ Parents
- ☐ Children
- ☐ Other relatives
- ☐ Other (e.g. friend, business partner)

→ **If you co-signed this loan with others, take into account all co-signers as best you can when answering the survey. If no co-signers, answer based on your own situation.**

5. When you began the process of getting this mortgage, how familiar were you (and any co-signers) with each of the following?

	Very	Somewhat	Not At All
The mortgage interest rates available at that time	☐	☐	☐
The different types of mortgages available	☐	☐	☐
The mortgage process	☐	☐	☐
The down payment needed to qualify for a mortgage	☐	☐	☐
The income needed to qualify for a mortgage	☐	☐	☐
Your credit history or credit score	☐	☐	☐
The money needed at closing	☐	☐	☐

6. When you began the process of getting this mortgage, how concerned were you about qualifying for a mortgage?

☐ Very ☐ Somewhat ☐ Not at all

7. How firm an idea did you have about the mortgage you wanted?

☐ Firm idea ☐ Some idea ☐ Little idea

8. How much did you use each of the following sources to get information about mortgages or mortgage lenders?

	A Lot	A Little	Not At All
Your mortgage lender/broker	☐	☐	☐
Other mortgage lenders/brokers	☐	☐	☐
Real estate agents or builders	☐	☐	☐
Material in the mail	☐	☐	☐
Websites that provide information on getting a mortgage	☐	☐	☐
Newspaper/TV/Radio	☐	☐	☐
Friends/relatives/co-workers	☐	☐	☐
Bankers, credit unions or financial planners	☐	☐	☐
Housing counselors	☐	☐	☐
Other (specify) ______	☐	☐	☐

9. Which one of the following best describes your shopping process?

- ☐ I picked the loan type first, and then I picked the mortgage lender/broker
- ☐ I picked the mortgage lender/broker first, and then I picked the loan type

10. Which one of the following best describes how you applied for this mortgage?

- ☐ Directly to a lender, such as a bank or credit union
- ☐ Through a mortgage broker who works with multiple lenders to get you a loan
- ☐ Through a builder who arranged financing
- ☐ Other (specify) ______

11. How many different mortgage lenders/brokers did you seriously consider before choosing where to apply for this mortgage?

☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 or more

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12. How many different mortgage lenders/brokers did you end up applying to?

☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 or more

13. Did you apply to more than one mortgage lender/broker for any of the following reasons?

	Yes	No
Searching for better loan terms	☐	☐
Concern over qualifying for a loan	☐	☐
Information learned from the "Loan Estimate"	☐	☐
Turned down on earlier application	☐	☐

14. How important were each of the following in choosing the mortgage lender/broker you used for the mortgage you took out?

	Important	Not Important
Having an established banking relationship	☐	☐
Having a local office or branch nearby	☐	☐
Used previously to get a mortgage	☐	☐
Mortgage lender/broker is a personal friend or relative	☐	☐
Paperless online mortgage process	☐	☐
Recommendation from a friend/relative/co-worker	☐	☐
Recommendation from a real estate agent/home builder	☐	☐
Reputation of mortgage lender/broker	☐	☐
Spoke my primary language, which is not English	☐	☐
Could provide documents in my primary language, which is not English	☐	☐

15. Who initiated the first contact between you and the mortgage lender/broker you used for the mortgage you took out?

☐ I (or one of my co-signers) did
☐ The mortgage lender/broker did
☐ We were put in contact by a third party *(such as a real estate agent or home builder)*

16. How open were you to suggestions from your mortgage lender/broker about mortgages with different features or terms?

☐ Very ☐ Somewhat ☐ Not at all

17. How important were each of the following in determining the mortgage you took out?

	Important	Not Important
Lower interest rate	☐	☐
Lower APR *(Annual Percentage Rate)*	☐	☐
Lower closing fees	☐	☐
Lower down payment	☐	☐
Lower monthly payment	☐	☐
An interest rate fixed for the life of the loan	☐	☐
A term of 30 years	☐	☐
No mortgage insurance	☐	☐

18. Your lender may have given you a booklet "Your home loan toolkit: A step-by-step guide," do you remember receiving a copy?

☐ Yes
☐ No
☐ Don't know
} **Skip to 20**

19. Did the "Your home loan toolkit" booklet lead you to ask additional questions about your mortgage terms?

☐ Yes ☐ No

20. In the process of getting this mortgage from your mortgage lender/broker, did you…

	Yes	No
Have to add another co-signer to qualify	☐	☐
Resolve credit report errors or problems	☐	☐
Answer follow-up requests for more information about income or assets	☐	☐
Have more than one appraisal	☐	☐
Redo/refile paperwork due to processing delays	☐	☐
Delay or postpone closing date	☐	☐
Have your "Loan Estimate" revised to reflect changes in your loan terms	☐	☐
Check other sources to confirm that terms of this mortgage were reasonable	☐	☐
Get documents in your primary language, which is not English	☐	☐
Have the lender/broker translate in your primary language, which is not English	☐	☐

21. Was the "Loan Estimate" you received from your mortgage lender/broker…

	Yes	No
Easy to understand	☐	☐
Valuable information	☐	☐

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22. Did the "Loan Estimate" lead you to...

	Yes	No
Ask questions of your mortgage lender/broker	☐	☐
Seek a change in your loan or closing	☐	☐
Apply to a different mortgage lender/broker	☐	☐

23. During the application process were you told about mortgages with any of the following?

	Yes	No
An interest rate that is fixed for the life of the loan	☐	☐
An interest rate that could change over the life of the loan	☐	☐
A term of less than 30 years	☐	☐
A higher interest rate in return for lower closing costs	☐	☐
A lower interest rate in return for paying higher closing costs *(discount points)*	☐	☐
Interest-only monthly payments	☐	☐
An escrow account for taxes and/or homeowner insurance	☐	☐
A prepayment penalty *(fee if the mortgage is paid off early)*	☐	☐
Reduced documentation or "easy" approval	☐	☐
An FHA, VA, USDA or Rural Housing loan	☐	☐

24. In selecting your settlement/closing agent did you use someone...

	Yes	No
Selected/recommended by the mortgage lender/broker, or real estate agent	☐	☐
You used previously	☐	☐
Found shopping around	☐	☐

☐ Did not have a settlement/closing agent

25. Do you have title insurance on this mortgage?

☐ Yes
☐ No
☐ Don't know } **Skip to 27**

26. Which one best describes how you picked the title insurance?

☐ Reissued previous title insurance
☐ Used title insurance recommended by mortgage lender/broker or settlement agent
☐ Shopped around

27. Overall, how satisfied are you that the mortgage you got was the one with the...

	Very	Somewhat	Not At All
Best terms to fit your needs	☐	☐	☐
Lowest interest rate for which you could qualify	☐	☐	☐
Lowest closing costs	☐	☐	☐

28. Overall, how satisfied are you with the...

	Very	Somewhat	Not At All
Mortgage lender/broker you used	☐	☐	☐
Application process	☐	☐	☐
Documentation process required for the loan	☐	☐	☐
Loan closing process	☐	☐	☐
Information in mortgage disclosure documents	☐	☐	☐
Timeliness of mortgage disclosure documents	☐	☐	☐
Settlement agent	☐	☐	☐

29. Did you take a course about home-buying or talk to a professional housing counselor?

☐ Yes
☐ No → **Skip to 33 on page 4**

30. Was your home-buying course or counseling...

	Yes	No
In person, one-on-one	☐	☐
In person, in a group	☐	☐
Over the phone	☐	☐
Online	☐	☐
Required	☐	☐

31. How many hours was your home-buying course or counseling?

☐ Less than 3 hours
☐ 3 – 6 hours
☐ 7 – 12 hours
☐ More than 12 hours

32. Overall, how helpful was your home-buying course or counseling?

☐ Very ☐ Somewhat ☐ Not at all

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33. Which one of these reasons best describes this most recent mortgage?

- ☐ To buy a property
- ☐ To refinance or modify an earlier mortgage
- ☐ To add/remove co-signer(s)/co-owner(s)
- ☐ To finance a construction loan
- ☐ To take out a new loan on a mortgage-free property
- ☐ Some other purpose (specify) ______

Skip to 37

34. Did you do the following before or after you made an offer on this house or property?

	Before Offer	After Offer	Did Not Do
Contacted a lender to explore mortgage options	☐	☐	☐
Got a pre-approval or pre-qualification from a lender	☐	☐	☐
Decided on the type of loan	☐	☐	☐
Made a decision on which lender to use	☐	☐	☐
Submitted an official loan application	☐	☐	☐

35. What percent down payment did you make on this property?

- ☐ 0%
- ☐ Less than 3%
- ☐ 3% to less than 5%
- ☐ 5% to less than 10%
- ☐ 10% to less than 20%
- ☐ 20% to less than 30%
- ☐ 30% or more

36. Did you use any of the following sources of funds to purchase this property?

	Used	Not Used
Proceeds from the sale of another property	☐	☐
Savings, retirement account, inheritance, or other assets	☐	☐
Assistance or loan from a nonprofit or government agency	☐	☐
A second lien, home equity loan, or home equity line of credit (HELOC)	☐	☐
Gift or loan from family or friend	☐	☐
Seller contribution	☐	☐

Skip to 41

37. How important were the following in your decision to refinance, modify or obtain a new mortgage?

	Important	Not Important
Change to a fixed-rate loan	☐	☐
Get a lower interest rate	☐	☐
Get a lower monthly payment	☐	☐
Consolidate or pay down other debt	☐	☐
Repay the loan more quickly	☐	☐
Take out cash	☐	☐

38. Approximately how much was owed, in total, on the old mortgage(s) and loan(s) you refinanced?

$ ______ .00

☐ Zero *(the property was mortgage-free)*

39. How did the total amount of your new mortgage(s) compare to the total of the old mortgage(s) and loan(s) you paid off?

- ☐ New amount is lower
- ☐ New amount is about the same
- ☐ New amount is higher
- ☐ Property was mortgage-free

40. Did you use the money you got from this new mortgage for any of the following?

	Yes	No
College expenses	☐	☐
Auto or other major purchase	☐	☐
Buy out co-signer(s)/co-owner(s)	☐	☐
Pay off other bills or debts	☐	☐
Home repairs or new construction	☐	☐
Savings	☐	☐
Closing costs of new mortgage	☐	☐
Business or investment	☐	☐
Other (specify) ______	☐	☐

☐ Did not get money from refinancing

This Mortgage

41. When you took out this most recent mortgage or refinance, what was the dollar amount you borrowed?

$ ______ .00 ☐ Don't know

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42. What is the monthly payment, including the amount paid to escrow for taxes and insurance?

$ ____________ .00 ☐ Don't know

43. What is the interest rate on this mortgage?

________ % ☐ Don't know

44. Is this an adjustable-rate mortgage (one that allows the interest rate to change over the life of the loan)?

☐ Yes
☐ No

☐ Don't know

45. Which one of the following best describes how you decided on the interest rate of your mortgage?

☐ Paid higher closing costs to get lower interest rate
☐ Paid lower closing costs with a higher interest rate
☐ Got a balance between closing costs and interest rate

46. Does this mortgage have...

	Yes	No	Don't Know
A prepayment penalty *(fee if the mortgage is paid off early)*	☐	☐	☐
An escrow account for taxes and/or homeowner insurance	☐	☐	☐
A balloon payment	☐	☐	☐
Interest-only payments	☐	☐	☐
Private mortgage insurance	☐	☐	☐

47. At any time after you made your final loan application did any of the following change?

	Higher	Same	Lower
Monthly payment	☐	☐	☐
Interest rate	☐	☐	☐
Other fees	☐	☐	☐
Amount of money needed to close loan	☐	☐	☐

48. The "Closing Disclosure" statement you received at closing shows the loan closing costs and other closing costs separately. What were the loan closing costs you paid on this loan?

$ ____________ .00 ☐ Don't know

49. How were the total closing costs (loan costs and other costs) for this loan paid?

	Yes	No	Don't Know
By me or a co-signer with a check or wire transfer	☐	☐	☐
Added to the mortgage amount	☐	☐	☐
By mortgage lender/broker	☐	☐	☐
By seller/builder	☐	☐	☐
Other (specify) ____________	☐	☐	☐

☐ Loan had no closing costs

50. Were the loan costs you paid similar to what you had expected to pay based on the Loan Estimates or Closing Disclosures you received?

☐ Yes ☐ No

51. Did you seek input about your closing documents from any of the following people?

	Yes	No
Mortgage lender/broker	☐	☐
Settlement/closing agent	☐	☐
Real estate agent	☐	☐
Personal attorney	☐	☐
Title insurance agent	☐	☐
Trusted friend or relative who is not a co-signer on the mortgage	☐	☐
Housing counselor	☐	☐
Other (specify) ____________	☐	☐

52. Did you face any of the following at your loan closing?

	Yes	No
Loan documents not ready at closing	☐	☐
Closing did not occur as originally scheduled	☐	☐
Three-day rule required re-disclosure	☐	☐
Mortgage terms different at closing than expected, e.g. interest rate, monthly payment	☐	☐
More cash needed at closing than expected, e.g. escrow, unexpected fees	☐	☐
Less cash needed at closing than expected	☐	☐
Asked to sign blank documents at closing	☐	☐
Asked to sign pre-dated or post-dated documents at closing	☐	☐
Felt rushed at closing or not given time to read documents	☐	☐

53. Is there any additional problem you encountered while getting this mortgage that you'd like to tell us about?

54. At the same time you took out this mortgage, did you also take out another loan on the property you financed with this mortgage *(a second lien, home equity loan, or a home equity line of credit (HELOC))*?

☐ Yes
☐ No → **Skip to 56**

55. What was the amount of this loan?

$ ______ .00
☐ Don't know

56. How well could you explain to someone the...

	Very	Somewhat	Not At All
Process of taking out a mortgage	☐	☐	☐
Difference between a fixed- and an adjustable-rate mortgage	☐	☐	☐
Difference between a prime and subprime loan	☐	☐	☐
Difference between a mortgage's interest rate and its APR	☐	☐	☐
Amortization of a loan	☐	☐	☐
Consequences of not making required mortgage payments	☐	☐	☐
Difference between lender's and owner's title insurance	☐	☐	☐
Relationship between discount points and interest rate	☐	☐	☐
Reason payments into an escrow account can change	☐	☐	☐

This Mortgaged Property

57. When did you first become the owner of this property?

______ / ______
month year

58. What was the purchase price of this property, or if you built it, the construction and land cost?

$ ______ .00 ☐ Don't know

59. Which one of the following best describes how you acquired this property?

☐ Purchased an existing home
☐ Purchased a newly-built home from a builder
☐ Had or purchased land and built a house
☐ Received as a gift or inheritance
☐ Other (specify) ______

60. Which one of the following best describes this property?

☐ Single-family detached house
☐ Mobile home or manufactured home
☐ Townhouse, row house, or villa
☐ 2-unit, 3-unit, or 4-unit dwelling
☐ Apartment (or condo/co-op) in apartment building
☐ Unit in a partly commercial structure
☐ Other (specify) ______

61. Does this mortgage cover more than one unit?

☐ Yes ☐ No

62. About how much do you think this property is worth in terms of what you could sell it for now?

$ ______ .00 ☐ Don't know

63. Do you rent out all or any portion of this property?

☐ Yes
☐ No → **Skip to 65 on page 7**

64. How much rent do you receive annually?

$ ______ .00 per year

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65. Besides you, the mortgage co-signers, and renters, does anyone else help pay the expenses for this property?

☐ Yes ☐ No

66. Which of the following best describes how you use this property?

☐ Primary residence *(where you spend the majority of your time)*
☐ It will be my primary residence soon
☐ Seasonal or second home
☐ Home for other relatives
☐ Rental or investment property
☐ Other (specify) ____________

Skip to 68

67. If primary residence, when did you move into this property?

_____ / _____
month year

68. In the last couple years, how have the following changed in the neighborhood where this property is located?

	Significant Increase	Little/No Change	Significant Decrease
Number of homes for sale	☐	☐	☐
Number of vacant homes	☐	☐	☐
Number of homes for rent	☐	☐	☐
Number of foreclosures or short sales	☐	☐	☐
House prices	☐	☐	☐
Overall desirability of living there	☐	☐	☐

69. What do you think will happen to the prices of homes in this neighborhood over the next couple of years?

☐ Increase a lot
☐ Increase a little
☐ Remain about the same
☐ Decrease a little
☐ Decrease a lot

70. In the next couple of years, how do you expect the overall desirability of living in this neighborhood to change?

☐ Become more desirable
☐ Stay about the same
☐ Become less desirable

71. How likely is it that in the next couple of years you will...

	Very	Somewhat	Not At All
Sell this property	☐	☐	☐
Move but keep this property	☐	☐	☐
Refinance the mortgage on this property	☐	☐	☐
Pay off this mortgage and own the property mortgage-free	☐	☐	☐

Your Household

72. What is your current marital status?

☐ Married
☐ Separated
☐ Never married
☐ Divorced
☐ Widowed

73. Do you have a partner who shares the decision-making and responsibilities of running your household but is not your legal spouse?

☐ Yes ☐ No

Please answer the following questions for you and your spouse or partner, if applicable.

74. Age at last birthday:

	You	Spouse/ Partner
	_____ years	_____ years

75. Sex:

	You	Spouse/ Partner
Male	☐	☐
Female	☐	☐

76. Highest level of education achieved:

	You	Spouse/ Partner
Some schooling	☐	☐
High school graduate	☐	☐
Technical school	☐	☐
Some college	☐	☐
College graduate	☐	☐
Postgraduate studies	☐	☐

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77. **Hispanic or Latino:**

	You	Spouse/ Partner
Yes	☐	☐
No	☐	☐

78. **Race:** *Mark all that apply.*

	You	Spouse/ Partner
White	☐	☐
Black or African American	☐	☐
American Indian or Alaska Native	☐	☐
Asian	☐	☐
Native Hawaiian or Pacific Islander	☐	☐

79. **Current work status:** *Mark all that apply.*

	You	Spouse/ Partner
Self-employed full time	☐	☐
Self-employed part time	☐	☐
Employed full time	☐	☐
Employed part time	☐	☐
Retired	☐	☐
Unemployed, temporarily laid-off or on leave	☐	☐
Not working for pay *(student, homemaker, disabled)*	☐	☐

80. **Ever served on active duty in the U.S. Armed Forces, Reserves or National Guard?**

	You	Spouse/ Partner
Never served in the military	☐	☐
Only on active duty for training in the Reserves or National Guard	☐	☐
Now on active duty	☐	☐
On active duty in the past, but not now	☐	☐

81. **Besides you (and your spouse/partner) who else lives in your household?** *Mark all that apply.*

☐ Children/grandchildren under age 18
☐ Children/grandchildren age 18 – 22
☐ Children/grandchildren age 23 or older
☐ Parents of you or your spouse or partner
☐ Other relatives like siblings or cousins
☐ Non-relative

☐ No one else

82. **Do you speak a language other than English at home?**

☐ Yes ☐ No

83. **Approximately how much is your total annual household income from all sources** *(wages, salaries, tips, interest, child support, investment income, retirement, social security, and alimony)*?

☐ Less than $35,000
☐ $35,000 to $49,999
☐ $50,000 to $74,999
☐ $75,000 to $99,999
☐ $100,000 to $174,999
☐ $175,000 or more

84. **How does this total annual household income compare to what it is in a "normal" year?**

☐ Higher than normal
☐ Normal
☐ Lower than normal

85. **Does your total annual household income include any of the following sources?**

	Yes	No
Wages or salary	☐	☐
Business or self-employment	☐	☐
Interest or dividends	☐	☐
Alimony or child support	☐	☐
Social Security, pension or other retirement benefits	☐	☐

86. **Does anyone in your household have any of the following?**

	Yes	No
401(k), 403(b), IRA, or pension plan	☐	☐
Stocks, bonds, or mutual funds *(not in retirement accounts or pension plans)*	☐	☐
Certificates of deposit	☐	☐
Investment real estate	☐	☐

87. **Which one of the following statements best describes the amount of financial risk you are willing to take when you save or make investments?**

☐ Take substantial financial risks expecting to earn substantial returns
☐ Take above-average financial risks expecting to earn above-average returns
☐ Take average financial risks expecting to earn average returns
☐ Not willing to take any financial risks

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88. Do you agree or disagree with the following statements?

	Agree	Disagree
Owning a home is a good financial investment	☐	☐
Most mortgage lenders generally treat borrowers well	☐	☐
Most mortgage lenders would offer me roughly the same rates and fees	☐	☐
Late payments will lower my credit rating	☐	☐
Lenders shouldn't care about any late payments, only whether loans are fully repaid	☐	☐
It is okay to default or stop making mortgage payments if it is in the borrower's financial interest	☐	☐
I would consider counseling or taking a course about managing my finances if I faced financial difficulties	☐	☐

89. In the last couple of years, have any of the following happened to you?

	Yes	No
Separated, divorced or partner left	☐	☐
Married, remarried or new partner	☐	☐
Death of a household member	☐	☐
Addition to your household (not including spouse/partner)	☐	☐
Person leaving your household (not including spouse/partner)	☐	☐
Disability or serious illness of household member	☐	☐
Disaster affecting a property you own	☐	☐
Disaster affecting your (or your spouse/partner's) work	☐	☐
Moved within the area (less than 50 miles)	☐	☐
Moved to a new area (50 miles or more)	☐	☐

90. In the last couple of years, have any of the following happened to you (or your spouse/partner)?

	Yes	No
Layoff, unemployment, or reduced hours of work	☐	☐
Retirement	☐	☐
Promotion	☐	☐
Starting a new job	☐	☐
Starting a second job	☐	☐
Business failure	☐	☐
A personal financial crisis	☐	☐

91. In the last couple years, how have the following changed for you (and your spouse/partner)?

	Significant Increase	Little/No Change	Significant Decrease
Household income	☐	☐	☐
Housing expenses	☐	☐	☐
Non-housing expenses	☐	☐	☐

92. In the next couple of years, how do you expect the following to change for you (and your spouse/partner)?

	Significant Increase	Little/No Change	Significant Decrease
Household income	☐	☐	☐
Housing expenses	☐	☐	☐
Non-housing expenses	☐	☐	☐

93. How likely is it that in the next couple of years you (or your spouse/partner) will face...

	Very	Somewhat	Not At All
Retirement	☐	☐	☐
Difficulties making your mortgage payments	☐	☐	☐
A layoff, unemployment, or forced reduction in hours	☐	☐	☐
Some other personal financial crisis	☐	☐	☐

94. If your household faced an unexpected personal financial crisis in the next couple of years, how likely is it you could...

	Very	Somewhat	Not At All
Pay your bills for the next 3 months without borrowing	☐	☐	☐
Get significant financial help from family or friends	☐	☐	☐
Borrow a significant amount from a bank or credit union	☐	☐	☐
Significantly increase your income	☐	☐	☐

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The Federal Housing Finance Agency and the Consumer Financial Protection Bureau thank you for completing this survey.

We have provided the space below if you wish to share additional comments or further explain any of your answers. ***Please do not put your name or address on the questionnaire.***

Please use the enclosed business reply envelope to return your completed questionnaire.

FHFA
1600 Research Blvd, RC B16
Rockville, MD 20850

For any questions about the survey or online access you can call toll free 1-855-339-7877.

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[FR Doc. 2019–26593 Filed 12–9–19; 8:45 am]

BILLING CODE 8070–01–C

GENERAL SERVICES ADMINISTRATION

[Notice–MA–2019–10; Docket No. 2019–0002; Sequence No. 32]

Relocation Allowances: Taxes on Travel, Transportation, and Relocation Expenses

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform Federal agencies that FTR Bulletin 20–02, pertaining to travel, transportation, and relocation allowances impacted by recent changes to Federal tax law, has been published and is now available online at *www.gsa.gov/ftrbulletin.* This bulletin contains certain examples and tables that were removed from the FTR as a result of FTR Amendment 2020–02, published by GSA on November 25, 2019, and issued as a direct final rule. This bulletin also rescinds FTR Bulletins 18–05 and 19–02 now that FTR Amendment 2020–02 has been issued, amending the FTR in line with changes to the Internal Revenue Code.

DATES: *Applicable:* This notice applies to employees who are authorized reimbursement for relocation expenses under the FTR and who receive some or all reimbursements, direct payments, or indirect payments on or after January 1, 2018, and on or before December 31, 2025.

FOR FURTHER INFORMATION CONTACT: For clarification of content, please contact Mr. Rick Miller, Program Analyst, Office of Government-wide Policy, Office of Asset and Transportation Management, at 202–501–3822, or by email at *travelpolicy@gsa.gov.* Please cite Notice of FTR Bulletin 20–02.

Jessica Salmoiraghi,

Associate Administrator, Office of Government-wide Policy.

[FR Doc. 2019–26511 Filed 12–9–19; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on Maternal and Fetal Effects of Mental Health Treatments in Pregnant and Breastfeeding Women: A Systematic Review of Pharmacological Interventions

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for supplemental evidence and data submissions.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *Maternal and Fetal Effects of Mental Health Treatments in Pregnant and Breastfeeding Women: A Systematic Review of Pharmacological Interventions,* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

DATES: *Submission Deadline* on or before 30 days after date of publication.

ADDRESSES:

Email Submissions: epc@ahrq.hhs.gov.

Print Submissions:

Mailing Address: Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857.

Shipping Address (FedEx, UPS, etc.): Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Jenae Benns, Telephone: 301–427–1496 or Email: *epc@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for *Maternal and Fetal Effects of Mental Health Treatments in Pregnant and Breastfeeding Women: A Systematic Review of Pharmacological Interventions.* AHRQ is conducting this systematic review pursuant to Section 902(a) of the Public Health Service Act, 42 U.S.C. 299a(a).

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on *Maternal and Fetal Effects of Mental Health Treatments in Pregnant and Breastfeeding Women: A Systematic Review of Pharmacological Interventions,* including those that describe adverse events. The entire research protocol, including the key questions, is also available online at: *https://effectivehealthcare.ahrq.gov/topics/mental-health-pregnancy/protocol.*

This is to notify the public that the EPC Program would find the following information on Maternal and Fetal Effects of Mental Health Treatments in Pregnant and Breastfeeding Women: A Systematic Review of Pharmacological Interventions helpful:

- A list of completed studies that your organization has sponsored for this indication. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov trial number.*
- *For completed studies that do not have results on ClinicalTrials.gov,* a summary, including the following elements: Study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.
- *A list of ongoing studies that your organization has sponsored for this indication.* In the list, please provide the *ClinicalTrials.gov* trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.
- Description of whether the above studies constitute *ALL Phase II and above clinical trials* sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of four weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://www.effectivehealthcare.ahrq.gov/email-updates.*

The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.

The Key Questions

Key Question 1: Among pregnant and postpartum women, what is the effectiveness of pharmacologic interventions on maternal outcomes?

a. Among those with a new or preexisting anxiety disorder?

b. Among those with a new or preexisting depressive disorder?

c. Among those with a new or preexisting bipolar disorder?

d. Among those with new or preexisting schizophrenia?

Key Question 2: Among pregnant and postpartum women, what is the comparative effectiveness of pharmacologic interventions on maternal outcomes?

a. Among those with a new or preexisting anxiety disorder?

b. Among those with a new or preexisting depressive disorder?

c. Among those with a new or preexisting bipolar disorder?

d. Among those with new or preexisting schizophrenia?

Key Question 3: Among reproductive-aged women with any mental health disorder, what are the maternal and fetal harms associated with pharmacologic interventions for a mental health disorder during preconception, pregnancy, and postpartum?

Key Question 4: Among reproductive-aged women with any mental health disorder, what are the comparative maternal and fetal harms of pharmacologic interventions for a mental health disorder during preconception, pregnancy, and postpartum?

Contextual Question 1: Among women who are preconceptional, pregnant, or postpartum, within a given disorder, what are the harms of NOT treating or stopping a pharmacological treatment, or of switching medications?

TABLE 1—PICOTS (POPULATIONS, INTERVENTIONS, COMPARATORS, OUTCOMES, TIMING, SETTINGS) AND INCLUSION/EXCLUSION CRITERIA

PICOTS	Inclusion	Exclusion
Population	KQ 1, KQ 2: Women who are pregnant or postpartum with new or preexisting diagnosis of anxiety, depression, bipolar disorder, or schizophrenia. • Anxiety disorders include DSM 5 and DSM–IV diagnoses (including generalized anxiety disorder, panic disorder, social anxiety disorder [social phobia], obsessive compulsive disorder [OCD]; and posttraumatic stress disorder). • Depressive disorders include major depressive disorder KQ 3, KQ 4: Reproductive-aged women (15–44 years old during preconception [≤12 weeks before pregnancy], pregnancy, and postpartum [through 1 year]) with any mental health disorder (new or preexisting).	KQs 1, 2: Studies of women with disorders other than anxiety (including PTSD and OCD), depression, bipolar disorder, and schizophrenia. KQs 3, 4: <90% of reproductive age (15–44). KQs 1–4: Studies with 100% substance use disorders.
Intervention †	Pharmacologic interventions for a mental health disorder including: ... • Antipsychotics (haloperidol, chlorpromazine, aripiprazole, quetiapine, olanzapine, risperidone, clozapine, lurasidone, paliperidone, fluphenazine, perphenazine, iloperidone, asenapine, brexpiprazole, and ziprasidone). • SSRIs and serotonin modulators (citalopram, escitalopram, fluoxetine, fluvoxamine, nefazodone, paroxetine, sertraline, trazodone, vilazodone, and vortioxetine). • SNRIs (venlafaxine, desvenlafaxine, milnacipran, and duloxetine). • Tricyclic antidepressants (amitriptyline, amoxapine, desipramine, doxepin, imipramine, nortriptyline, protriptyline, and trimipramine). • Other antidepressants (bupropion, mirtazapine). • Mood stabilizers (lithium). • Antianxiety agent (benzodiazepines [alprazolam, clobazam, clonazepam, clorazepate, clonidine, chlordiazepoxide, diazepam, lorazepam, temazepam, and triazolam] and buspirone). • Anticonvulsants (valproate, carbamazepine, oxcarbazepine, topiramate, and lamotrigine). • Other medications for a mental health disorder (gabapentin, zolpidem, eszopiclone, zaleplon, ramelteon, diphenhydramine, lisdexamfetamine, and hydroxyzine).	All other interventions.
Comparator ..	KQ 1, KQ 3: Placebo or no treatment .... KQ 2, KQ 4: Other pharmacologic interventions, any psychotherapy, combined pharmacotherapy, and psychotherapy.	KQ 1, KQ 3: Active comparators, no comparators KQ 2, KQ 4: • Treatments other than pharmacologic interventions or psychotherapy (*e.g.,* yoga, mindfulness, self-care, nutritional or herbal supplements) • No comparators • Placebo or no treatment comparators.
Outcomes ‡ ..	KQ 1, KQ 2: Effectiveness .... • Final health outcomes (maternal benefits). • Symptoms (response/remission/relapse, suicidal ideation). • Functional capacity *. • Quality of life *. • Peripartum events (delivery mode, breastfeeding, weight change). • Adherence to treatment/care/discontinuation. Suicidal events. KQ 3, KQ 4: Harms. • Maternal harms.	All other outcomes

TABLE 1—PICOTS (POPULATIONS, INTERVENTIONS, COMPARATORS, OUTCOMES, TIMING, SETTINGS) AND INCLUSION/EXCLUSION CRITERIA—Continued

PICOTS	Inclusion	Exclusion
	○ Harms specific to pregnancy and breastfeeding (infertility, miscarriage, abruption, preterm labor/preterm birth, preeclampsia, gestational hypertensive disorders, glucose intolerance/gestational diabetes mellitus, reduced milk production in breastfeeding/undesired weaning). ○ Danger to self or infant. ○ Misuse of prescription medication. ○ Serious adverse events related to treatment. ○ Death. • Fetal/infant/child harms. ○ Preterm birth/small for gestational age or large for gestational age. ○ Congenital anomalies. ○ Perinatal complications (low APGAR, withdrawal, respiratory distress, neonatal intensive care unit time, persistent pulmonary hypertension). ○ Poor infant attachment/bonding *†. ○ Delayed social, emotional, and cognitive development *. ○ Death.	
Time frame	*Followup* KQ 1, KQ 2: From conception up to 1 year postpartum for maternal outcomes. KQ 3, KQ 4: All	*Followup* • KQ 1, KQ 2: More than 12 weeks preconception for maternal preconception outcomes, more than 1 year for maternal postpartum outcomes • KQ 3, KQ 4: None.
Settings §	*Clinical setting* All settings	*Clinical setting* None.
Study design	• RCTs, CCTs, case-control studies, cohort studies with comparison arms. • Reference lists of relevant systematic reviews published in 2013 or later will be used to ensure our search strategies captured all relevant studies.	All other designs and studies using included designs that do not meet the sample size criterion.
Language	Studies published in English	Studies published in languages other than English.

* We will limit included outcomes to those using validated measures. Another potential exclusion, depending on volume of yield, includes studies that fail to control for confounding.
† Drugs such as brexanolone that are awaiting FDA approval will be included in the review once they are approved
‡ We will focus strength of evidence (SOE) grades on outcomes prioritized by the Technical Expert Panel (TEP).
§ Depending on volume, we may limit the primary analysis to studies from geographic settings with resources comparable or applicable to the United States.

Dated: December 4, 2019.

Virginia Mackay-Smith,

Associate Director.

[FR Doc. 2019–26510 Filed 12–9–19; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Statement of Organization, Functions, and Delegations of Authority

Part J (Agency for Toxic Substances and Disease Registry) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (50 FR 25129–25130, dated June 17, 1985, as amended most recently at 82 FR 42555, dated September 8, 2017) is amended to reflect the Order of Succession for the Agency for Toxic Substances and Disease Registry.

Section J–C, Order of Succession:

Delete in its entirety the Section J–C, Order of Succession, and insert the following:

During the absence or disability of the Administrator, Agency for Toxic Substances and Disease Registry (ATSDR), or in the event of a vacancy in that office, the first official listed below who is available shall act as Administrator, except during a planned period of absence, the Administrator may specify a different order of succession:

1. Assistant Administrator, ATSDR
2. Deputy Director for Non-Infectious Diseases
3. Principal Deputy Director
4. Chief Medical Officer
5. Director, Center for Preparedness and Response

Sherri A. Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019–26494 Filed 12–9–19; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10221, CMS–10344 and CMS–10137]

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 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 9, 2020.

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' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html*

1. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Independent Diagnostic Testing Facilities (IDTFs) Site Investigation Form Revisions; *Use:* The data collection is used by Medicare contractors and/or their subcontractors on site visits to verify compliance with required IDTF performance standards. If a subcontractor is used, the subcontractor collects the information from the IDTF through an interview and forwards it to the Medicare contractor for evaluation.

The collection and verification of this information defends and protects our beneficiaries from illegitimate IDTFs. These procedures also protect the Medicare Trust Fund against fraud. The data collected also ensures that the applicant has the necessary credentials to provide the health care services for which they intend to bill Medicare. *Form Number:* CMS–10221 (OMB control number: 0938–1029); *Frequency:* Occasionally; *Affected Public:* Private Sector (Business or other for-profit and Not-for-profit institutions); *Number of Respondents:* 727; *Total Annual Responses:* 727; *Total Annual Hours:* 1,454. (For policy questions regarding this collection contact Kimberly McPhillips at 410–786–5374.)

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Elimination of Cost-Sharing for full benefit dual-eligible Individuals Receiving Home and Community-Based Services; *Use:* Each month CMS deems individuals automatically eligible for the full subsidy, based on data from State Medicaid Agencies and the Social Security Administration (SSA). The SSA sends a monthly file of Supplementary Security Income-eligible beneficiaries to CMS. Similarly, the State Medicaid agencies submit Medicare Modernization Act files to CMS that identify full subsidy beneficiaries. CMS deems the beneficiaries as having full subsidy and auto-assigns these beneficiaries to bench mark Part D plans. Part D plans receive premium amounts based on the monthly assessments.

State MMA Phase Down (SPD) exchange enables CMS to implement the Medicare Prescription Drug, Improvement, and Modernization Act, also called the Medicare Modernization Act (MMA), which was enacted into law in 2003. This data exchange allows the State Medicaid Agency (SMA) to identify Medicare beneficiaries with coverage under the Medicaid program. The SMAs also identify other low-income Medicare beneficiaries who have applied for the Part D Low-Income Subsidy (LIS). As a result of the identification of these two groups of beneficiaries, CMS auto-assigns and/or facilitates enrollment of the appropriate beneficiaries into Part D plans.

Section 1860 D–14 of the Social Security Act sets forth requirements for premium and cost-sharing subsidies for low-income beneficiaries enrolled in Medicare Part D. Based on this statute, 42 CFR 423.771, provides guidance concerning limitations for payments made by and on behalf of low-income Medicare beneficiaries who enroll in Part D plans. 42 CFR 423.771 (b) establishes requirements for determining a beneficiary's eligibility for full subsidy under the Part D program. Regulations set forth in 423.780 and 423.782 outline premium and cost sharing subsidies to which full subsidy eligible are entitled under the Part D program. *Form Number:* CMS–10344 (OMB control number: 0938–1127); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 612; *Total Annual Hours:* 612. (For policy questions regarding this collection contact Roland O. Herrera at 410–786–0668.)

3. *Type of Information Collection Request:* Revision with change of a currently approved collection; *Title of Information Collection:* Title Solicitation for Applications for Medicare Prescription Drug Plan 2021 Contracts; *Use:* Coverage for the prescription drug benefit is provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA–PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Waiver Plans (EGWP) may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application.

Collection of this information is mandated in Part D of the Medicare Prescription Drug, Improvement, and

Modernization Act of 2003 (MMA) in Subpart 3. The application requirements are codified in Subpart K of 42 CFR 423 entitled ''*Application Procedures and Contracts with PDP Sponsors.*''

The information will be collected under the solicitation of proposals from PDP, MA–PD, Cost Plan, Program of All Inclusive Care for the Elderly (PACE), and EGWP applicants. The collected information will be used by CMS to: (1) Ensure that applicants meet CMS requirements for offering Part D plans (including network adequacy, contracting requirements, and compliance program requirements, as described in the application), (2) support the determination of contract awards. *Form Number:* CMS–10137 (OMB control number: 0938–0936); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 243; *Total Annual Responses:* 290; *Total Annual Hours:* 1,384.79. (For policy questions regarding this collection contact Arianne Spaccarelli at 410–786–5715.)

Dated: December 5, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–26595 Filed 12–9–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–304/–304a and CMS–368/–R–144]

Agency Information Collection Activities: Proposed Collection; 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 (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 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 February 10, 2020.

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 the following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

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: William N. Parham at (410) 786–4669.

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**).

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:* Reconciliation of State Invoice (ROSI) and Prior Quarter Adjustment Statement (PQAS); *Use:* Form CMS–304 (ROSI) is used by manufacturers to respond to the state's rebate invoice for current quarter utilization. Form CMS–304a (PQAS) is required only in those instances where a change to the original rebate data submittal is necessary. *Form Number:* CMS–304 and –304a (OMB control number: 0938–0676); *Frequency:* Quarterly; *Affected Public:* Business or other for-profits; *Number of Respondents:* 1,255; *Total Annual Responses:* 5,020; *Total Annual Hours:* 227,416. (For policy questions regarding this collection contact Andrea Wellington at 410–786–3490.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicaid Drug Rebate State Reporting Program Forms; *Use:* We develop the rebate amount per drug unit from information supplied by the drug manufacturers and distributes these data to the states. States then must report quarterly to the drug manufacturers and report to us the total number of units of each dosage form/strength of their covered outpatient drugs reimbursed during a quarter and the rebate amount to be refunded. This report is due within 60 days of the end of each calendar quarter. The information in the report is based on claims paid by the state Medicaid agency during a calendar quarter. Form CMS–R–144 (Quarterly Report Data) is required from states quarterly to report utilization for any drugs paid for during

that quarter. Form CMS–368 (Administrative Data) is required only in those instances where a change to the original data submittal is necessary. *Form Number:* CMS–368 and –R–144 (OMB control number: 0938–0582); *Frequency:* Quarterly and on occasion; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 234; *Total Annual Hours:* 12,101. (For policy questions regarding this collection contact Shannon Evans at 410–786–3083.)

Dated: December 5, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–26594 Filed 12–9–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of NIGMS IDeA Program Infrastructure for Clinical and Translational Research (IDeA–CTR) (U54) Applications.

Date: March 6, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Diplomat/Ambassador Conference Room, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Ruth Grossman, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, (301) 435–2409, *grossmanrs@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 4, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26506 Filed 12–9–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Pediatric Brain Tumor Consortium.

Date: January 9, 2020.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Dr., Rm. 7W126, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Caron A. Lyman, Ph.D., Chief, Scientific Review Officer, National Cancer Institute, NIH, Division of Extramural Activities, Research Programs Review Branch, 9609 Medical Center Dr., Rm. 7W126, Bethesda, MD 20892–9750, 240–276–6348, *lymanc@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–6: NCI Clinical and Translational R21 and Omnibus R03.

Date: January 31, 2020.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North, Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, MD 20850, 240–276–7684, *saejeong.kim@nih.gov.*

Name of Committee: National Cancer Institute Initial Review Group; TEP–3: SBIR Contract Review.

Date: February 6, 2020.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 5E030, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology & Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W254, Bethesda, MD 20892, 240–276–7975, *chufanee@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project (P01) Review I.

Date: February 12–13, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton BWI (Baltimore), 1100 Old Elkridge Landing Road, Baltimore, MD 21090.

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, 9609 Medical Center Drive, Room 7W238, National Cancer Institute, NIH, Bethesda, MD 20892–9750, (240) 276–6371, *decluej@mail.nih.gov.*

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee I—Transition to Independence.

Date: February 20–21, 2020.

Time: 4:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Delia Tang, M.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W602, Bethesda, MD 20892, (240) 276–6456, *tangd@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP 5: SBIR Contract Review.

Date: March 5, 2020.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W102, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, 9609 Medical Center Drive, Room 7W238, National Cancer Institute, NIH, Bethesda, MD 20892–9750, (240) 276–6371, *decluej@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction;

93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 3, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26503 Filed 12–9–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Eye Institute Special Emphasis Panel; NEI Institutional Training Grants (T32, T35, K12) 2.

Date: December 18, 2019.

Time: 3:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Brian Hoshaw, Ph.D., Acting Review Chief, National Eye Institute, National Institutes of Health, Division of Extramural Research, 6700 B Rockledge Dr., Ste. 3400, Rockville, MD 20892, (301) 451–2020, *hoshawb@mail.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. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 4, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26504 Filed 12–9–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Request for Information on "Update on Selected Topics in Asthma Management 2020: A Report From the National Asthma Education and Prevention Program Coordinating Committee (NAEPPCC) Expert Panel Report 4 (EPR–4) Working Group"; Correction

AGENCY: National Institutes of Health, HHS.

ACTION: Notice; correction.

SUMMARY: The Department of Health and Human Services, National Institutes of Health published a Notice in the **Federal Register** on December 2, 2019. That Notice requires a correction in the **DATES** section.

FOR FURTHER INFORMATION CONTACT: Questions about this request for information should be directed to Susan T. Shero, RN, MS, Executive Secretary, NAEPPCC, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Blvd., Rm. 9182, Bethesda, MD 20892, *Asthma2020Guidelines@westat.com,* 301–496–1051.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of December 2, 2019, in FR Doc. 2019–26017, on page 65991, in the third column, correct the **DATES** caption to read:

DATES: The NHLBI NAEPPCC RFI is open for public comment for a period of 35 days. Comments must be received by January 17, 2020 to ensure consideration. After the public comment period has closed, the comments received will be considered in a timely manner by the NHLBI NAEPPCC Expert Panel Working Group.

Dated: December 4, 2019.

Daniel R. Hernandez,

Federal Register Officer, National Institutes of Health.

[FR Doc. 2019–26502 Filed 12–9–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group; Biological Aging Review Committee NIA–B.

Date: January 30–31, 2020.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Salon C, 5701 Marinelli Road, Rockville, MD 20852.

Contact Person: Bita Nakhai, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 402–7701, *nakhaib@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 4, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26505 Filed 12–9–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Minority Health and Health Disparities.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: February 3–4, 2020.

Closed: February 3, 2020, 1:30 p.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Conference Rooms A, B, and C, Bethesda, MD 20892.

Open: February 4, 2020, 8:00 a.m. to 2:00 p.m.

Agenda: Opening Remarks, Administrative Matters, Director's Report, NIH Health Disparities Update, Presentations, and Other Business of the Council.

Place: National Institutes of Health, 6700B Rockledge Drive, Conference Room A, B, and C, Bethesda, MD 20892.

Contact Person: Joyce A. Hunter, Ph.D., Deputy Director, DEA, National Institute on Minority Health and Health Disparities, National Institutes of Health, 6707 Democracy Boulevard, Suite 800, Bethesda, Maryland 20892–5465, (301) 402–1366, *hunterj@nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Dated: December 4, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26507 Filed 12–9–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2014–0022]

Technical Mapping Advisory Council

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Federal Emergency Management Agency (FEMA) Technical Mapping Advisory Council (TMAC) will hold a remote meeting on Thursday, January 9, 2020. The meeting will be open to the public via an Adobe Connect link and conference line.

DATES: The TMAC will meet on Thursday, January 9, 2020, from 11 a.m. to 3 p.m. Eastern Standard Time (EST). Please note that the meeting will close early if the TMAC has completed its business.

ADDRESSES: The meeting will be held virtually using an Adobe Connect link (*https://fema.connectsolutions.com/tmacmeeting*) to share meeting visuals and a conference line number (1–800–320–4330 Pin: 875873#) to connect to the audio of the meeting. Members of the public who wish to attend the virtual meeting must register in advance by sending an email to *FEMA-TMAC@fema.dhs.gov* (Attention: Michael Nakagaki) by 5 p.m. EST on Wednesday, January 8, 2020. For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, contact the person listed below as soon as possible.

To facilitate public participation, members of the public are invited to provide written comments on the issues to be considered by the TMAC, as listed in the **SUPPLEMENTARY INFORMATION** section below. Associated meeting materials will be available at *www.fema.gov/TMAC* for review by Friday, January 3, 2020. Written comments to be considered by the committee at the time of the meeting must be submitted and received by Wednesday, January 8, 2020, identified by Docket ID FEMA–2014–0022, and submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Regulatory Affairs Division, Office of Chief Counsel, FEMA, 500 C Street SW, Room 8NE, Washington, DC 20472–3100.

Instructions: All submissions received must include the words ''Federal Emergency Management Agency'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For docket access to read background documents or comments received by the TMAC, go to *http://www.regulations.gov* and search for the Docket ID FEMA–2014–0022.

A public comment period will be held on Thursday, January 9, 2020, from 12 p.m. to 12:30 p.m. EST. Speakers are requested to limit their comments to no more than three minutes. The public comment period will not exceed 30 minutes. Please note that the public comment period may end before the time indicated, following the last call for comments. Contact the person listed below to register as a speaker by close of business on Wednesday, January 8, 2020.

FOR FURTHER INFORMATION CONTACT: Michael Nakagaki, Designated Federal Officer for the TMAC, FEMA, 400 C Street SW, Washington, DC 20024, telephone (202) 212–2148, and email *michael.nakagaki@fema.dhs.gov*. The TMAC website is: *http://www.fema.gov/TMAC*.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the *Federal Advisory Committee Act,* 5 U.S.C. App. (Pub. L. 92–463).

In accordance with the Biggert-Waters Flood Insurance Reform Act of 2012, the TMAC makes recommendations to the FEMA Administrator on: (1) How to improve, in a cost-effective manner, the (a) accuracy, general quality, ease of use, and distribution and dissemination of flood insurance rate maps and risk data; and (b) performance metrics and milestones required to effectively and efficiently map flood risk areas in the United States; (2) mapping standards and guidelines for (a) flood insurance rate maps, and (b) data accuracy, data quality, data currency, and data eligibility; (3) how to maintain, on an ongoing basis, flood insurance rate maps and flood risk identification; (4) procedures for delegating mapping activities to State and local mapping partners; and (5) (a) methods for improving interagency and intergovernmental coordination on flood mapping and flood risk determination, and (b) a funding strategy to leverage and coordinate budgets and expenditures across Federal agencies. Furthermore, the TMAC is required to submit an annual report to the FEMA Administrator that contains: (1) A description of the activities of the Council; (2) an evaluation of the status and performance of flood insurance rate maps and mapping activities to revise and update Flood Insurance Rate Maps; and (3) a summary of recommendations made by the Council to the FEMA Administrator.

Agenda: The purpose of this meeting is for the TMAC members to hold a vote to submit the final report to the FEMA administrator. Any related materials will be posted to the FEMA TMAC site prior to the meeting to provide the public an opportunity to review the materials. The full agenda and related meeting materials will be posted for review by Friday, January 3, 2020 at *http://www.fema.gov/TMAC*.

Michael M. Grimm,

Assistant Administrator for Risk Management, Federal Emergency Management Agency.

[FR Doc. 2019–26482 Filed 12–9–19; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2019–0006; OMB No. 1660–0040]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Standard Flood Hazard Determination Form

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a reinstatement, without change, of a previously approved information collection for which approval has expired. FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 9, 2020.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Susan Bernstein, Insurance Specialist, FIMA, Marketing and Outreach Branch, 303–701–3595.

SUPPLEMENTARY INFORMATION: Section 1365 of the National Flood Insurance Act of 1968 (NFIA) (42 U.S.C. 4104b), as added by Section 528 of the National Flood Insurance Reform Act of 1994 (Pub. L. 103–325, title V), requires that FEMA develop a standard hazard determination form for recording the determination of whether a structure is located within an identified Special Flood Hazard Area and whether flood insurance is available. Regulated lending institutions, federal agency lenders, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Association must complete this form for any loan made, increased, extended, renewed or purchased by these entities. The requirement for federally regulated lending institutions to determine whether a building or mobile home securing a loan is located in an area having special flood hazards and whether flood insurance is available has been in effect since the enactment of the Flood Disaster Protection Act of 1973, although the use of a standard form was not required until the enactment of the Section 1365 of the NFIA. The establishment of the Standard Flood Hazard Determination form has enabled lenders to provide consistent information.

This proposed information collection previously published in the **Federal Register** on April 29, 2019 at 84 FR 18069 with a 60 day public comment period. The comment period closed on June 30, 2019. No comments were received. This information collection expired on November 30, 2018. FEMA is requesting a reinstatement, without change, of a previously approved information collection for which approval has expired. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Standard Flood Hazard Determination Form.

Type of information collection: Reinstatement, without change, of a previously approved information collection for which approval has expired.

OMB Number: 1660–0040.

Form Titles and Numbers: FEMA Form 086–0–32, Standard Flood Hazard Determination Form.

Abstract: This form is used by regulated lending institutions, federal agency lenders, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Association. Federally regulated lending institutions complete this form when making, increasing, extending, renewing or purchasing each loan for the purpose is of determining whether flood insurance is required and available. FEMA is responsible for maintaining the form and making it available.

Affected Public: Business and other for-profit; and Individuals or Households.

Estimated Number of Respondents: 26,616,265.

Estimated Number of Responses: 26,616,265.

Estimated Total Annual Burden Hours: 8,783,367.

Estimated Total Annual Respondent Cost: $214,138,487.

Estimated Respondents' Operation and Maintenance Costs: 0.

Estimated Respondents' Capital and Start-Up Costs: 0.

Estimated Total Annual Cost to the Federal Government: 0.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Maile Arthur,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2019–26508 Filed 12–9–19; 8:45 am]

BILLING CODE 9111–52–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6189–N–01]

Section 8 Housing Assistance Payments Program—Annual Adjustment Factors, Fiscal Year 2020

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice of Fiscal Year (FY) 2020 Annual Adjustment Factors (AAFs).

SUMMARY: The United States Housing Act of 1937 requires that certain assistance contracts signed by owners participating in the Department's Section 8 housing assistance payment programs provide annual adjustments to monthly rentals for units covered by the contracts. This notice announces FY 2020 AAFs for adjustment of contract rents on the anniversary of those assistance contracts. The factors are based on a formula using residential rent and utility cost changes from the most recent annual Bureau of Labor Statistics (BLS) Consumer Price Index (CPI) survey. The FY 2020 AAFs are the first to use the revised BLS area definitions for local area CPI. A separate **Federal Register** notice, to be published following the finalization of the FY 2020 federal appropriations, will be used in the calculation of the calendar year (CY) 2020 Housing Choice Voucher (HCV) renewal funding for public housing agencies (PHAs)

DATES: December 10, 2019.

FOR FURTHER INFORMATION CONTACT: Contact Becky Primeaux, Director, Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, 202–708–1380, for questions relating to the Project-Based Certificate and Moderate Rehabilitation programs (not the Single Room Occupancy program); Norman A. Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, 202–402–5015, for questions regarding the Single Room Occupancy (SRO) Moderate Rehabilitation program; Katherine Nzive, Director, OAMPO Program Administration Office, Office of Multifamily Housing, 202–402–3440, for questions relating to all other Section 8 programs; and Marie Lihn, Economist, Program Parameters and Research Division, Office of Policy Development and Research, 202–402–5866, for technical information regarding the development of the schedules for specific areas or the methods used for calculating the AAFs. The mailing address for these individuals is: Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410. Hearing- or speech-impaired persons may contact the Federal Relay Service at 800–877–8339 (TTY). (Other than the ''800'' TTY number, the above-listed telephone numbers are not toll free.)

SUPPLEMENTARY INFORMATION: This notice announces FY 2020 AAFs for adjustment of contract rents on the anniversary of those assistance contracts. The factors for adjustment are based on a formula using residential rent and utility cost changes from the most recent annual Bureau of Labor Statistics (BLS) Consumer Price Index (CPI) survey. The FY 2020 AAFs are the first to use the revised BLS area definitions for local area CPI. There are now only 70 metropolitan areas covered by local CPI data; previously there were 123 metropolitan and nonmetropolitan areas. The AAFs are applied at the anniversary of Housing Assistance Payment (HAP) contracts for which rents are to be adjusted using the AAF for those calendar months commencing after the effective date of this notice. AAFs are distinct from, and do not apply to the same properties as, Operating Cost Adjustment Factors (OCAFs). OCAFs are annual factors used to adjust rents for project-based rental assistance contracts issued under Section 8 of the United States Housing Act of 1937 and renewed under section 515 or section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA). A separate **Federal Register** notice, to be published following the finalization of the FY 2020 federal appropriations, will be used in the calculation of the calendar year (CY) 2020 Housing Choice Voucher (HCV) renewal funding for public housing agencies (PHAs).

Tables showing AAFs will be available electronically from the HUD data information page at *http://www.huduser.gov/portal/datasets/aaf.html.*

I. Applying AAFs to Various Section 8 Programs

AAFs established by this notice are used to adjust contract rents for units assisted in certain Section 8 housing assistance payment programs during the initial (*i.e.,* pre-renewal) term of the HAP contract. There are two categories of Section 8 programs that use the AAFs:

Category 1: The Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation programs;

Category 2: The Section 8 Loan Management (LM) and Property Disposition (PD) programs.

Each Section 8 program category uses the AAFs differently. The specific application of the AAFs is determined by the law, the HAP contract, and appropriate program regulations or requirements.

AAFs are not used in the following cases:

Renewal Rents. AAFs are not used to determine renewal rents after expiration of the original Section 8 HAP contract (either for projects where the Section 8 HAP contract is renewed under a restructuring plan adopted under 24 CFR part 401; or renewed without restructuring under 24 CFR part 402). In general, renewal rents are established in accordance with the statutory provision in MAHRA, as amended, under which the HAP is renewed. After renewal, annual rent adjustments will be provided in accordance with MAHRA.

Budget-based Rents. AAFs are not used for budget-based rent adjustments. For projects receiving Section 8 subsidies under the LM program (24 CFR part 886, subpart A) and for projects receiving Section 8 subsidies under the PD program (24 CFR part 886, subpart C), contract rents are adjusted, at HUD's option, either by applying the AAFs or by budget-based adjustments in accordance with 24 CFR 886.112(b) and 24 CFR 886.312(b). Budget-based adjustments are used for most Section 8/202 projects.

Housing Choice Voucher Program. AAFs are not used to adjust rents in the Tenant-Based or the Project-Based Voucher programs.

II. Adjustment Procedures

This section of the notice provides a broad description of procedures for adjusting the contract rent. Technical details and requirements are described in HUD notices H 2002–10 (Section 8 New Construction and Substantial Rehabilitation, Loan Management, and Property Disposition) and PIH 97–57 (Moderate Rehabilitation and Project-Based Certificates). Because of statutory and structural distinctions among the various Section 8 programs, there are separate rent adjustment procedures for the two program categories:

Category 1: Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation Programs

In the Section 8 New Construction and Substantial Rehabilitation programs, the published AAF factor is applied to the pre-adjustment contract rent. In the Section 8 Moderate Rehabilitation program (both the regular program and the single room occupancy program) the published AAF is applied to the pre-adjustment base rent.

For Category 1 programs, the Table 1 AAF factor is applied before determining comparability (rent reasonableness). Comparability applies if the pre-adjustment gross rent (pre-adjustment contract rent plus any allowance for tenant-paid utilities) is above the published Fair Market Rent (FMR).

If the comparable rent level (plus any initial difference) is lower than the contract rent as adjusted by application of the Table 1 AAF, the comparable rent level (plus any initial difference) will be the new contract rent. However, the pre-adjustment contract rent will not be decreased by application of comparability.

In all other cases (*i.e.,* unless the contract rent is reduced by comparability):

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

Category 2: Section 8 Loan Management Program (24 CFR Part 886, Subpart A) and Property Disposition Program (24 CFR Part 886, Subpart C)

Category 2 programs are not currently subject to comparability. Comparability will again apply if HUD establishes regulations for conducting comparability studies under 42 U.S.C. 1437f(c)(2)(C).

The applicable AAF is determined as follows:

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

III. When To Use Reduced AAFs (From AAF Table 2)

In accordance with Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(A)), the AAF is reduced by 0.01:

In Section 8 programs, for a unit occupied by the same family at the time of the last annual rent adjustment (and where the rent is not reduced by application of comparability (rent reasonableness)).

The law provides that:

> Except for assistance under the certificate program, for any unit occupied by the same family at the time of the last annual rental adjustment, where the assistance contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor and where the rent for a unit is otherwise eligible for an adjustment based on the full amount of the factor, 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0. In the case of assistance under the certificate program, 0.01 shall be subtracted from the amount of the annual adjustment factor (except that the factor shall not be reduced to less than 1.0), and the adjusted rent shall not exceed the rent for a comparable unassisted unit of similar quality, type and age in the market area. 42 U.S.C. 1437f(c)(2)(A).

Legislative history for this statutory provision states that ''the rationale [for lower AAFs for non-turnover units is] that operating costs are less if tenant turnover is less . . .'' (see Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1995, Hearings Before a Subcommittee of the Committee on Appropriations 103d Cong., 2d Sess. 591 (1994)). The Congressional Record also states the following:

> Because the cost to owners of turnover-related vacancies, maintenance, and marketing are lower for long-term stable tenants, these tenants are typically charged less than recent movers in the unassisted market. Since HUD pays the full amount of any rent increases for assisted tenants in section 8 projects and under the Certificate program, HUD should expect to benefit from this 'tenure discount.' Turnover is lower in assisted properties than in the unassisted market, so the effect of the current inconsistency with market-based rent increases is exacerbated. (140 Cong. Rec. 8659, 8693 (1994)).

To implement the law, HUD publishes two separate AAF Tables, Table 1 and Table 2. The difference between Table 1 and Table 2 is that each AAF in Table 2 is 0.01 less than the corresponding AAF in Table 1. Where an AAF in Table 1 would otherwise be less than 1.0, it is set at 1.0, as required by statute; the corresponding AAF in Table 2 will also be set at 1.0, as required by statute.

IV. How To Find the AAF

AAF Table 1 and Table 2 are posted on the HUD User website at *http://www.huduser.gov/portal/datasets/aaf.html.* There are two columns in each AAF table. The first column is used to adjust contract rent for rental units where the highest cost utility is included in the contract rent, *i.e.,* where the owner pays for the highest cost utility. The second column is used where the highest cost utility is not included in the contract rent, *i.e.,* where the tenant pays for the highest cost utility.

The applicable AAF is selected as follows:

- Determine whether Table 1 or Table 2 is applicable. In Table 1 or Table 2, locate the AAF for the geographic area where the contract unit is located.
- Determine whether the highest cost utility is or is not included in contract rent for the contract unit.
- If highest cost utility is included, select the AAF from the column for ''Highest Cost Utility Included.'' If highest cost utility is not included, select the AAF from the column for ''Highest Cost Utility Excluded.''

V. Methodology

AAFs are rent inflation factors. Two types of rent inflation factors are calculated for AAFs: Gross rent factors and shelter rent factors. The gross rent factor accounts for inflation in the cost of both the rent of the residence and the utilities used by the unit; the shelter rent factor accounts for the inflation in the rent of the residence but does not reflect any change in the cost of utilities. The gross rent inflation factor is designated as ''Highest Cost Utility Included'' and the shelter rent inflation factor is designated as ''Highest Cost Utility Excluded.''

AAFs are calculated using CPI data on ''rent of primary residence'' and ''fuels and utilities.'' [1] The CPI inflation index for rent of primary residence measures the inflation of all surveyed units regardless of whether utilities are included in the rent of the unit or not. In other words, it measures the inflation of the ''contract rent'' which includes units with all utilities included in the rent, units with some utilities included in the rent, and units with no utilities included in the rent. In producing a gross rent inflation factor and a shelter rent inflation factor, HUD decomposes the contract rent CPI inflation factor into parts to represent the gross rent change and the shelter rent change. This is done by applying data from the Consumer Expenditure Survey (CEX) on the percentage of renters who pay for heat (a proxy for the percentage of renters who pay shelter rent) and, also, American Community Survey (ACS) data on the ratio of utilities to rents. For Puerto Rico, the Puerto Rico Community Survey (PRCS) is used to determine the ratio of utilities to rents, resulting in different AAFs for some metropolitan areas in Puerto Rico.[2]

[1] CPI indexes CUUSA103SEHA and CUSR0000SAH2 respectively.

[2] The formulas used to produce these factors can be found in the Annual Adjustment Factors overview and in the FMR documentation at *www.HUDUSER.gov.*

Survey Data Used To Produce AAFs

The rent inflation factor and fuel and utilities inflation factor for each large metropolitan area and Census region are based, respectively, on changes in the CPI index for rent of primary residence and the CPI index for fuels and utilities from 2017 to 2018. The CEX data used to decompose the contract rent inflation factor into gross rent and shelter rent inflation factors come from a special tabulation of 2018 CEX survey data produced for HUD. The utility-to-rent ratio used to produce AAFs comes from 2017 ACS median rent and utility costs.

Geographic Areas

Beginning with the data collection for 2018, BLS revised the sample for the CPI to be based on Core Based Statistical Areas (CBSAs). Previously the sample was based on Metropolitan Statistical Areas (MSAs) as defined in 1998. In addition, the population required to be designated a Class A CPI city was increased from 1.5 million to 2.5 million. The following major metropolitan areas were eliminated under the new sample design: Pittsburgh PA, Cincinnati-Hamilton OH–KY–IN, Cleveland-Akron OH, Milwaukee-Racine WI, Kansas City MO–KS, and Portland-Salem OR–WA. There are now 23 major metropolitan areas (excluding Puerto Rico, which is unchanged) with local CPI data, down from 28 last year (Riverside-San Bernardino has been split off from the Los Angeles survey area). This decline has resulted in fewer metropolitan component areas receiving local CPI adjustments, down to 70 metropolitan areas and subareas (HUD Metro FMR Areas) from 124 metropolitan and nonmetropolitan areas. There are no longer any nonmetropolitan areas using local CPI inflation factors (except for Puerto Rico).

Each metropolitan area that uses a local CPI update factor is listed alphabetically in the tables and each HUD Metro FMR Area (HMFA) is listed alphabetically within its respective CBSA. Each AAF applies to a specific geographic area and to units of all bedroom sizes. AAFs are provided:

• For metropolitan areas at the MSA or HMFA level.

• For the four Census Regions (to be used for those metropolitan areas that are not covered by a CPI city-survey and non-metropolitan areas).

AAFs use the same OMB metropolitan area definitions, as revised by HUD, that are used for the FY 2020 FMRs.

Area Definitions

To make certain that they are using the correct AAFs, users should refer to the Area Definitions Table section at *http://www.huduser.gov/portal/datasets/aaf.html.* The Area Definitions Table lists CPI areas in alphabetical order by state, and the associated Census region is shown next to each state name. Areas whose AAFs are determined by local CPI surveys are listed first. All metropolitan areas with local CPI surveys have separate AAF schedules and are shown with their corresponding county definitions or as metropolitan counties. In the six New England states, the listings are for counties or parts of counties as defined by towns or cities. The remaining counties use the CPI for the Census Region and are not separately listed in the Area Definitions Table at *http://www.huduser.gov/portal/datasets/aaf.html.*

Puerto Rico uses its own AAFs calculated from the Puerto Rico CPI as adjusted by the PRCS, the Virgin Islands uses the South Region AAFs and the Pacific Islands uses the West Region AAFs.

Dated: November 26, 2019.

Seth D. Appleton,

Assistant Secretary for Policy Development and Research.

[FR Doc. 2019–26426 Filed 12–9–19; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2014–0050; FXES111X0500000–XXX–FF05E00000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for Indiana Bat (Myotis Sodalis) and Northern Long-Eared Bat (Myotis Septentrionalis) at the Copenhagen Wind Farm, Jefferson and Lewis Counties, New York; and Draft Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of documents; request for comment and information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the receipt of an application from Copenhagen Wind Farm, LLC (applicant), for an incidental take permit (ITP) under the Endangered Species Act (ESA). The applicant requests the ITP for take of the federally endangered Indiana bat and threatened northern long-eared bat incidental to otherwise lawful activities associated with operation of its Copenhagen Wind Farm, a 40-turbine wind farm that has been constructed in Jefferson and Lewis Counties, New York. The applicant proposes a conservation program to minimize and mitigate for the unavoidable incidental take as described in its Indiana Bat and Northern Long-eared Bat Habitat Conservation Plan for the Copenhagen Wind Farm, Lewis and Jefferson Counties, New York (HCP). We request public comment on the application, which includes the applicant's proposed HCP, and the Service's draft environmental assessment, prepared pursuant to the National Environmental Policy Act. We provide this notice to seek comments from the public and Federal, Tribal, State, and local governments.

DATES: We will accept comments received or postmarked on or before January 9, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**) must be received by 11:59 p.m. Eastern Standard Time on the closing date.

ADDRESSES: *Obtaining documents:*

• *Internet:* You may obtain copies of the application including the HCP and draft environmental assessment (EA) on the internet at the New York Ecological Services Field Office's website at *https://www.fws.gov/northeast/nyfo/* or at *http://www.regulations.gov* at Docket No. FWS–R5–ES–2014–0050.

• *In-person:* Documents are available for public inspection by appointment during regular business hours at the New York Ecological Services Field Office, 3817 Luker Road, Cortland, NY 13045. Call 607–753–49334 to make an appointment.

Submitting Comments: If you wish to submit comments on any of the documents, you may do so by one of the following methods. Please reference Docket Number FWS–R5–ES–2014–0050 in all comments. For additional guidance on submitting comments, please see Public Comments under **SUPPLEMENTARY INFORMATION.**

• *Electronically:* Go to the Federal eRulemaking Portal website at: *http://www.regulations.gov.* In the Search box, enter FWS–R5–2014–0050, which is the docket number for this notice. Click on the appropriate link to locate this document and submit a comment.

• *By hard copy:* You may submit by mail or hand-delivery to Public Comments Processing, Attn: Docket No. FWS–R5–ES–2014–0050, New York Ecological Services Field Office, U.S. Fish and Wildlife Service, 3817 Luker Road, Cortland, NY 13045. We request that you send comments by only the methods described above.

FOR FURTHER INFORMATION CONTACT: Robyn Niver, by mail at New York Ecological Services Field Office, U.S. Fish and Wildlife Service, 3817 Luker Road, Cortland, NY 13045; or by phone at 607–753–9334.

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and its implementing regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the ESA as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect ''listed animal species'', or to attempt to engage in such conduct'' (16 U.S.C. 1538). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing incidental take permits for endangered and threatened species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

Applicant's Proposed Project

The applicant requests a 25-year ITP to take the federally endangered Indiana bat (*Myotis sodalis*) and threatened northern long-eared bat (*Myotis septentrionalis*). The applicant determined that unavoidable take is reasonably certain to occur incidental to operation of 40 previously constructed wind turbines. The proposed conservation strategy in the applicant's proposed HCP is designed to avoid, minimize, and mitigate the impacts of the covered activity on the covered species. The biological goals and objectives are to minimize potential take of Indiana bats and northern long-eared bats through onsite minimization measures and to provide habitat conservation measures for Indiana bats and northern long-eared bats to offset any unavoidable impacts from operations of the project. The HCP provides onsite avoidance and minimization measures, which include turbine operational adjustments. The estimated level of take from the project is 4 Indiana bats and 16 northern long-eared bats over the 25-year project duration. To offset the impacts of the unavoidable taking of Indiana bats and northern long-eared bats, the applicant proposes to protect a high priority winter hibernaculum by installing a gate.

National Environmental Policy Act

The issuance of an ITP is a Federal action that triggers the need for compliance with NEPA (42 U.S.C. 4321 *et seq.*). We prepared a draft EA that analyzes the environmental impacts on the human environment resulting from three alternatives: A no-action alternative, the proposed action, and an alternative consisting of feathering below the manufacturer's cut-in wind speed.

Next Steps

The Service will evaluate the application and the comments received to determine whether the permit application meets the requirements of section 10(a) of the ESA (16 U.S.C. 1531 *et seq.*). We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the above findings, we will determine whether the permit issuance criteria of section 10(a)(l)(B) of the ESA have been met. If met, the Service will issue the requested ITP to the applicant.

Public Comments

The Service invites the public to comment on the proposed HCP and draft EA during a 30-day public comment period (see **DATES**). You may submit comments by one of the methods shown under **ADDRESSES**.

Public Availability of Comments

We will post on *http://regulations.gov* all public comments and information received electronically or via hardcopy. All comments received, including names and addresses, will become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

The Service provides this notice under section 10(c) (16 U.S.C. 1539(c)) of the ESA and NEPA regulation 40 CFR 1506.6.

Glenn S. Smith,

Acting Assistant Regional Director, Ecological Services, North Atlantic-Appalachian Region.

[FR Doc. 2019–26491 Filed 12–9–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO430000 L12200000.PM0000; OMB Control Number 1004–0119]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Permits for Recreation on Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) is proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 9, 2020.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to the BLM at U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW, Room 2134LM, Washington, DC 20240, Attention: Jean Sonneman, or by email to *jesonneman@blm.gov.* Please reference OMB Control Number 1004–0119 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact David Ballenger by email at *dballeng@blm.gov,* or by telephone at 202–912–7642. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.* Persons who use a telecommunication device for the deaf may call the Federal Relay Service at 1–800–877–8339, to leave a message for Mr. Ballenger.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, the BLM provides the general public and other Federal agencies with an opportunity to comment on new, proposed, revised and continuing collections of information. This helps to assess the impact of the BLM's information collection requirements and minimize the public's reporting burden. It also helps the public understand the BLM's information collection requirements and provides the requested data in the desired format. A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on August 22, 2019 (84 FR 43818). No comments were received.

We are again soliciting comments on the proposed ICR that is described below. The BLM is especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the BLM; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the BLM enhance the quality, utility, and clarity of the information to be collected; and (5) how might the BLM minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. The BLM will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to the BLM to withhold your personal identifying information from public review, the BLM cannot guarantee that it will be able to do so.

The following information pertains to this request:

Abstract: Control number 1004–0119 allows the BLM to collect the required information to authorize commercial, competitive, and an organized group of recreational uses of public lands.

Title of Collection: Permits for Recreation on Public Lands (43 CFR part 2930).

OMB Control Number: 1004–0119.

Form: 2930–1, Special Recreation Permit Application.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals, commercial and competitive groups.

Description of Respondents: Applicants for recreational use of public lands managed by the BLM.

Total Estimated Number of Annual Respondents: 1,323.

Total Estimated Number of Annual Responses: 1,323.

Total Estimated Completion Time per Response: Varies from 4 hours per response.

Total Estimated Number of Annual Burden Hours: 5,292.

Respondent's obligation: Responses are required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor—and a person is not required to respond to—a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Chandra Little,

Bureau of Land Management, Regulatory Analyst.

[FR Doc. 2019–26537 Filed 12–9–19; 8:45 am]

BILLING CODE 4310–84–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–991 (Third Review)]

Silicon Metal From Russia; Scheduling of a Full Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of a full review pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the antidumping duty order on silicon metal from Russia would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: December 4, 2019.

FOR FURTHER INFORMATION CONTACT: Nitin Joshi ((202) 708–1669), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On September 6, 2019, the Commission determined that responses to its notice of institution of the subject five-year review were such that a full review should proceed (84 FR 49763, September 23, 2019); accordingly, a full review is being scheduled pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's website.

Participation in the review and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in this review as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the review need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

For further information concerning the conduct of this review 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, D, E, and F (19 CFR part 207).

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 this review available to authorized applicants under the APO issued in the review, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the review. A party granted access to BPI following publication of the Commission's notice of institution of the review need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the review will be placed in the nonpublic record on March 11, 2020, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the review beginning at 9:30 a.m. on Tuesday, March 31, 2020, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before March 23, 2020. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should participate in a prehearing conference to be held on March 30, 2020, at the U.S. International Trade Commission Building, if deemed necessary. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony in camera no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party to the review may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is March 20, 2020. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is April 8, 2020. In addition, any person who has not entered an appearance as a party to the review may submit a written statement of information pertinent to the subject of the review on or before April 8, 2020. On April 30, 2020, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before May 4, 2020, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. 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 Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (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.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 5, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–26532 Filed 12–9–19; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1438 and 1440 (Final)]

Acetone From Singapore and Spain

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of acetone from Singapore and Spain, provided for in subheadings 2914.11.10 and 2914.11.50 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV'').[2 3]

Background

The Commission, pursuant to section 735(b) of the Act (19 U.S.C. 1673d(b)), instituted these investigations effective February 19, 2019, following receipt of a petition filed with the Commission and Commerce by the Coalition for Acetone Fair Trade, consisting of AdvanSix Inc., Parsippany, New Jersey, Altivia Petrochemicals, LLC, Haverhill, Ohio, and Olin Corporation, Clayton, Missouri. The Commission scheduled the final phase of the investigations following notification of preliminary determinations by Commerce that imports of acetone from Singapore and Spain were being sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on August 26, 2019 (84 FR 44635). The hearing was held in Washington, DC, on October 21, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to section 735(b) of the Act (19 U.S.C. 1673d (b)). It completed and filed its determinations in these investigations on December 5, 2019. The views of the Commission are contained in USITC Publication 4997 (December 2019), entitled *Acetone from Singapore and Spain: Investigation Nos. 731–TA–1438 and 1440 (Final).*

By order of the Commission.

Issued: December 5, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–26546 Filed 12–9–19; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Acetone from Singapore: Final Determination of Sales at Less Than Fair Value, 84 FR 56171, October 21, 2019.

[3] Acetone from Spain: Final Determination of Sales at Less Than Fair Value, and Final Determination of No Shipments, 84 FR 56166, October 21, 2019.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1444 (Final)]

Carbon and Alloy Steel Threaded Rod From Thailand; Determination

On the basis of the record [1] developed in the subject investigation, the United

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of carbon and alloy steel threaded rod (''threaded rod'') from Thailand, provided for in subheadings 7318.15.50, 7318.15.20, and 7318.19.00 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV'').[2] [3]

Background

The Commission, pursuant to section 735(b) of the Act (19 U.S.C. 1673d(b)), instituted this investigation effective February 21, 2019, following receipt of a petition filed with the Commission and Commerce by Vulcan Threaded Products Inc. (''Vulcan''), Pelham, Alabama. The Commission scheduled the final phase of the investigation following notification of a preliminary determination by Commerce that imports of threaded rod from Thailand [4] were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 27, 2019 (84 FR 44916). The hearing was held in Washington, DC, on October 15, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made this determination pursuant to section 735(b) of the Act (19 U.S.C. 1673d(b)). It completed and filed its determination in this investigation on December 5, 2019. The views of the Commission are contained in USITC Publication 4998 (December 2019), entitled *Carbon and Alloy Steel Threaded Rod from Thailand: Investigation No. 731–TA–1444 (Final).*

By order of the Commission.

[2] 84 FR 56162 (October 21, 2019) (final determination).

[3] The Commission also finds that imports subject to Commerce's affirmative critical circumstances determination are not likely to undermine seriously the remedial effect of the antidumping duty order on Thailand.

[4] 84 FR 38597 (August 7, 2019) (preliminary determination).

Issued: December 5, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–26581 Filed 12–9–19; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Nelson Farms, Inc., et al.,* Civil Action No. 2:16–cv–00319, was lodged with the United States District Court for the District of Vermont on December 4, 2019.

This proposed Consent Decree concerns a complaint filed by the United States against Nelson Farms, Inc. and Douglas Nelson, Sr., pursuant to Sections 301, 309, and 404 of the Clean Water Act (''CWA''), 33 U.S.C. 1311, 1319, and 1344, to obtain injunctive relief from and impose civil penalties against the Defendants for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendants to restore the impacted areas and/or perform mitigation and to pay a civil penalty.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Perry Rosen, Senior Attorney, United States Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, Post Office Box 7611, Washington, DC 20044–7611, and refer to *United States* v. *Nelson Farms, Inc., et al.,* DJ # 90–5–1–1–19989.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Vermont, 11 Elmwood Avenue, Room 240, Burlington, VT 05041. In addition, the proposed Consent Decree may be examined electronically at *http://www.justice.gov/enrd/consent-decrees.*

Cherie Rogers,

Assistant Section Chief, Environmental Defense Section, Environment and Natural Resources Division.

[FR Doc. 2019–26490 Filed 12–9–19; 8:45 am]

BILLING CODE 4410–15–P

LEGAL SERVICES CORPORATION

Pro Bono Innovation Fund Request for Letters of Intent To Apply for 2020 Grant Funding

AGENCY: Legal Services Corporation

ACTION: Notice.

SUMMARY: The Legal Services Corporation (LSC) issues this Notice describing the conditions for submitting Letters of Intent to Apply for 2020 Pro Bono Innovation Fund grants.

DATES: Letters of Intent must be submitted by 11:59 p.m. EST on Monday, February 10, 2020.

ADDRESSES: Letters of Intent must be submitted electronically at *http://lscgrants.lsc.gov.*

FOR FURTHER INFORMATION CONTACT: Mytrang Nguyen, Program Counsel, Office of Program Performance, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007; (202) 295–1564 or *nguyenm@lsc.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

Since 2014, Congress has provided an annual appropriation to LSC ''for a Pro Bono Innovation Fund.'' *See, e.g.,* Consolidated Appropriations Act, 2017, Public Law 115–31, 131 Stat. 135 (2017). LSC requested these funds for grants to ''develop, test, and replicate innovative pro bono efforts that can enable LSC grantees to expand clients' access to high quality legal assistance.'' LSC Budget Request, Fiscal Year 2014 at 26 (2013). The grants must involve innovations that are either ''new ideas'' or ''new applications of existing best practices.'' *Id.* Each grant would ''either serve as a model for other legal services providers to follow or effectively replicate a prior innovation. *Id.* The Senate Appropriations Committee explained that these funds ''will support innovative projects that promote and enhance pro bono initiatives throughout the Nation,'' and the House Appropriations Committee directed LSC ''to increase the involvement of private attorneys in the delivery of legal services to [LSC-eligible] clients.'' Senate Report 114–239 at 123 (2016), House Report 113–448 at 85 (2014).

Since its inception, the Pro Bono Innovation Fund has advanced LSC's goal of increasing the quantity and quality of legal services by funding projects that more efficiently and effectively involve pro bono volunteers in serving the critical unmet legal needs of LSC-eligible clients. In 2017, LSC built on these successes by creating three funding categories to better focus on innovations serving unmet and well-defined client needs (Project Grants), on building comprehensive and effective pro bono programs through new applications of existing best practices (Transformation Grants), and on providing continued development support for the most promising innovations (Sustainability Grants).

II. Funding Opportunities Information

A. Eligible Applicants

To be eligible for the Pro Bono Innovation Fund's Project, Sustainability, and Transformation grants, Applicants must be current grantees of LSC Basic Field-General, Basic Field-Migrant, or Basic Field-Native American grants. In addition, Sustainability Grant Applicants must also be a current Pro Bono Innovation Fund grantee with a 2018 grant award.

B. Pro Bono Innovation Fund Purpose and Key Goals

Pro Bono Innovation Fund grants develop, test, and replicate innovative pro bono efforts that can enable LSC grantees to use pro bono volunteers to serve larger numbers of low-income clients and improve the quality and effectiveness of the services provided. The key goals of the Pro Bono Innovation Fund are to:

1. Address gaps in the delivery of legal services to low-income people;
2. Engage more lawyers and other volunteers in pro bono service;
3. Develop, test, and replicate innovative pro bono efforts.

C. Funding Opportunities

1. Project Grants

The goal of Pro Bono Innovation Fund *Project Grants* is to leverage volunteers to meet a critical, unmet and well-defined client need. Consistent with the key goals of the Pro Bono Innovation Fund, applicants are encouraged to focus on engaging volunteers to increase free civil legal aid for low-income Americans by proposing new, replicable ideas. Applicants are strongly encouraged to research prior Pro Bono Innovation Fund projects to replicate and improve upon them. LSC is particularly interested in applications that propose to replicate projects LSC has previously funded with Sustainability Grants. Our Sustainability Grants have included:

- Community-based partnerships, like the Medical-Legal Partnership of Community Legal Aid, Inc. (MA) or the school-based clinic of Legal Aid of West Virginia, Inc., that work with law firms to provide legal services where clients are located;
- Court-based partnerships, like those at Legal Action of Wisconsin, Inc., and Legal Services Law Line of Vermont, Inc., that use pro bono volunteers to provide same-day, in-court representation and legal assistance;
- An ''emeritus'' project at The Legal Aid Society of Cleveland that provides transitioning and retired attorneys with varied and substantive opportunities to support the LASC's advocates and clients;
- A neighborhood-based project at Legal Aid of Western Missouri that engages transactional attorneys to assist clients in distressed and underserved communities.

Project Grants can be either 18 or 24 months.

2. Transformation Grants

The goal of Pro Bono Innovation Fund *Transformation Grants* is to support LSC grantees in comprehensive assessment and restructuring of pro bono programs through new applications of existing best practices in pro bono delivery. Each Transformation Grant will support a rigorous assessment of an LSC grantee's pro bono program and the identification of best practices in pro bono delivery that are best suited to that grantee's needs and circumstances. Transformation Grants are targeted towards LSC grantees whose leadership is committed to restructuring an entire pro bono program and incorporating pro bono best practices into core, high-priority client services with an urgency to create a high-impact pro bono program. This funding opportunity is open to all LSC grantees but is primarily intended for LSC grantees who have been unsuccessful applying for Project Grants or who have never applied for a Pro Bono Innovation Fund grant in the past.

New in 2020: Transformation Grants can be either 24 or 36 months.

3. Sustainability Grants

Pro Bono Innovation Fund *Sustainability Grants* are available to current Pro Bono Innovation Fund grantees who received 2018 grants. The goal of Sustainability Grants is to support further development of the most promising and replicable Pro Bono Innovation Fund projects with an additional 24 months of funding so grantees can leverage new sources of revenue for the project and collect meaningful data to demonstrate the project's results and outcomes for clients and volunteers. Applicants for Sustainability Grants will be asked to propose an ambitious strategy that reduces the Pro Bono Innovation Fund contribution to the project over the Sustainability Grant term.

D. Available Funds for 2020 Grants

The availability of funds for Pro Bono Innovation Fund grants for FY 2020 depends on LSC's appropriation. LSC is currently operating under a Continuing Resolution for FY 2019 which funds the federal government through December 20, 2019. The Continuing Resolution maintains funding at $415 million. Pro Bono Innovation Fund grant decisions for FY 2020 will be made in the summer of 2020. LSC anticipates knowing the total amount available for Pro Bono Innovation Fund grants before August.

In FY 2019, Congress appropriated to LSC $4.5 million for the Pro Bono Innovation Fund. LSC awarded $4.3 million in direct grants to support fifteen Pro Bono Innovation Fund projects with a median award of $289,812.

LSC will not designate fixed or estimated amounts for the three different funding categories and will make grant awards for the three categories within the total amount of funding available. There is no maximum amount for Pro Bono Innovation Fund requests that are within the total funding available.

E. Project and Grant Term

Pro Bono Innovation Fund grant awards can have grant terms of 18, 24, or 36 months, depending on the type of grant.

	18 Months	24 Months	36 Months
Project Grants	√	√	X
Transformation Grants	X	√	√
Sustainability Grants	X	√	X

Applicants for Project Grants can apply for either an 18- or a 24-month grant. Applicants for Transformation Grants can apply for either a 24- or a 36-month grant. Applicants for Sustainability Grants can apply for a 24-

month grant only. Applications must cover the full proposed grant term. The grant term is expected to commence on October 1, 2020.

III. Grant Application Process and Letter of Intent To Apply Instructions

A. Pro Bono Innovation Fund Grant Application Process

LSC is committed to reviewing all Pro Bono Innovation Fund grant applications in a timely and thorough manner. Applicants must first submit a Letter of Intent (LOI) to Apply for Funding to LSC by February 10, 2020 to be considered for a grant. After review by LSC Staff, LSC's President makes the final decision on which applicants will be asked to submit a detailed, full application due to LSC in April. Applicants will be notified of invitations to submit a full application by March 2020. Once LSC has received a full application from a selected applicant, the application will undergo a rigorous review by LSC staff and external subject matter experts. LSC's President makes the final decision on funding for the Pro Bono Innovation Fund.

B. Late or Incomplete Applications

LSC may consider an LOI after the deadline, but only if the Applicant has submitted an email to *probonoinnovation@lsc.gov* explaining the circumstances that caused the delay prior to the applicable deadline. Communication with LSC staff, including assigned Program Liaisons, is not a substitute for sending an explanatory email to *probonoinnovation@lsc.gov.* At its discretion, LSC may consider incomplete applications. LSC will determine the admissibility of late or incomplete applications on a case-by-case basis.

C. Letters of Intent To Apply for Funding Requirements and Format

The LOI should succinctly summarize the information requested for the category of funding the applicant seeks. A complete LOI consists of:

1. A narrative that responds to the questions for the funding category. The narrative should be submitted as a PDF entitled ''Organization Name_2019 LOI''.

2. A completed LOI Budget Template. The LOI Budget should be submitted as an Excel document entitled ''Organization Name_2019 LOI Budget''.

Applicants must submit the LOI via email to *probonoinnovation@lsc.gov.* The email should include the narrative and budget form as two separate attachments following the naming conventions described above.

The LOI narrative should be a PDF document. The narrative must not exceed 5 double-spaced pages or approximately 1,300 words in Times New Roman, 12-point font. The LOI narrative must be paginated. The budget form should be a completed LOI Budget Template, no changes or additions should be made to the template form. Applicants who do not follow the above formatting requirements for the Narrative submission may be subject to scoring penalties.

Applicants may submit multiple LOIs under the same or different funding category. If applying for multiple grants, applicants should submit a separate LOI in a separate email for each funding request.

1. Project Grants

The LOI Narrative for Project Grants should respond to the following questions.

a. Project Description. Please provide a brief description of the proposed project that includes:

- The specific client need and challenge or opportunity in the pro bono delivery system that the project will address.
- The goals and objectives of the project, the activities that make up the project, and how those activities will link to and achieve the stated goals and objectives.
- Strong indication of volunteer interest in and support for the project.
- The expected impact of the project. This should include a brief explanation of the changes and outcomes that will be created as a result of the project.
- The proposed strategies that are innovative or the best practices being replicated, including a brief discussion of how these strategies or best practices were identified.

b. Project Staff, Organizational Capacity, and Project Partners. Please briefly identify and describe the project team and project partners including:

- The qualifications and relevant experience of the proposed project team, any proposed partner organizations, and your organization.
- The role of your organization's executive management in the design and implementation of the project.

c. Budget and Timeline. Please state whether you are proposing an 18- or 24-month project and provide the following information about the estimated project costs:

- Estimated total project cost. This includes the estimate for the Pro Bono Innovation Fund requested amount and other in-kind or cash contributions to support the project. Your narrative should provide a breakdown of the major project expenses including, but not limited to, personnel, project expenses, contracts or sub-grants, etc., and how each expense supports the project design.
- For expenses related to personnel, please indicate how many and which positions will be fully or partially funded by the proposed grant.
- A list of any anticipated contributions, both in-kind and monetary, from all partners involved in the project.
- A list of key partners who will receive Pro Bono Innovation Fund funding, including their roles and the estimated dollar amount or percent of budget assigned to each partner.

2. Transformation Grants

The LOI Narrative for Transformation Grants should respond to the following questions.

a. Transformation Strategy. Please explain why you are seeking a Transformation Grant for your organization. In your response, please include:

- An honest assessment of the challenges with your organization's current pro bono efforts that inhibit your ability to innovate or replicate modern pro bono best practices.
- A brief description of your plans for a comprehensive and strategic assessment of your pro bono program.
- At least three specific and important improvements to your organization's pro bono program that you would like to achieve in the first year of a 24- or 36-month Transformation Grant.

b. Guiding Coalition. Please describe the core team who would be responsible for the pro bono transformation effort in your organization. In your response, please state:

- The qualifications and relevant experience of each proposed team member.
- Whether a majority of your executive and senior managers agree that your organization's pro bono program needs significant improvements.
- The role your organization's executive director and/or senior managers would play in a pro bono transformation effort.

c. Budget. Please state whether you are seeking a 24- or 36-month term and describe what you would like the Transformation Grant to fund over the proposed grant period. In your response, please include the following information about the anticipated costs associated with a transformation effort for your pro bono program:

• The estimated total cost and a clear description of what the grant will fund. Your narrative should provide a breakdown of the major expenses including, but not limited to, personnel, project expenses, contracts or sub-grants, etc., and how each expense supports the transformation effort to improve your pro bono program.

• For expenses related to personnel, please indicate how many and which positions will be fully or partially funded by the proposed grant.

• For contracts, please describe whether you intend to use consultants, implement new technology systems, conduct business process analysis, etc. and how this supports improvements to you pro bono program.

3. Sustainability Grants

The LOI Narrative for Sustainability Grants should respond to the following questions.

a. Justification for Sustaining the Pro Bono Innovation Project. Please describe why you are seeking a Sustainability Grant. In your response, please discuss the following:

• The impact of the Pro Bono Innovation Fund project to date, supported by data and analysis as to whether the goals of the project were achieved.

• Evidence of ongoing client need and how you intend to make the project part of your core legal services.

• The level of engagement of pro bono volunteers/private bar and the best practices in pro bono delivery that can be replicated by others.

• How ongoing program evaluation and data collection will be incorporated into the project.

b. Project Staff and Management Support. Please briefly identify and describe the project team and project partners. In your response, please include the following:

• The project staff that will be responsible for the sustainability phase of the project. Please include any additional staff, descriptions of new responsibilities for existing project staff and/or organizational changes that will be made.

• The role of your organization's executive management in the decision to seek this Sustainability Grant and recent examples of your organization's track record turning ''new'' or special projects into core legal services.

c. Budget and Strategy to Reduce PBIF Funding. Please describe what you would like the Sustainability Grant to fund. In your response, please be sure to provide the following information:

• Estimated total project cost. This includes the estimate for the Pro Bono Innovation Fund requested amount and other in-kind or cash contributions to support the project. Your narrative should provide a breakdown of the major project expenses including, but not limited to, personnel, project expenses, etc., and how each expense supports the project design.

• A narrative proposing how you plan to reduce the Pro Bono Innovation Fund contribution to the project for the grant term. LSC is not setting a specific percentage of required match for Sustainability Grant applicants, but will assess the two-year budget from the applicant's previously funded project with the grant amount proposed in the Sustainability LOI. LSC's expectation is that applicants will propose a meaningful shift from Pro Bono Innovation Fund support to other sources of support during the grant term.

• A narrative discussing the potential sources of funding that have been or will be cultivated. If the project has already received new financial support, please provide the source and amount committed and further describe the plans for ensuring continued financial support.

Dated: December 4, 2019.

Stefanie Davis,

Senior Assistant General Counsel.

[FR Doc. 2019–26499 Filed 12–9–19; 8:45 am]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Astronomy and Astrophysics Advisory Committee; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Astronomy and Astrophysics Advisory Committee (#13883).

Date and Time: January 23, 2020; 9:00 a.m.–5:00 p.m.

January 24, 2020; 9:00 a.m.–12:00 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314, Room E2020.

Type of Meeting: Open.

Attendance information for the meeting will be forthcoming on the website: *https://www.nsf.gov/mps/ast/aaac.jsp.*

Contact Person: Dr. Christopher Davis, Program Director, Division of Astronomical Sciences, Suite W 9136, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone: 703–292–4910.

Purpose of Meeting: To provide advice and recommendations to the National Science Foundation (NSF), the National Aeronautics and Space Administration (NASA) and the U.S. Department of Energy (DOE) on issues within the field of astronomy and astrophysics that are of mutual interest and concern to the agencies.

Agenda: To hear presentations of current programming by representatives from NSF, NASA, DOE and other agencies relevant to astronomy and astrophysics; to discuss current and potential areas of cooperation between the agencies; to formulate recommendations for continued and new areas of cooperation and mechanisms for achieving them. Discuss the Committee's draft annual report due 15 March 2020.

Dated: December 5, 2019.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2019–26585 Filed 12–9–19; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 040–08903; NRC–2019–0186]

Homestake Mining Company of California; Grants Reclamation Project

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an environmental assessment (EA) and a finding of no significant impact (FONSI) regarding a request from Homestake Mining Company (HMC) of California for approval of an amendment to HMC Radioactive Materials License SUA–1471 to add zeolite water treatment systems. HMC is authorized to manage a groundwater restoration program to restore the concentrations of the constituents of concern to the acceptable groundwater standards at its Grants Reclamation Project site in Milan, New Mexico, under NRC License SUA–1471, issued originally in 1988.

DATES: The EA referenced in this document is available on December 10, 2019.

ADDRESSES: Please refer to Docket ID NRC–2019–0186 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0186. Address questions about NRC dockets IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* 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: Jean Trefethen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–0867, email: *Jean.Trefethen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated December 11, 2017 (ADAMS Package Accession No. ML17361A006), Homestake Mining Company of California (HMC or the licensee) requested NRC approval of HMC's license amendment to modify its License No. SUA–1471, Condition 35. The request includes the addition of a zeolite water treatment system for the removal of low levels of uranium from contaminated groundwater as part of the approved groundwater corrective action program (CAP) at the Grants Reclamation Projects site. The CAP is authorized under NRC License No. SUA–1471, Condition 35.C and is implemented using an adaptive, ongoing strategy that includes monitoring, water management, water treatment, and source control. The Grants Reclamation Project site is located near Milan, New Mexico and is owned and operated by HMC. The NRC staff has prepared an EA (ADAMS Accession No. ML19263C623) as part of its review of this proposed action in accordance with the requirements in part 51 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions'' and associated staff guidance. The NRC has concluded that the proposed action will not have a significant effect on the quality of the human environment.

II. Summary of the Environmental Assessment

Description of the Proposed Action

The proposed action is to review and approve the request for modification of the CAP by amending License No. SUA–1471, Condition 35, to add the 300 gpm and 1200 gpm zeolite water treatment systems to increase the water treatment capacity. Pilot testing of the zeolite water treatment systems was performed by the licensee to verify the effectiveness of the treatment system in order to accelerate the groundwater restoration. As part of the pilot test, the 300 gpm and 1200 gpm zeolite treatment systems were installed and are currently in use.

Need for the Proposed Action

By letter dated December 11, 2017, the licensee notified the NRC of its proposal to formally add zeolite groundwater treatment systems to its CAP. Expanded groundwater treatment capacity is needed to accelerate groundwater restoration at the Grants site. Use of the zeolite water treatment system, in addition to reverse osmosis, will allow HMC to meet its NRC-mandated water remediation goals.

Environmental Impacts of the Proposed Action

The NRC staff evaluated the potential environmental impacts associated with the proposed action and has performed its environmental review in accordance with the requirements in 10 CFR part 51 and associated staff guidance. As detailed in the EA, the staff reviewed relevant information submitted by the licensee and consulted with the New Mexico State Historic Preservation Office (NMSHPO), the Hopi of Arizona, Navajo Nation, Pueblo of Acoma, Pueblo of Isleta, Pueblo of Laguna, and Pueblo of Zuni. The NRC staff, with the assistance of the U.S. Fish and Wildlife Service (USFWS) Information for Planning and Consultation (IPaC) project planning tool, determined that the listed species and/or critical habitat would not be adversely affected by the proposed action. Additionally, a draft EA was shared with New Mexico Environment Department (NMED).

During the pilot study, HMC constructed the 300 gpm and 1200 gpm zeolite systems in a previously and highly disturbed area within the licensed site boundary, and no further activities involving land disturbance are planned. Therefore, the NRC staff considers that there would be no impacts on the following resources areas: land use, geology and soils, water resources, ecology, meteorology, climate, air quality, noise, transportation, waste management, visual and scenic resources, and socioeconomic resources.

The NRC staff evaluated the radiological impacts on workers and the public. The staff found that the radiological doses to workers would be within the dose limits specified in 10 CFR 20.1201, ''Occupational dose limits to adults,'' and that radiological doses to the public would be indistinguishable when compared to background radiation.

The NRC staff also evaluated the cumulative impacts by identifying past, present, and reasonably foreseeable future actions at the Grants site, and the incremental impacts of HMC's proposed action. The staff determined that the proposed action would not significantly contribute to cumulative impacts. The staff also determined that the proposed action would not affect federally listed endangered or threatened species or their critical habitats, if present.

Environmental Impacts of the Alternatives to the Proposed Action

The NRC staff considered a no-action alternative for this EA. Under the no-action alternative, the NRC staff could deny HMC's request to add the zeolite water system at its Grants site. However, because HMC is using the zeolite system under a pilot test, the NRC considers the environmental impacts of this alternative to be similar to those of the proposed action. Therefore, staff concluded that denying the addition of the zeolite systems to HMC's license is not a reasonable alternative.

Agencies and Persons Consulted

In August 2018, the NRC staff accessed the USFWS IPaC online project planning tool and determined that, while there was potential for some threatened or endangered species to be present in the general area, there is no critical habitat at the project location. Therefore, the NRC has determined that no further consultation with the USFWS is required under Section 7 of the Endangered Species Act. By letter dated

October 31, 2018 (ADAMS Package Accession No. ML18267A257), the staff consulted with the New Mexico Department of Game and Fish (NMDGF) and asked them to concur with the determination that the proposed action was not the type to affect threatened or endangered species or their critical habitats, assuming they were present. The NMDGF replied by letter dated December 3, 2018 and indicated that, in 2016, a dozen migratory bird fatalities occurred at one of the evaporation ponds on the Grants site. As a follow-up to their response the NRC staff called the NMDGF to clarify that the pond in question is not part of the current licensing action and that the NRC would on their recommendation contact the USFWS. In March 2019, the NRC spoke with the USFWS to better understand whether their concerns extended to threatened and endangered species. During that call, the USFWS indicated that in 2016 they contacted HMC and provided suggestions for preventing migratory bird deaths. The contact at USFWS Region 2 is unaware of additional migratory bird deaths or whether threatened or endangered species were included among the dead birds at the Grants site.

Section 106 of the National Historic Preservation Act of 1966, as amended, requires federal agencies to consider the effects of their undertakings on historic properties. The NRC's approval of this license amendment request constitutes a federal undertaking. However, the NRC staff has determined that the scope of activities described in this license amendment request do not have the potential to cause effects on historic properties, assuming those were present, because the NRC's approval of this license request will not result in construction or land disturbance activities.

The NRC staff also consulted with the NMSHPO by letter dated September 21, 2018 (ADAMS Accession No. ML18232A151). The NMSHPO responded by email dated October 16, 2018, stating that they agreed with a finding of no adverse effect for the proposed action and also recommended by letter dated November 13, 2018, that the NRC consult six Tribes: Hopi of Arizona, Navajo Nation, Pueblo of Acoma, Pueblo of Isleta, Pueblo of Laguna, and Pueblo of Zuni (ADAMS Package Accession No. ML18233A143). By letter dated November 13, 2018, the NRC sent a consultation letter to the six Tribes explaining the activities involved in the proposed action and the preliminary determination of no potential to effect historic properties, assuming they were present.

In July 2019, the NRC provided the NMED with the opportunity to review the draft EA (ADAMS Accession No. ML19196A071) and requested NMED input. On August 12, 2019 the NMED responded by email (ADAMS Accession No. ML19225B308) that they had reviewed the draft EA with one comment and no other concerns with the NRC's EA findings. The NRC addressed NMED's comment in the final EA (ADAMS Accession Number ML19263C623).

III. Finding of No Significant Impact

In accordance with the requirements in 10 CFR part 51, the NRC staff has concluded that the proposed action will not significantly affect the quality of the human environment. Therefore, the staff finds, pursuant to 10 CFR 51.31, that preparation of an environmental impact statement is not required for the proposed action, and that a FONSI is appropriate.

Dated at Rockville, Maryland, this 4th day of December 2019.

For the Nuclear Regulatory Commission.

Cinthya I. Roman-Cuevas,

Chief, Environmental Review Materials Branch Division of Fuel Cycle Safety, Safeguards, and Environmental Review Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2019–26493 Filed 12–9–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250 and 50–251; NRC–2018–0101]

Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4

AGENCY: Nuclear Regulatory Commission.

ACTION: Subsequent License Renewal and record of decision.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued Subsequent Renewed Facility Operating License Nos. DPR–31 and DPR–41 to Florida Power & Light Company (FPL or licensee), operator of the Turkey Point Nuclear Generating Unit Nos. 3 and 4 (Turkey Point). The NRC has prepared a record of decision (ROD) that supports the NRC's decision to issue Subsequent Renewed Facility Operating License Nos. DPR–31 and DPR–41.

DATES: The Subsequent Renewed Facility Operating License Nos. DPR–31 and DPR–41 were issued on December 4, 2019.

ADDRESSES: Please refer to Docket ID NRC–2018–0101 when contacting the NRC about the availability of information regarding this document. You may obtain publicly- available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2018–0101. Address questions about NRC dockets to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@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 access publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* 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: William Burton, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6332, email: *William.Burton@nrc.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the NRC has issued Subsequent Renewed Facility Operating License Nos. DPR–31 and DPR–41 to Florida Power & Light Company (FPL or licensee), the operator of Turkey Point Nuclear Generating Unit Nos. 3 and 4 (Turkey Point). Subsequent Renewed Facility Operating License No. DPR–31 authorizes operation of Turkey Point Unit 3 through July 19, 2052, by the licensee at reactor core power levels not in excess of 2,644 megawatts thermal, in accordance with the provisions of the Turkey Point 3 operating license and technical specifications. Subsequent Renewed Facility Operating License No. DPR–41 authorizes operation of Turkey Point Unit 4 through April 10, 2053, by the licensee at reactor core power levels not in excess of 2,644 megawatts thermal, in accordance with the provisions of the Turkey Point 4 operating license and technical specifications. The NRC's ROD that supports the NRC's decision to issue Subsequent Renewed Facility Operating License Nos. DPR–31 and DPR–41 is available in ADAMS under Accession No. ML19309F859.

As discussed in the ROD and the final supplemental environmental impact statement (FSEIS) for Turkey Point, entitled Supplement 5, Second Renewal, to NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Final Report,'' dated October 2019 (ADAMS Accession No. ML19290H346), the NRC has considered the reasonably foreseeable impacts of subsequent license renewal for Turkey Point Units 3 and 4, as well as a range of reasonable alternatives that included natural gas combined-cycle (NGCC); NGCC and solar photovoltaic combination; new nuclear; and the no-action alternative. In addition, the staff evaluated the use of mechanical draft cooling towers as a cooling water system alternative to the existing Cooling Canal System (CCS). This analysis compared the environmental impacts of the closed-cycle cooling system approach with the existing CCS. The FSEIS documents the environmental review, including the determination that the adverse environmental impacts of subsequent license renewal for Turkey Point are not so great that preserving the option of subsequent license renewal for energy-planning decisionmakers would be unreasonable.

The Turkey Point nuclear units are located in Miami-Dade County, east of Florida City, Florida. Each unit consists of a Westinghouse pressurized-water reactor nuclear steam supply system. The application for the subsequent renewed licenses dated January 30, 2018 (ADAMS Package Accession No. ML18037A812), as supplemented by letters dated February 9, 2018 (ADAMS Accession No. ML18044A653); February 16, 2018 (ADAMS Package Accession No. ML18053A123); March 1, 2018 (ADAMS Package Accession No. ML18072A224); and April 10, 2018 (ADAMS Accession No. ML18102A521 and ADAMS Package Accession No. ML18113A132). The NRC staff has determined that the application, as supplemented, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the NRC's regulations. As required by the Act and the NRC's regulations in chapter 1 of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC has made appropriate findings, which are set forth in the license.

A public notice of the NRC's consideration of the subsequent renewed license application and an opportunity for a hearing was published in the **Federal Register** on May 2, 2018 (83 FR 19304). Requests for hearing were filed, and an adjudicatory proceeding was then initiated. All contested issues were subsequently decided by an NRC Atomic Safety and Licensing Board (Board) and proceedings before the Board have terminated; appeals from the Board's decisions are pending before the Commission. The ASLB's decisions have not been stayed pending Commission review, and issuance of the subsequent renewed licenses is therefore permissible. The NRC staff has determined that issuance of the subsequent renewed licenses prior to Commission action on the pending appeals would not foreclose or prejudice any action by the Commission.

For further details with respect to this action, see: (1) FPL's subsequent license renewal application for Turkey Point Units 3 and 4, dated January 30, 2018 (ADAMS Package Accession No. ML18037A812), and the above cited supplements; (2) the NRC's safety evaluation report published on July 22, 2019 (ADAMS Accession No. ML19191A057); (3) the NRC's final environmental impact statement (NUREG–1437, Supplement 5, Second Renewal) for Turkey Point Units 3 and 4, dated on October 2019 (ADAMS Accession No. ML19290H346); and (4) the NRC's ROD, issued on December 4, 2019 (ADAMS Accession No. ML19309F859).

Dated at Rockville, Maryland, this 4th day of December 2019.

For the Nuclear Regulatory Commission

Anna H. Bradford,

Director, Division of New and Renewed Licenses, Office of Nuclear Reactor Regulation.

[FR Doc. 2019–26500 Filed 12–9–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of December 9, 16, 23, 30, 2019, January 6, 13, 2020.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

Week of December 9, 2019

There are no meetings scheduled for the week of December 9, 2019.

Week of December 16, 2019—Tentative

Tuesday, December 17, 2019

10:00 a.m. Briefing on Equal Employment Opportunity, Affirmative Employment, and Small Business (Public Meeting); (Contact: Larniece McKoy Moore: 301–415–1942).

This meeting will be webcast live at the Web address—*https://www.nrc.gov/.*

Week of December 23, 2019—Tentative

There are no meetings scheduled for the week of December 23, 2019.

Week of December 30, 2019—Tentative

There are no meetings scheduled for the week of December 30, 2019.

Week of January 6, 2020—Tentative

There are no meetings scheduled for the week of January 6, 2020.

Week of January 13, 2020—Tentative

There are no meetings scheduled for the week of January 13, 2020.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov.* The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or by email at *Wendy.Moore@nrc.gov* or *Tyesha.Bush@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated at Rockville, Maryland, this 6th day of December 2019.

For the Nuclear Regulatory Commission.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2019–26681 Filed 12–6–19; 4:15 pm]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Notice of Approval of Alternative Arbitration Procedure; American Arbitration Association

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of approval.

SUMMARY: This notice advises interested persons that the Pension Benefit Guaranty Corporation (PBGC) has approved a request from the American Arbitration Association (AAA) for approval of an alternative arbitration procedure.

DATES: PBGC's approval of the AAA's alternative arbitration procedure is effective January 1, 2020.

FOR FURTHER INFORMATION CONTACT: Bruce Perlin (*Perlin.Bruce@PBGC.gov*), 202–326–4020, ext. 6818, Office of the General Counsel, Suite 340, 1200 K Street NW, Washington, DC 20005–4026; (TTY users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4020, extension 6818 or 6757.)

SUPPLEMENTARY INFORMATION:

Background

Section 4221(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), requires ''any dispute'' between an employer and a multiemployer pension plan concerning a withdrawal liability determination to be ''resolved through arbitration.'' Under the MPPAA, an employer has 90 days after receipt of notice of a withdrawal liability assessment to request review of that assessment. ERISA § 4219(b)(2)(A). If there remains a dispute about the assessment of withdrawal liability, the employer may ''initiate'' arbitration of the dispute within a 60-day period after the earlier of (i) the date the employer was notified of the plan's response to the employer's request for review, or (ii) 120 days after the date that the employer requested review of the withdrawal liability. ERISA § 4221(a)(1). If the employer fails to timely initiate arbitration, the assessment becomes due and owing and the plan sponsor may bring an action in a state or federal court to collect the assessment. ERISA § 4221(b).

The MPPAA directed PBGC to promulgate fair and equitable procedures for the conduct of an arbitration under section 4221 of ERISA. PBGC's implementing regulation, ''Arbitration of Disputes in Multiemployer Plans'' (29 CFR part 4221), was designed to provide procedures to facilitate prompt resolution of disputes by an impartial arbitrator, facilitating expeditious resolutions of disputes concerning an employer's withdrawal liability. PBGC's default arbitration procedures provide rules for the appointment and powers of the arbitrator, rules for discovery and hearings, and rules for awards, costs, filing and service (§§ 4221.4–4221.13).

Scope of Alternative Arbitration Procedures

In lieu of the default procedures, under § 4221.14 of PBGC's arbitration regulation, an arbitration may be conducted in accordance with an alternative arbitration procedure approved by PBGC in accordance with § 4221.14(c). Certain rules applicable to the default procedures cannot be varied in any alternative procedure. 29 CFR 4221.14(b). If an arbitration is conducted under a PBGC-approved alternative procedure, the alternative procedure governs all aspects of the arbitration, with the following exceptions provided in § 4221.14(b): The time limits for initiating arbitration may not differ from the time limits provided § 4221.3; the arbitrator must be selected after the initiation of arbitration; the arbitrator must give the parties an opportunity for prehearing discovery that is substantially equivalent to that required by § 4221.5(a)(2); copies of the award must be made available to the public at least to the extent mandated by § 4221.8(g); and the arbitration costs must be allocated in accordance with § 4221.10.

Process for Approval of Alternative Arbitration Procedures

Under § 4221.14(c) PBGC may approve arbitration procedures on its own initiative by publishing an appropriate notice in the **Federal Register**. Additionally, the sponsor of an arbitration procedure may request PBGC approval of its procedures by submitting an application to PBGC. The application must include: (1) A copy of the procedures for which approval is sought; (2) a description of the history, structure and membership of the organization that sponsors the procedures; and (3) a description of the reasons why, in the sponsoring organization's opinion, the procedures satisfy the criteria for approval set forth in this section.

Criteria for Approval of Alternative Procedures

Under § 4221.21(d), PBGC shall approve an application if it determines that the proposed procedures will be substantially fair to all parties involved in the arbitration of a withdrawal liability dispute and that the sponsoring organization is neutral and able to carry out its role under the procedures. PBGC may request comments on the application by publishing an appropriate notice in the **Federal Register** and notice of PBGC's decision on the application shall be published in the **Federal Register**. Unless the notice of approval specifies otherwise, approval will remain effective until revoked by PBGC through a **Federal Register** notice.

AAA's Alternative Arbitration Rules—1981 & 1986 MPPAR

In 1985, on its own initiative, PBGC approved the 1981 Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes (the ''1981 MPPAR''), an alternative arbitration procedure sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association (AAA). 50 FR 38046 (Sept. 19, 1985). In 1986, PBGC approved AAA's request to use an amended MPPAR (the ''1986 MPPAR'') which eliminated certain procedural differences from the 1981 MPPAR and PBGC's final arbitration regulation. 51 FR 22585 (June 20, 1986). The administrative fee schedule for handling arbitrations in the 1986 MPPAR was applicable until 2013, at which point AAA adopted an updated 2013 Fee Schedule, creating a revised MPPAR, effective February 1, 2013 (''2013 MPPAR''). The new Administrative Fee Schedule provides for increases to the Initial Filing Fee, establishes two different fee arrangements—the Standard and Flexible Fee Schedules, and adds a ''Final Fee'' under each schedule and a ''Proceed Fee'' in the flexible schedule context. Other than significant changes to the Administrative Fee Schedule and the removal of language regarding the apportionment of fees, the 2013 MPPAR are identical to the 1986 MPPAR that PBGC previously approved. Under § 4221.14, AAA has requested PBGC approval of the updated proposed 2013 MPPAR (the ''Application'').

Procedural Background

PBGC published a notice of the AAA's request in the **Federal Register** at 81 FR 15578 (March 23, 2016), to advise interested persons of the AAA's Application for approval and solicit their views on it. PBGC received four comments in response to the March 23, 2016 notice. PBGC then invited AAA to respond to the public comments. PBGC published AAA's response in the **Federal Register** at 82 FR 27089 (June 13, 2017), and solicited additional comments. PBGC received one final comment. After the final comment period closed, PBGC and AAA began discussions on changes to the 2013 MPPAR.

AAA's Application

AAA's Application included the necessary information under § 4221.14(c): A copy of the 2013 MPPAR; a description of the history, structure and membership of AAA; and a discussion of the reasons why, in AAA's opinion, the 2013 MPPAR satisfies the criteria for PBGC approval under § 4221.14(d). In response to the public comments and discussions between AAA and PBGC, AAA submitted the proposed rules modifying the 2013 MPPAR (''the 2019 Rules''), which completely revised the applicable fee schedule, added language regarding the apportionment of fees, and revised procedural rules related to the arbitrator selection process.

Section 4221.14(c)(2)—History and Structure of AAA

AAA's Application provided:

The American Arbitration Association (AAA), is a not-for-profit organization with offices throughout the U.S. as well as abroad. AAA has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court. The AAA is named in 40 federal statutes and regulations, as well as over 300 state statutes and regulations. The AAA is not a membership organization.

The AAA role in the dispute resolution process is to administer cases, from filing to closing. The AAA provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution (ICDR). The AAA's and ICDR's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the AAA aims to move cases through arbitration or mediation in a fair and impartial manner until completion.

Additional AAA services include the design and development of alternative dispute resolution (ADR) systems for corporations, unions, government agencies, law firms, and the courts. The Association also provides elections services as well as education, training, and publications for those seeking a broader or deeper understanding of alternative dispute resolution.

Section 4221.14(c)(3)—Discussion of Why the 2013 MPPAR Satisfies the Criteria for PBGC Approval Under § 4221.14(d)

AAA's Application provided:

The American Arbitration Association (AAA) has been administering the cases that fall under the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes for thirty-four (34) years. The rules that have been previously approved by the PBGC are effective June 1, 1981 and revised effective September 1, 1986. The AAA's 1986 MEPPA Rules did not change; the only update made was to increase the administrative fees for handling MEPPA arbitrations from the 1986 fee schedule to the 2013 fee schedule.

The AAA has provided quality administration on this caseload and based on parties and arbitrator feedback, the AAA's service is valued and should continue to be available. However, as a not-for profit organization that receives funding only through the administrative fees earned on cases, we need to ensure that the costs associated with the administration of a particular caseload do not vastly exceed the fees earned.

The fee increase implemented by the AAA was necessary because of the substantial administrative costs and staffing associated with these complex arbitrations. In particular, MEPPA arbitrations are similar to many of the large complex arbitrations administered by the AAA. They tend to be highly contentious, involve large dollar amounts, the parties engage in voluminous discovery, and there can be multiple preliminary calls as well as multiple days of evidentiary hearings, can be pending for long periods of time, involve bifurcated issues and extensive briefing.

The AAA also found it necessary to implement a substantially heightened arbitrator disclosure requirements based on the nature of the MEPPA cases. All of these factors were considered when reviewing the fee schedule and a determination was made to change the fees from the 1986 $650.00 fee to the 2013 fee schedule. The 1986 fee schedule provided the AAA discretion to set the fee where the net amount in dispute was in excess of $5 million. Given this level of discretion provided in the 1986 fee schedule, the AAA did set administrative fees equivalent to those reflected in the 2013 fee schedule for cases with claims in excess of $5 million. In addition, the 2013 fee schedule is the same schedule the AAA has applied to other arbitrations caseloads that are similarly complex.

The American Arbitration Association was founded in 1926, following enactment of the Federal Arbitration Act, with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes. This legal framework was passed by Congress and signed by President Calvin Coolidge. The AAA's staff members and neutrals continue to live out the principles on which the Association was founded.

The AAA's official mission statement and vision statement are based on three core values: Integrity, conflict management, and service. We have a long term working relationship with the Arbitrators on the MEPPA Panel. In addition to managing this panel, the AAA recruits Arbitrators who meet the criteria established for admission to this panel. The AAA has long held its mediators and arbitrators to strict codes of ethics and model standards of conduct to ensure fairness and impartiality in conflict management. To further ensure the AAA's integrity, however, the Association also developed Standards of Ethics and Business Conduct for its staff, as well as a general Statement of Ethical Principles to expand on its core values as an organization.

Public Comments and Resulting Changes to 2019 Rules

All interested persons were invited to submit written comments on the Application request. PBGC received four comments. Each commenter urged PBGC to reject AAA's Application on the basis that the fees in the 2013 MPPAR were too high. Three commenters maintained that AAA's Application did not substantiate the significant increase in fees under the 2013 MPPAR. Another commenter suggested that a reasonable fee increase to account for the passage of time since the 1986 MPPAR made sense. PBGC agrees that a modest increase from the 1986 MPPAR is reasonable. In response, AAA proposed a modified fee structure that removes the Final and Flexible fee schedules and considerably reduces the initiation fees:

Amount in dispute	1986 MPPAR	Proposed 2013 MPPAR	Proposed 2019 rules
	Initiation fee	Maximum fees	Initiation fee
Less than $1M	$650–$1,000	$1,550–$11,200	$2,500
$1M–$5M	1,000–1,450	14,400	3,750

Amount in dispute	1986 MPPAR	Proposed 2013 MPPAR	Proposed 2019 rules
	Initiation fee	Maximum fees	Initiation fee
$5M and above	Case-by-case	14,400–77,500	5,000

With the removal of the Final and Flexible fee schedules, the 2019 Rules provide for additional fees for matters that are in abeyance for over one year ($300) and a hearing rescheduling fee ($150). The 2019 Rules also include a Refund Schedule based on the timing of a case settlement or withdrawal, however $750 of the Initiation Fee is non-refundable. Other than these fees, parties initiating arbitration will only be required to pay the Initiation Fee and the Final Fees are no longer applicable. With these changes and the adjustment to the Initiation Fee schedule, PBGC has determined that the 2019 Rules are fair and equitable based on AAA's Response and follow-up discussions between PBGC and AAA. The 2019 Rules provide for a reasonable inflation adjustment from 1986 and also account for resources that were not necessary in 1986 such as cyber-security.

Three commenters pointed out that the 2013 MPPAR did not specifically provide for apportionment of the initiation fees between the parties. Additionally, two commenters suggested that the initiation fee should be split in advance of the arbitration. Under § 4221.10, ''other costs of arbitration'' are required to be ''borne equally unless the arbitrator determines otherwise'' and § 4221.14(b)(5) requires alternative procedures to allocate the cost of arbitration in accordance with § 4221.10. Therefore, PBGC agrees that the 2019 Rules should specify that the arbitration fees should be borne equally, subject to arbitrator discretion. However, due to the pay first, dispute later arrangement that MPPAA requires, PBGC does not agree that the initiation fee should be borne by both parties equally in advance of the arbitration. Section 47 of the 2019 Rules specifically provide for apportionment, as follows:

> An Initial Filing Fee is payable in full by the filing party when a claim, counterclaim, or additional claim is filed, subject to final apportionment by the Arbitrator in the Award.

Fee Apportionment

Under 29 CFR 4221.10, the cost of arbitration shall be borne equally by the parties, unless the arbitrator determines otherwise. § 4221.14 (b) (5) also requires alternative procedures to allocate the cost of arbitration in accordance with § 4221.10.

The inclusion of this language in the 2019 Rules addresses PBGC's concerns regarding fee apportionment and is consistent with § 4221.10. Two commenters focused on the arbitrator selection process and, specifically, AAA's ability to unilaterally appoint an arbitrator if the parties cannot agree on an arbitrator selection. One of those commenters also pointed out that AAA's process for disqualification of an arbitrator is inadequate as compared to PBGC's default rule. Although the arbitrator selection process in the proposed 2013 MPPAR did not differ from the approved 1986 MPPAR, PBGC believes the commenters raised valid concerns with the arbitrator selection process. PBGC's 1986 MPPAR approval provided that ''fundamental fairness demands that the impartiality of one in whom such powers are vested be free from reasonable doubt, and the best way to ensure that all parties will have confidence in his impartiality is to have him selected by mutual consent.'' PBGC's default rules under § 4221.4(e) provide that if the parties fail to select an arbitrator either party or both may seek the designation and appointment of an arbitrator in a U.S. district court pursuant to the provisions in title 9 of the United States Code. PBGC agrees with the commenters that AAA's, and not the parties' selection of an arbitrator, and their ultimate determination on a party's objection undercuts the principle of mutual consent. Therefore, PBGC recommended that AAA amend its rules consistent with § 4221.4(e) and provide a more equitable process that ensures an arbitrator is selected by mutual consent and the arbitrator removal process is more aligned with PBGC regulations. AAA agreed to provide an extended selection process if the parties cannot agree on an arbitrator, and if the parties are still unable to mutually select an arbitrator, either party may seek designation and appointment of an arbitrator in a U.S. District Court, consistent with § 4221.4(e).

Additionally, consistent with § 4221.4(b), the 2019 Rules provide for automatic removal of an arbitrator if a party objects within 10 days of a post-appointment disclosure. In that case, a new arbitrator will be selected through the mutual consent process. Objections received after 10 days of a post-appointment disclosure will be ruled on by the arbitrator, not AAA, unless the parties mutually agree to have AAA make the determination. These changes in the 2019 Rules are found in Section 11, Appointment from Panel and Section 13, Disclosure and Challenge Procedure:

Section 11. Appointment From Panel

> The Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of not less than five (5) persons, with a brief biographical profile and fee structure of each, chosen from the Panel. Each party to the dispute shall have fourteen days from the mailing date in which to cross off any names objected to, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the parties can agree to the submission of additional names. If the parties fail to mutually consent to the selection of an arbitrator, either party or both may seek designation and appointment of an arbitrator in a U.S. district court, consistent with 29 CFR 4221.4(e).

Section 13. Disclosure and Challenge Procedure

> A person appointed as neutral Arbitrator shall disclose to the AAA any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such Arbitrator or other source, the AAA shall communicate such information to the parties, and, if it deems it appropriate to do so, the Arbitrator and others.
>
> In the event a party objects within 10 days of a post-appointment disclosure, consistent with 29 CFR 4221.4(b), the arbitrator shall withdraw and the AAA shall select a new arbitrator by going back to the selection process. Objections received after 10 days will be determined by the Arbitrator and not the AAA, consistent with 29 CFR 4221.4(c), unless the parties mutually agree to have the AAA make the decision.

Statutory and Regulatory Criteria

In addition to requiring that alternative arbitration procedures mirror PBGC's default rules of arbitration, § 4221.14 provides the procedure and criteria for approval. The *Procedure for approval of alternative procedures* under § 4221.14(c) provides that an application requesting approval shall include (1) a copy of the procedures for which approval is sought; (2) a description of the history, structure and membership of the organization that sponsors the procedures; and (3) a discussion of the reasons why, in the sponsoring organization's opinion, the procedures satisfy the criteria for approval set forth in 4221.14(d). The *Criteria for approval of alternative procedures* under § 4221.14(d) provides: ''PBGC shall approve an application if it determines that the proposed procedures will be substantially fair to all parties involved in the arbitration of a withdrawal liability dispute and that the sponsoring organization is neutral and able to carry out its role under the procedures.''

Determination

In light of the significant increase of fees in the 2013 MPPAR and the comments submitted by interested parties, PBGC resumed discussions with AAA to seek changes to ensure the proposed rules were substantially fair to all parties involved in the arbitration of withdrawal liability disputes. PBGC advised AAA that three specific issues needed to be addressed for any amendment to the 1986 MPPAR to be approved: (i) Fee Increase; (ii) Apportionment of Fees; and (iii) Arbitrator Selection Process. The discussions resulted in proposed changes by AAA which are memorialized in the 2019 Rules as discussed above. PBGC has determined that the changes reflected in the 2019 Rules are consistent with the requirements of section 4221 of ERISA and the regulatory requirements under § 4221.14(d) in that they are fair to all parties involved in the arbitration of a withdrawal liability dispute and AAA is neutral and able to carry out its role under the procedures. This approval is effective unless revoked by PBGC, and future changes, including changes to the applicable fee schedule will be subject to PBGC review under § 4211.14(d).

Issued in Washington, DC.

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2019–26519 Filed 12–9–19; 8:45 am]

BILLING CODE 7709–02–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2020–45 and CP2020–43; MC2020–46 and CP2020–44]

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 12, 2019.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 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).:* MC2020–45 and CP2020–43; *Filing Title:* USPS Request to Add Priority Mail Contract 568 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 4, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 12, 2019.

2. *Docket No(s).:* MC2020–46 and CP2020–44; *Filing Title:* USPS Request to Add Priority Mail Contract 569 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 4, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 12, 2019.

This Notice will be published in the **Federal Register**.

Darcie S. Tokioka,

Acting Secretary.

[FR Doc. 2019–26514 Filed 12–9–19; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 10, 2019.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 4, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 569 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–46, CP2020–44.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–26480 Filed 12–9–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 10, 2019.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 4, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 568 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–45, CP2020–43.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–26479 Filed 12–9–19; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87655; File No. SR–LCH SA–2019–007]

Self-Regulatory Organizations; LCH SA; Notice of Filing of Proposed Rule Change Relating to Amendments to LCH SA's Liquidity Risk Modelling Framework

December 4, 2019.

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 December 3, 2019, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (''Proposed Rule Change'') described in Items I, II, and III below, which Items have been primarily prepared by LCH SA. The Commission is publishing this notice to solicit comments on the Proposed Rule Change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

LCH SA is proposing to amend its Liquidity Risk Modelling Framework (the ''Framework''), which describes the Liquidity Stress Testing framework by which the Collateral and Liquidity Risk Management department (''CaLRM'') of LCH Group Holdings Limited (''LCH Group'') assures that LCH SA has enough cash available to meet any financial obligations, both expected and unexpected, that may arise over the liquidation period for each of the clearing services that LCH SA offers.[3] The Commission first approved the Framework by Order dated July 18, 2018.[4]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, LCH SA 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. LCH SA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Framework is one of several well-developed policies and procedures that LCH SA maintains to manage its liquidity risk, *i.e.,* the risk that LCH SA will not have enough cash available, in extreme but plausible circumstances, to settle margin payments or delivery obligations when they become due, in particular upon the default of a clearing member. Such policies and procedures include, among others: (i) The Group Liquidity Risk Policy; (ii) the Group Liquidity Plan; (iii) the Group Financial Resource Adequacy Plan; (iv) the Group Collateral Risk Policy; (v) the Group Investment Risk Policy; and (vi) the LCH SA Collateral Control Framework. The Framework complements these policies and procedures and develops further the Group Liquidity Risk Policy.

In brief, the Framework: (i) Identifies LCH SA's sources of liquidity and corresponding liquidity risks; (ii) identifies LCH SA's liquidity requirements with respect to its members and its interoperable central counterparty (''CCP'');[5] (iii) describes the metrics and limits that LCH SA monitors; and (iv) describes the scenarios under which these metrics are computed.[6]

(i) Physically-Settled Options

LCH SA is proposing to amend the Framework in order to address more accurately its liquidity requirements in the event of the assignment and exercise of physically-settled options involving a defaulting clearing member during the liquidation period of such clearing member. Specifically, the amended Framework will address LCH SA's liquidity requirements in the event options that are in the money are

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] LCH SA, a subsidiary of LCH Group, manages its liquidity risk pursuant to, among other policies and procedures, the Group Liquidity Risk Policy and the Group Liquidity Plan applicable to each entity within LCH Group.

In addition to its CDSClear service, LCH SA provides clearing services in connection with cash equities and derivatives listed for trading on Euronext (EquityClear), commodity derivatives listed for trading on Euronext (CommodityClear), and tri-party Repo transactions (RepoClear).

[4] Securities Exchange Act Release No. 34–83691 (July 24, 2018), 83 FR 36635 (July 30, 2018); File No. SR–LCH SA–2018–003) (the ''Release'').

[5] LCH SA has an interoperability agreement with Cassa di Compensazione e Garanzia (''CC&G''), an Italian CCP, pursuant to which LCH SA's clearing members and CC&G's clearing members are able to benefit from common clearing services without having to join the other CCP. Each CCP is a clearing member of the other one with a particular status when accessing the clearing system of the other counterparty.

[6] The Release describes the operation of the Framework in greater detail.

exercised either on the day (''T''), or on the business day immediately following the day (''T+1''), on which the clearing member that is a seller of the options defaults.

If such defaulting clearing member is a seller of a Call option that is in the money, LCH SA would have to purchase the underlying securities in the market at a stressed price and await payment at the strike price from the non-defaulting purchaser of the Call option at settlement. If such defaulting clearing member is a seller of a Put option that is in the money, LCH SA would have to purchase the underlying securities at the strike price from the non-defaulting purchaser of the Put option. Although margins should cover any potential loss, liquidity outflows as a result of the sales' proceeds are included as liquidity requirements, in each case.

In the current Framework, there is no liquidity provision related to the risk of assignment and exercise of options at expiration. In order to address this concern, the amended Framework will anticipate, prior to the expiration dates, the amount of liquidity funding that may arise from options that may be exercised, in the event of the default of LCH SA's two largest members (''Cover2''). On a daily basis, LCH's Liquidity and Concentration Risk (''LCR'') calculation will identify all of the potential positions that are in the money or at the money on that day and the next business day. Given the potential option exercise, the LCR will generate a liquidity need. The additional liquidity amount that LCH SA could potentially need will be equal to the sum of the equities to source following the option assignments at expiration and/or the difference between the underlying securities and the strike price or the strike price minus the asset in the event of a cash settlement.

In practice, the process will work as follows on a daily basis:

- The liquidity needs arising from the options that are in the money or at the money, having their expiries on T or T+1, will be computed by applying no market stress to the equities.
- The liquidity needs arising from the options that are in the money or at the money, having their expiries on T or T+1, will be computed by applying a stress scenario to the equities.
- LCH SA will select the positions consistent with the Cover2 for both modes described above and will retain the most punitive one.

This amount will be added to the current cash equity amount in the LCR.

(ii) Fixed Income Clearing System

Further, LCH SA is proposing to amend the Framework to take into account the expansion of sovereign debt for which LCH SA provides clearing services through its Fixed Income Clearing System. LCH SA initially provided clearing services only with respect to French sovereign debt. The Fixed Income Clearing service subsequently added the sovereign debt of Italy, Spain, Germany, and Belgium. More recently, the Fixed Income Clearing System has been extended to eight additional Euro markets: Austria, Netherlands, Finland, Ireland, Portugal, Slovakia, Slovenia and Supranationals.[7]

In this regard, therefore, the Framework has been revised to provide that all securities resulting from the settlement of all repurchase contracts (''repos'') on behalf of a defaulting clearing member, not just repos on the sovereign debt of France, Italy and Spain, may be used to generate liquidity at the Banque de France. The amended Framework also clarifies that, in the event that a Central Bank Guarantee (''CBG'') is triggered by the default of a clearing member posting the CBG, the relevant Central Bank will pay the liabilities of the defaulting clearing member in cash.

Further, the Framework has been revised to (i) identify the relevant central securities depository (''CSD'') through which transactions in the sovereign debt of the different jurisdictions may settle,[8] (ii) describe the manner by which LCH SA injects liquidity into each settlement platform, in particular, Euroclear Bank and Clearstream Luxembourg, and (iii) modify the limits by settlement platform on the main liquidity drivers (*i.e.,* cash injected into the platforms, auto-collateralization and gross fails).

(iii) Stress Tests

LCH SA is proposing clarifications with respect to certain aspects of its stress tests. With respect to the operational liquidity target,[9] which is a metric allowing LCH SA to confirm that the business as usual liquidity sources are sufficient for a five day period in stressed situations, consistent with the LCR time horizon, the Framework notes that LCH SA uses a three-day window, in particular with regard to margin reduction. The Framework further clarifies that, in calculating liquidity resources, LCH SA deducts funds required to facilitate settlements, cover end of day fails at Euroclear Bank and Clearstream Luxembourg, and avoid Target 2 Securities fails. In addition, the Framework assumes that members allowed to post CBGs will switch from cash or ECB-eligible non-cash collateral to CBGs (although the Framework does not currently take such switches into account, since all eligible members, *i.e.,* Dutch and Belgian members, have already done so). Moreover, the amended Framework confirms that, in calculating required variation margin payments to CC&G, LCH SA assumes a theoretical 5-day holding period.

The amended Framework also clarifies how stressed liquidity requirements and impact are calculated for each clearing member, in particular with respect to the cash equity settlement requirement for options. These calculations are used to determine the two clearing members that would potentially cause the largest aggregate liquidity exposure for the CCP in extreme but plausible market conditions.

Finally, the Framework clarifies how LCH SA conducts reverse stress tests in order to determine if there is a combination of changes in LCH SA's liquidity that could lead to a liquidity shortfall. In particular, the amended Framework considers whether there is a combination of changes in LCH SA's liquidity resources that could lead to a liquidity shortfall, even in the absence of stress in the market.

2. Statutory Basis

LCH SA has determined that Proposed Rule Change is consistent with the requirements of Section 17A of the Act[10] and regulations thereunder applicable to it. Section 17A(b)(3)(F) of the Act requires, *inter alia,* that the rules of a clearing agency ''assure the safeguarding of securities and funds that are in its custody or control or for which it is responsible.''[11] Further, Regulation 17dA–22(e)(4)(ii) requires a CCP that is involved in activities with a more

[7] The supranational debt eligible for clearing is currently limited to the Euro denominated debt of the European Investment Bank.

[8] French sovereign debt may settle through Euroclear Bank, Italian sovereign debt through Monte Titoli, Spanish sovereign debt through Iberclear, German sovereign debt through Clearstream Frankfurt, and Belgian sovereign debt through the National Bank of Belgium. The sovereign debt of the remaining jurisdictions may settle through either Euroclear Bank or Clearstream Luxembourg. All transactions are settled through Target 2 Securities, a Eurosystem technical platform to which CSDs assign the management of securities settlement in central bank money.

[9] Operational liquidity is defined to mean the amount of liquidity related to the operational management of LCH SA that is required to be held in a stressed environment that does not lead to a clearing member's default.

[10] 15 U.S.C. 78q–1.

[11] 15 U.S.C. 78q–1(b)(3)(F).

complex risk profile, *e.g.,* that provides CCP services for security-based swaps, to maintain and enforce written policies and procedures reasonably designed to effectively ''measure, monitor, and manage its credit exposures from its payment, clearing and settlement processes'' to assure that it maintains additional financial resources to enable it to cover a wide range of stress scenarios that include the default to two participant family clearing members that would potentially cause the largest aggregate liquidity exposure for the CCP in extreme but plausible market conditions.[12]

As discussed earlier, LCH SA is proposing to amend the Framework to address specifically LCH SA's liquidity requirements in the event of the assignment and exercise of physically-settled options involving a defaulting clearing member during the liquidation of such clearing member. The proposed amendment will assist LCH SA in defining more accurately its liquidity requirements by assuring that LCH SA will maintain appropriate levels of liquidity in the event of the assignment and exercise of options involving a defaulting clearing member. Specifically, the amended Framework will anticipate, prior to their expiration dates, the amount of liquidity funding that may arise from options that may be exercised, in the event of the default of LCH SA's two largest members.

The policies and procedures set out in the amended Framework, therefore, are designed to enhance LCH SA's to measure, monitor, and manage the liquidity risk that may arise in connection with its activities as a covered clearing agency. As such the amendments to the Framework regarding LCH SA's liquidity requirements in the event of the assignment and exercise of options involving a defaulting clearing member are consistent with the requirements of Regulation 17dA–22(e)(4)(ii).

As noted above, Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency ''assure the safeguarding of securities and funds that are in its custody or control or for which it is responsible.'' To better implement this statutory requirement, LCH SA is proposing to amend the Framework to take into account the expansion of sovereign debt for which LCH SA provides clearing services through its Fixed Income Clearing System. In addition to French sovereign debt, the Fixed Income Clearing service now provides clearing services with respect to the sovereign debt of eleven other European jurisdictions, as well as the European Investment Bank.[13] The revised Framework: (i) Identifies the relevant CSD through which transactions in the sovereign debt of the different jurisdictions may settle; (ii) describes the manner by which LCH SA injects liquidity into each settlement platform; and (iii) modifies the limits by settlement platform on the main liquidity drivers (*i.e.,* cash injected into the platforms, auto-collateralization and gross fails). The revised Framework also provides that all securities resulting from the settlement of repos on behalf of a defaulting clearing member may be used to generate liquidity at the Banque de France and clarifies that, in the event that a CBG is triggered by the default of a clearing member, the relevant Central Bank will pay the defaulting clearing member's liabilities in cash.

The proposed amendments strengthen LCH SA's policies and procedures intended to ''assure the safeguarding of securities and funds that are in its custody or control or for which it is responsible'' (i) by specifying the CSDs through which transactions in the identified foreign sovereign debt may settle and the means by which LCH SA interacts with such CSDs, (ii) by confirming that all securities of a defaulting clearing member resulting from repos are available to the Banque de France, and (iii) by providing that a Central Bank that has provided a CBG will pay a defaulting clearing member's liabilities in cash. As such, the amendments to the Framework regarding the Fixed Income Clearing Service are consistent with Section 17A(b)(3)(F) of the Act.

Regulation 17dA–22(e)(4)(i) and (vi)(A) requires a clearing agency to maintain and enforce written policies and procedures reasonably designed to conduct stress testing of its total financial resources once each day using standard predetermined parameters and assumptions to assure that it has sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[14] As discussed above, LCH SA is proposing amendments to the Framework to identify certain additional factors that that LCH will take into account in conducting its stress tests and provide greater clarity regarding LCH SA's stress testing practices.

In particular, the Framework confirms that in calculating its operational liquidity target,[15] LCH SA uses a three-day rather than a five-day window, in particular with regard to margin reduction. The Framework further clarifies that, in calculating liquidity resources, LCH SA deducts funds required to facilitate settlements, cover end of day fails at Euroclear Bank and Clearstream Luxembourg, and avoid Target 2 Securities fails. The Framework also confirms that it assumes that members allowed to post CBGs will switch from cash or ECB-eligible non-cash collateral.

The amended Framework further clarifies how stressed liquidity requirements are calculated for each clearing member, in particular with respect to the cash equity settlement requirement for options, to determine the two clearing members that would potentially cause the largest aggregate liquidity exposure for the CCP in extreme but plausible market conditions. The Framework also clarifies the manner in which LCH SA conducts reverse stress tests in order to determine if there is a combination of changes in LCH SA's liquidity that could lead to a liquidity shortfall.

By clarifying the factors that it takes into account in conducting daily stress testing, the proposed amendments enhance LCH SA's written policies and procedures with regard to stress testing and thereby assures that LCH SA maintains sufficient additional financial resources to enable it to cover a wide range of stress scenarios that include the default to two participant family clearing members that would potentially cause the largest aggregate liquidity exposure for the CCP in extreme but plausible market conditions. As such, therefore, the proposed amendments, therefore, are consistent with the requirements of Regulation 17dA–22(e)(4)(i) and (vi)(A).

B. Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[16] LCH SA does not believe the Proposed Rule Change would have any impact, or impose any burden, on competition. The Proposed Rule Change does not address any competitive issue or have any impact on the competition among central counterparties. LCH SA operates an open access model, and the Proposed

[12] 17 CFR 240.17Ad–22(e)(4)(ii).

[13] The eleven jurisdictions are: Austria; Belgium; Finland; Germany; Ireland; Italy; Netherlands; Portugal; Spain; Slovakia; and Slovenia.

[14] 17 CFR 240.17Ad-22(e)(4)(i) and (vi).

[15] The term ''operational liquidity'' is defined at footnote 21, *supra.*

[16] 15 U.S.C. 78q–1(b)(3)(I).

Rule Change will have no effect on this model.

C. Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the Proposed Rule Change have not been solicited or received. LCH SA will notify the Commission of any written comments received by LCH SA.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove 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:

- 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–LCH SA–2019–007 on the subject line.

Paper Comments

- Send paper comments in triplicate to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–LCH SA–2019–007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of LCH SA and on LCH SA's website at *http://www.lch.com/resources/rules-and-regulations/proposed-rule-changes-0.* All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–LCH SA–2019–007 and should be submitted on or before December 31, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–26497 Filed 12–9–19; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87656; File No. SR–FINRA–2019–008]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Establish a Corporate Bond New Issue Reference Data Service

December 4, 2019.

I. Introduction

On March 27, 2019, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish a new issue reference data service for corporate bonds. The Commission published notice of filing of the proposed rule change in the **Federal Register** on April 8, 2019.[3] On May 22, 2019, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved.[4] On July 1, 2019, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act [5] to determine whether to approve or disapprove the proposed rule change.[6] On October 3, 2019, FINRA filed partial Amendment No. 2 to the proposed rule change.[7] On October 4, 2019, the Commission published notice of Amendment No. 2 to the proposed rule change and designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the proposed rule change.[8] The Commission received comments on the proposal and one response to comments from FINRA.[9] This order approves the proposed rule change, as modified by Amendment No. 2.

II. Summary of the Proposed Rule Change, as Modified by Amendment No. 2

As described in more detail in the Notice and Amendment No. 2,[10] FINRA proposes to establish a new issue reference data service for corporate bonds. FINRA states that its proposal is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 85488 (April 2, 2019), 84 FR 13977 (''Notice'').

[4] *See* Securities Exchange Act Release No. 85911, 83 FR 24839 (May 29, 2019). The Commission designated July 7, 2019, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[5] 15 U.S.C. 78s(b)(2)(B).

[6] *See* Securities Exchange Act Release No. 86256, 84 FR 32506 (July 8, 2019).

[7] Partial Amendment No. 1 was also filed on October 3, 2019 and subsequently withdrawn on the same day due to a non-substantive administrative error and replaced with Amendment No. 2. In Amendment No. 2, the Exchange: (i) Withdrew the proposed fees for receipt of corporate new issue reference data in the proposal and stated that a separate proposed rule change would be filed to establish fees related to the corporate bond new issue reference data service at a future date prior to implementing the service; (ii) revised the list of data fields to be collected under the proposal to clarify certain proposed data fields and to add six new data fields; and (iii) included additional rationale for the data fields proposed to be collected. Amendment No. 2 is available at: *https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-6252424-192827.pdf.*

[8] *See* Securities Exchange Act Release No. 87232, 84 FR 54712 (October 10, 2019). The Commission extended the date by which the Commission shall approve or disapprove the proposed rule change to December 4, 2019.

[9] All comments on the proposed rule change, including FINRA's response to comments, are available at: *https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008.htm.*

[10] *See supra* notes 3 and 7.

in line with a recommendation from the SEC Fixed Income Market Structure Advisory Committee (''FIMSAC'').[11] On October 29, 2018, the FIMSAC unanimously approved a recommendation from its Technology and Electronic Trading Subcommittee (''Subcommittee'') that the Commission, in conjunction with FINRA, establish a reference data service for corporate bonds which would contain specified data elements on TRACE-eligible corporate bond new issues.[12] FINRA's proposal would implement that recommendation, and in doing so, FINRA would establish a central depository for public dissemination of new issue corporate bond reference data.

Specifically, FINRA is proposing to amend Rule 6760 (Obligation to Provide Notice)[13] to require that underwriters subject to Rule 6760[14] report to FINRA a number of data elements, including some already specified by the rule, for new issues in Corporate Debt Securities.[15] Proposed Rule 6760(b)(2) would require that, in addition to the information required by Rule 6760(b)(1),[16] for a new issue in a Corporate Debt Security, excluding bonds issued by religious organizations or for religious purposes, the following information must be reported, if applicable: (A) The International Securities Identification Number (ISIN); (B) the currency; (C) the issue date; (D) the first settle date; (E) the interest accrual date; (F) the day count description; (G) the coupon frequency; (H) the first coupon payment date; (I) a Regulation S indicator; (J) the security type; (K) the bond type; (L) the first coupon period type; (M) a convertible indicator; (N) a call indicator; (O) the first call date; (P) a put indicator; (Q) the first put date; (R) the minimum increment; (S) the minimum piece/denomination; (T) the issuance amount; (U) the first call price; (V) the first put price; (W) the coupon type; (X) rating (TRACE Grade); (Y) a perpetual maturity indicator; (Z) a Payment-In-Kind (PIK) indicator; (AA) first conversion date; (BB) first conversion ratio; (CC) spread; (DD) reference rate; (EE) floor; and (FF) underlying entity ticker.

FINRA proposes to require underwriters to report all data fields for Corporate Debt Securities prior to the first transaction in the security. FINRA would disseminate the corporate bond new issue reference data collected under Rule 6760 upon receipt.[17] FINRA states that it will submit a separate filing to establish fees related to the new issue reference data service at a future date and will implement the service after those fees are adopted.[18]

FINRA proposes to announce the effective date of the proposed rule change in a *Regulatory Notice.* The effective date will be no later than 270 days following Commission approval.

III. Summary of Comments and Response Letter [19]

A number of commenters generally supported the proposal,[20] while other

[11] The FIMSAC is a federal advisory committee formed in November 2017 to provide the Commission with diverse perspectives on the structure and operations of the U.S. fixed income markets, as well as advice and recommendations on matters related to fixed income market structure. The FIMSAC's charter is available at: *https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-charter-nov-2019.pdf.* The committee comprises 23 members. The membership includes individuals representing a range of perspectives on the fixed income markets including retail and institutional investors, corporate and municipal issuers, trading venues, institutional dealers, a retail dealer, a regional municipal securities dealer, a proprietary trading firm, a data provider, academics, and self-regulatory organizations (''SROs''). For a list of FIMSAC members, *see https://www.sec.gov/spotlight/fixed-income-advisory-committee/fixed-income-market-structure-advisory-committee-subcommittees.htm.*

[12] *See* Fixed Income Market Structure Advisory Committee Recommendation (October 29, 2018) available at: *https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-corporate-bond-new-issue-reference-data-recommendation.pdf* (''Recommendation''). In particular, the FIMSAC recommended that the Commission, in conjunction with FINRA, establish a new issue data service with the following elements: (i) The managing underwriter of all TRACE-eligible corporate bond new issues, including registered offerings and unregistered Rule 144A offerings, would be required to send specified new issue information, as well any follow-up adjustments, electronically to a central database managed by FINRA; (ii) the managing underwriter would be required to submit the new issue information to FINRA no later than distribution of the information to any reference data vendor or other third party not involved in the offering; (iii) once the central database has all the required reporting information, FINRA will make the data available in a real-time electronic format to reference data vendors and other market participants as determined by FINRA; and (iv) FINRA shall provide subscribers with access to the service on an impartial basis at fees determined on a commercially reasonable basis, subject to applicable regulation. The FIMSAC recommended that such data service provide the following new issue reference data fields: (a) Issuer; (b) coupon; (c) ISIN number; (d) CUSIP number; (e) currency; (f) issue date/first settle date; (g) interest accrual date; (h) day count description; (i) coupon frequency; (j) first coupon payment date; (k) maturity; (l) calculation types; (m) 144A eligible indicator; (n) Regulation S indicator; and (o) security type.

[13] As part of the proposal, FINRA would amend the title of the Rule to ''Obligation to Provide Notice and Dissemination of Corporate Debt Security New Issue Reference Data.''

[14] As part of the proposal, FINRA would amend Rule 6760(a)(1) to clarify that underwriters subject to the rule must report required information for the purpose of providing market participants in the corporate debt security markets with reliable and timely new issue reference data to facilitate the trading and settling of these securities, in addition to the current purpose of facilitating trade reporting and dissemination in TRACE-Eligible Securities, as that term is defined in Rule 6710(a).

[15] In connection with the proposal, FINRA proposes to move the definition of ''Corporate Debt Security,'' which is currently located in FINRA Rule 2232 (Customer Confirmations), into the TRACE Rule Series (specifically Rule 6710 (Definitions)) and to make corresponding technical edits to Rule 2232 to refer to the relocated definition in Rule 6710. In addition, FINRA proposes to make two changes to the definition of ''Corporate Debt Security,'' which FINRA states are technical, non-substantive edits that reflect the original intent of the definition and are consistent with current FINRA guidance. *See* Notice, at 13978, n.6. Specifically, FINRA proposes to revise the current definition of Corporate Debt Security to (i) clarify that the definition is limited to TRACE-Eligible Securities, and (ii) update the definition to exclude Securitized Products (defined in Rule 6710(m)), rather than Asset-Backed Securities (defined in Rule 6710(cc)).

[16] Rule 6760(b), proposed to be renumbered as Rule 6760(b)(1), currently requires the following information to be reported to FINRA: (A) The CUSIP number or if a CUSIP number is not available, a similar numeric identifier (*e.g.,* a mortgage pool number); (B) the issuer name, or, for a Securitized Product, the names of the Securitizers; (C) the coupon rate; (D) the maturity; (E) whether Securities Act Rule 144A applies; (F) the time that the new issue is priced, and, if different, the time that the first transaction in the offering is executed; (G) a brief description of the issue (*e.g.,* senior subordinated note, senior note); and (H) such other information FINRA deems necessary to properly implement the reporting and dissemination of a TRACE-Eligible Security, or if any of items (B) through (H) has not been determined or a CUSIP number (or a similar numeric identifier) is not assigned or is not available when notice must be given, such other information that FINRA deems necessary and is sufficient to identify the security accurately.

[17] FINRA states that under proposed Rule 6760(d), there may be some information collected under the rule for security classification or other purposes that would not be disseminated. This may include, for example, information about ratings that is restricted by agreement. In addition, CUSIP Global Services' (''CGS'') information would not be disseminated to subscribers that do not have a valid license regarding use of CGS data.

[18] *See* Amendment No. 2, at 4. FINRA originally proposed to make the corporate bond new issue reference data available to any person or organization for a fee of $250 per month for internal purposes only, and for a fee of $6,000 per month where the data is retransmitted or repackaged for delivery and dissemination to any outside person or organization. *See* Notice, at 13979. FINRA withdrew these proposed fees in Amendment No. 2. *See supra* note 7.

[19] Certain comments are not discussed below because they do not bear on the basis for the Commission's decision to approve the proposed rule. *See, e.g.,* Letter from Christopher B. Killian, Managing Director, SIFMA, dated July 29, 2019 (''SIFMA Letter II''), at 2 (stating that if the proposal is approved, the Commission or FINRA should provide guidance that providing reference data information to FINRA's data service will not constitute an offer, an offer to sell, or a solicitation of an offer to buy for purposes of the Securities Act of 1933); Letter from Lynn Martin, President and COO, ICE Data Services, dated April 29, 2019 (''ICE Data Letter''), at 2 (stating that the final rule should specify that entities who are third parties involved in the offering are prohibited from sharing data with affiliated corporate entities).

[20] *See* ICE Data Letter; Letter from Cathy Scott, Director, Fixed Income Forum, on behalf of The Credit Roundtable, dated April 29, 2019 (''Credit

commenters generally opposed the proposal.[21]

A. Justification for the Creation of the New Issue Reference Data Service

Several of the commenters stated that currently there is no uniform, universally available mechanism for providing market participants with consistent and timely access to reference data about corporate bonds on the day a newly issued corporate bond commences trading.[22] These commenters stated that access to reference data is necessary for valuing, as well as trading and settling corporate bonds.[23] As access to this reference data is not available to all market participants prior to the beginning of trading in a new issue, commenters asserted that certain market participants are currently at a competitive disadvantage.[24] In addition, commenters asserted that a centralized data reporting requirement for new corporate bond issues would increase the efficiency of the corporate bond market and reduce trading and research costs.[25]

On the other hand, many of the commenters asserted that FINRA did not provide sufficient justification to support the need for the creation of the new issue reference data service as required under Section 15A(b)(6) [26] of the Act.[27] In particular, one commenter argued that FINRA provided no evidence that (i) the proposal would provide market participants with more complete, accurate, and timely data about new issues; [28] (ii) the proposal would reduce broken trades and errors; [29] (iii) there is a market structure problem that requires regulatory intervention; [30] and (iv) the proposal would reduce costs or duplicated efforts.[31] One commenter argued that the proposal would increase regulatory and liability burdens for underwriters without any clear benefit,[32] and another commenter argued that the proposed rule's compliance burden would disproportionately impact smaller underwriters.[33]

In its response, FINRA stated that it believes the record provides sufficient support for the proposal, which is based on evidence FINRA received from market participants and analyzed in its filing.[34] FINRA pointed to the economic impact assessment included in its filing and reiterated that the proposal ''was informed by outreach to eleven market participants—four data providers, three

Roundtable Letter''); Letter from Salman Banaei, Executive Director, IHS Markit, dated April 29, 2019 (''IHS Markit Letter''); Letter from Marshall Nicholson and Thomas S. Vales, ICE Bonds dated April 29, 2019 (''ICE Bonds Letter''); Letter from Christopher B. Killian, Managing Director, SIFMA, dated April 29, 2019 (''SIFMA Letter''); Letter from Larry Harris, Fred V. Keenan Chair in Finance, U.S.C. Marshall School of Business, dated May 17, 2019 (''Harris Letter''); Letter from John Plansky, Executive Vice President and Chief Executive Officer, Charles River Development, dated May 24, 2019 (''Charles River Letter''); and Letter from SEC Fixed Income Market Structure Advisory Committee, dated June 11, 2019 (''FIMSAC Letter''). One of these commenters stated that it supports the goals and conceptual basis of the proposed service but also stated that several complications and ambiguities in the proposal prevent it from ''expressly supporting the proposal,'' and it remains concerned about several aspects of the proposal (as discussed below). *See* SIFMA Letter II, at 1; Letter from Christopher B. Killian, Managing Director, SIFMA, dated October 24, 2019 (''SIFMA Letter III'').

[21] *See* Letter from David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation, dated April 29, 2019 (''Heritage Letter''); Letter from Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce, dated April 29, 2019 (''Chamber Letter''); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, dated April 29, 2019 (''Healthy Markets Letter''); Letter from Greg Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. dated April 29, 2019 (''Bloomberg Letter''); Letter from Larry Tabb, TABB Group, dated May 15, 2019 (''Tabb Letter''); and Letter from John Thornton, Co-Chair, et al., Committee on Capital Markets Regulation, dated July 27, 2019 (''Committee Letter''). *See also* Letter from Greg Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., dated July 1, 2019 (''Bloomberg Letter II''); Letter from Greg Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., dated July 29, 2019 (''Bloomberg Letter III''); Letter from Greg Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., dated October 24, 2019 (''Bloomberg Letter IV''); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, dated July 29, 2019 (''Healthy Markets Letter II''); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, dated October 25, 2019 (''Healthy Markets Letter III''); Letter from David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation, dated July 29, 2019 (''Heritage Letter II''); Letter from David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation, dated October 23, 2019 (''Heritage Letter III''); Letter from Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce, dated July 29, 2019 (''Chamber Letter II''); Letter from Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce, dated October 24, 2019 (''Chamber Letter III''); Letter from John Thornton, Co-Chair, et al., Committee on Capital Markets Regulation, dated October 22, 2019 (''Committee Letter II''); and Letter from Greg Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., dated November 27, 2019 (''Bloomberg Letter V''). One of these commenters was generally supportive of the objective of providing market participants with greater data to facilitate the trading of corporate bonds, but opposed the proposal because of what it believed was insufficient justification. *See* Healthy Markets Letter, at 4, 7.

[22] *See* ICE Data Letter, at 1–2; ICE Bonds Letter, at 1–2; Charles River Letter, at 2; FIMSAC Letter, at 1–2.

[23] *See* ICE Data Letter, at 2; Harris Letter, at 2–3; Charles River Letter, at 2; FIMSAC Letter, at 1–2.

[24] *See* ICE Data Letter, at 2; ICE Bonds Letter, at 2; FIMSAC Letter, at 2.

[25] *See* ICE Data Latter, at 2; Harris Letter, at 2–3; Charles River Letter, at 2.

[26] Section 15A(b)(6) of the Act requires, among other things, that the rules of a national securities association 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; and not to permit unfair discrimination between customers, issuers, brokers, or dealers. 15 U.S.C. 78*o*-3(b)(6).

[27] *See* Heritage Letter, at 1–2; Chamber Letter, at 2; Healthy Markets Letter, at 4–5; Bloomberg Letter, at 9–10. *See also* Healthy Markets Letter II, at 4–6; Healthy Markets Letter III; Heritage Letter II, at 2; Heritage Letter III, at 2; Chamber Letter II, at 3–4; Bloomberg Letter II, at 4–7; Bloomberg Letter III, at 5–8; Bloomberg Letter IV, at 4; Bloomberg Letter V, at 3–4.

[28] The commenter stated that ''it is questionable whether a single SRO would provide more accurate, complete and timely service than competing private sector providers.'' *See* Bloomberg Letter, at 9. In addition, the commenter stated that the impact of any errors in a centralized system would be magnified. *See id.,* at 10.

[29] The commenter stated that ''there appears to be plenty of time to correct errors before they enter the settlement and clearing process'' and presented evidence that over 91% of new issues settle three days or more after a new issue is priced and 66% settle four days or more after a new issue is priced. *See* Bloomberg Letter, at 10–11.

[30] *See* Bloomberg Letter, at 12–13; Bloomberg Letter II at 4–6; Bloomberg Letter III at 6–7; Bloomberg Letter V, at 3. This commenter presented data regarding alternative trading system (''ATS'') trading on pricing day to argue that electronic trading platforms can readily access new issue bond reference data, and that the market for new issue corporate bonds is healthy and already evolving in the manner that the FIMSAC desires. For example, this commenter provided data (for new issues from March 12, 2019 to April 11, 2019) demonstrating that ATSs arranged a trade in 43% of the new Jumbo-sized issues, 28% of the new Benchmark-sized issues, and 11% of medium-sized issues on the day the bond was free to trade. *See* Bloomberg Letter, at 12–13. In addition, this commenter presented evidence that over the past year, the number of Jumbo-sized new issues that traded electronically on the day they were priced more than doubled to 30%. *See* Bloomberg Letter II, at 4–6; Bloomberg Letter III, at 6; and Bloomberg Letter IV, at 4–5. This commenter further stated that since FINRA proposed its effort to standardize and centralize bond-reference data reporting, competition in this area has only increased, citing a recent effort by various financial institutions to streamline communications and data among market participants by connecting underwriters and investors. *See* Bloomberg Letter IV, at 6.

[31] *See* Bloomberg Letter, at 9–14; Bloomberg Letter II, at 4–7; Bloomberg Letter III, at 5–8. This commenter stated that market participants currently demand more reference data fields than FINRA is proposing to collect; thus the proposal will not avoid ''duplicative efforts'' and may fragment the market. *See* Bloomberg Letter, at 13–14. In addition, this commenter stated that FINRA will have no market incentive to improve its technology for collecting or distributing bond data, and that in the existing TRACE system, 20% of entries have errors. *See* Bloomberg Letter III, at 5–6.

[32] *See* Chamber Letter, at 4; Chamber Letter III, at 2.

[33] *See* Bloomberg Letter IV, at 5. *See also* Chamber Letter III, at 3.

[34] *See* Letter from Alexander Ellenberg, Associate General Counsel, FINRA, dated October 29, 2019 (''Response Letter''), at 3–4. *See also* Notice, at 13980–83.

underwriters, two trading platforms, and two clearing firms—which FINRA believes demonstrated a regulatory need for consistent, uniform, and timely corporate bond new issue reference data.'' [35] Based on this outreach, FINRA determined that ''there is not currently consistent collection of new issue reference data according to established data standards, nor is there uniform distribution of the data to market participants in a timely manner.'' [36] For example, FINRA noted the experience of one trading platform that stated its reference data provider would only provide data relating to new issues the morning after issuance, which resulted in the firm's clients not being able to trade new issues on the platform on the first day of trading.[37] FINRA also stated that during its outreach it received comments from data vendors concerning the differences in their access to corporate bond new issue reference data.[38]

FINRA further stated that during the outreach a number of problems were raised as a result of the lack of accurate, complete and timely corporate bond new issue reference data.[39] Specifically, as the proposal noted, FINRA found that limited new issue reference data may prevent traders from identifying and evaluating newly issued bonds for trading (particularly small traders that cannot afford multiple data vendor subscriptions), and it may prevent electronic trading platforms from making newly issued corporate bonds available to trade.[40] In addition, FINRA found from its outreach that inaccurate reference data create inconsistencies in trading and settlement and increases transaction costs for trading platforms, clearing firms, and electronic trading platforms.[41]

In the Response Letter, FINRA stated that the robust public record supporting the unanimous FIMSAC Recommendation also provides support for the proposal.[42] FINRA pointed to statements by members of the FIMSAC and panelists at the FIMSAC meeting, including a data provider and an investment management firm,[43] to refute the assertion that a well-functioning, competitive market currently exists for corporate new issue reference data, as suggested by some commenters.[44] In addition, FINRA stated that supporting comment letters submitted in response to the proposal further reinforce the regulatory need for the proposal.[45]

In the Response Letter, FINRA provided an analysis of corporate bond transactional data reported to FINRA's TRACE, which FINRA stated is consistent with the problematic market conditions described by FIMSAC participants and commenters, and provides additional support for the proposal.[46] Specifically, FINRA examined the time lapse between the first secondary market trade reported to TRACE and the first trade reported by ATSs for newly issued corporate bonds in 2018.[47] FINRA found persistent lags between the first reported trades and first reported ATS trades, which FINRA stated suggested that some ATSs may not be receiving reference data in a timely fashion to allow them to set up new issues to begin trading on their platforms.[48] In response, however, one commenter stated that FINRA's analysis is flawed in that the data (i) does not show that untimely reference data is the cause of differences in the timing of trading on different platforms, (ii) includes all new issue bonds, rather than limiting the scope to large issues that are more likely to trade electronically; and (iii) ignores more current data, which this commenter stated shows movement toward electronic trading is accelerating rapidly in 2019.[49]

B. Competitive Impact and Data Quality

Several commenters argued that the proposal fails to adequately explain why the rule's burden on competition is necessary or appropriate consistent with Section 15A (b)(9) [50] of the Act.[51] Some commenters asserted that the proposal would diminish competition among private sector reference data providers, which could ultimately impede the quality of data available to market participants.[52] One of these commenters stated that the proposal ''would expand a key regulator's commercial role into new lines of heretofore competitive private business'' and stressed ''the likely chilling effect that this would have on investment and innovation.'' [53] Another commenter opposed giving FINRA or any other utility or vendor a monopoly or competitive advantage in the collection and dissemination of corporate bond new issue reference data, stating that doing so may reduce the overall quality and timeliness, and increase the cost, of the data.[54] One commenter stated that the proposal creates a conflict of interest and reduces FINRA's standing as an independent regulatory force.[55]

[35] *See* Response Letter, at 4. *See also* Notice, at 13980–81.

[36] *See* Response Letter, at 4.

[37] *See id. See also* Notice, at 13980, n.17.

[38] *See* Response Letter, at 4. *See also* Notice, at 13981.

[39] *See* Response Letter, at 4.

[40] *See id. See also* Notice, at 13980.

[41] *See id.*

[42] *See* Response Letter, at 4–5.

[43] Specifically, FINRA pointed to (i) a statement by the chair of the Subcommittee that developed the Recommendation that ''there are indeed gaps in corporate bond fixed income reference data, both in terms of when that data is available with different reference data providers, as well as sometimes the accuracy;'' (ii) a statement from a data provider panelist that ''there are some market anomalies where some of the vendors have access to information much earlier than other vendors,'' and ''that creates basically competitive advantage on certain platforms;'' and (iii) a statement from an investment management firm panelist noting that there are ''cases where a new issue does take time to get set up on some of [the investment firm's] electronic trading platforms, and that means that we can't necessarily go and use those electronic trading platforms right away.'' *See* Response Letter, at 5 (citing to Transcript of FIMSAC Meeting (October 29, 2018), available at *https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-102918transcript.txt*).

[44] *See* Response Letter, at 5. *See also supra* note 27 and accompanying text.

[45] FINRA cited comment letters submitted in response to the proposal noting that there currently exist issues with the availability, completeness, and timeliness of new issue reference data; and that the current information asymmetry with respect to such data harms liquidity, execution quality and competition in the corporate bond market. *See* Response Letter, at 5 (citing to Harris Letter; ICE Bonds Letter; ICE Data Letter; Charles River Letter; and FIMSAC Letter). *See also supra* notes 22–25 and accompanying text.

[46] *See* Response Letter, at 6–7.

[47] *See id.*

[48] *See id.* FINRA found that for the first day of trading in corporate bond new issues, an ATS traded at most 3% of the 11,518 newly issued bonds, and that over the subsequent 10 days after issuance, ATSs represented an increasing percentage of trading.

[49] *See* Bloomberg Letter V, at 1–2.

[50] Section 15A(b)(9) of the Act requires that the rules of a national securities association not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. 15 U.S.C. 78*o*–3(b)(9).

[51] *See, e.g.,* Healthy Markets Letter II, at 5–6; Bloomberg Letter III, at 8–11; Heritage Letter II; at 2–3; Bloomberg Letter IV, at 4.

[52] *See* Heritage Letter, at 1–2; Chamber Letter, at 2; Bloomberg Letter, at 2–3; Healthy Markets Letter II, at 5; Tabb Letter, at 2–3. Some of these commenters questioned the quality of FINRA's current TRACE data, and pointed to a recent study that found that approximately 20% of entries had errors. *See, e.g.,* Healthy Markets Letter II, at 5; Bloomberg Letter III, at 5–6; and Bloomberg Letter IV, at 4 (citing to Larry Tabb, Tabb Forum, ''An SEC-Mandated Corporate Bond Monopoly Will Not Help Quality'' (Mar. 21, 2019) (''Tabb Study'')). *See also supra* note 31.

[53] *See* Bloomberg Letter II, at 1. *See also* Bloomberg Letter IV, at 5. This commenter compared the proposal to a previous FINRA proposal to create a facility to consolidate all quotation data in the over-the-counter equities market, which was ultimately withdrawn by FINRA. See Bloomberg Letter V, at 3–4 (citing Securities Exchange Act Release No. 60999 (November 13, 2009), 74 FR 61183 (November 23, 2009) (SR–FINRA–2009–077) (Notice of Filing of Proposed Rule Change Relating to the Restructuring of Quotation Collection and Dissemination for OTC Equity Securities).

[54] *See* Tabb Letter, at 3. *See also* Bloomberg Letter V, at 2.

[55] *See* Bloomberg Letter IV, at 5.

In contrast, one commenter asserted that because of the limited set of data proposed to be captured by FINRA, the proposal would not supplant private sector market data providers.[56] This commenter also stated it would be concerned by any alternative construct to FINRA's proposal that would give increased market power to a single commercial data provider without a commensurate level of regulatory oversight, as data vendors are conflicted by competing commercial interests and should not be in a position to determine who can have access to data necessary to value, trade and settle a newly issued corporate bond.[57] Another commenter asserted that providing reference data in a manner similar to that proposed by FINRA promotes competition by reducing barriers to entry for new entrants in the reference data provider market.[58]

In the Response Letter, FINRA reiterated that the proposed data service is not designed to affect the opportunity for private third party vendors to compete and is rather intended to promote competition among new reference data providers by, among other things, lowering barriers to entry and allowing competition on other dimensions, such as additional fields, updates to existing data based on subsequent events related to the security, presentation, ease of access, and integration to other data or metrics deemed valuable by market participants.[59] FINRA stated that its proposed data service will provide only the basic fields necessary for trading and settling newly issued corporate bonds, and it would not inhibit reference data vendors' ability to redistribute the data with supplementary fields and other value-added services.[60] FINRA also noted that several commenters responding to the proposal agreed that the proposal would not displace reference data providers and would instead increase competition and reduce overall costs.[61]

In response to comments regarding alleged conflicts of interest and FINRA acting in a commercial rather than a regulatory role,[62] FINRA stated that, as a non-profit registered securities association and self-regulatory organization, it does not intend to compete with or displace private data vendors.[63] FINRA added that it did not initiate the proposal for commercial benefit but did so in response to a specific recommendation and regulatory need identified by the FIMSAC.[64] FINRA stated that the proposal is designed to achieve a clear regulatory objective— to provide more timely and accurate consolidation and dissemination of key corporate bond new issue reference data.[65] Furthermore, FINRA noted that under Section 15A of the Act, it is charged with a number of responsibilities including, among others, developing rules that are designed to foster cooperation and coordination with persons engaged in clearing, settling, processing and facilitating transactions in securities.[66] FINRA stated that, in light of this mandate, the collection, consolidation and dissemination of fundamental security information is not a novel role for a registered securities association, and FINRA routinely provides other types of basic security information to the marketplace to, among other things, facilitate the clearing and settlement of securities and improve transparency.[67] FINRA stated that it provided a detailed analysis of the proposal's anticipated costs and benefits in its filing,[68] and stated that the proposed new issue reference data service was modeled as a ''regulatory utility.''[69] FINRA stated that for the foregoing reasons, it believes that the establishment of a corporate bond new issue reference data service fits squarely within the scope of FINRA's affirmative regulatory authority under the Act.[70]

While FINRA acknowledged that the proposed data service may create a potential single point of failure, it stated it continues to believe any concerns about the risks of consolidation do not outweigh the benefits of the data service, and that, as previously discussed, vendors are likely to continue collecting corporate bond new issue reference data.[71] In response to comments concerning the risk of consolidating the proposed corporate bond new issue reference data with FINRA and the timeliness and accuracy of current TRACE data,[72] FINRA stated that there is key information missing from the analysis on which these commenters rely, and without such information it is difficult for FINRA to provide a meaningful response to the analysis.[73] FINRA stated that based on its own review of TRACE and the same vendor's data, FINRA found different results, including a significant number of instances where it received data not yet available from the vendor.[74] FINRA

[56] *See* FIMSAC Letter, at 3.

[57] *See id.* at 4. One commenter that has both a data business and an electronic bond trading platform stated that there is no basis for FIMSAC's claims that integrated firms are using their data business to harm competition in trading. The commenter pointed to data showing that it holds only 3.2% of market share of domestic institutional electronic corporate bond trading, and argued that this data contradicts any suggestion that the commenter has leveraged its data business to gain a competitive advantage for its electronic trading business. *See* Bloomberg Letter II, at 2–4.

[58] *See* Harris Letter, at 4.

[59] *See* Response Letter, at 8–9. *See also* Notice, at 13982.

[60] *See* Response Letter, at 9.

[61] *See id.* at 8 (citing to Harris Letter; FIMSAC Letter; ICE Data Letter; Charles River Letter). *See also supra* notes 56–58 and accompanying text.

[62] *See, e.g., supra* notes 53 and 55 and accompanying text.

[63] *See* Response Letter, at 10.

[64] *See id.*

[65] *See id.*

[66] *See id.* at 9. *See also* Section 15A(b)(6) of the Act, 15 U.S.C. 78*o*–3(b)(6).

[67] *See* Response Letter, at 9–10. For example, FINRA makes available to the public all transaction data in corporate bonds through TRACE. *See* FINRA's TRACE Overview, available at *https://www.finra.org/sites/default/files/TRACE_Overview.pdf.* FINRA also makes details about corporate and agency debt securities available to FINRA members and provides a tool to the public that enables them to analyze and compare the costs of owning mutual funds. *See* TRACE OTC Corporate Bonds and Agency Debt User Guide, available at: *https://www.finra.org/sites/default/files/TRAQS-CA-user-guide-v4.7.pdf.pdf*; FINRA Fund Analyzer, available at: *https://tools.finra.org/fund_analyzer/.*

[68] *See* Response Letter, at 10. *See also* Notice, at 13981–83 (FINRA included an ''Economic Impact Assessment'' in its proposal, which, among other things, described the current dissemination process of new issue reference data in the corporate bond market, pricing of the proposed data service, benefits of the proposal, costs and negative impacts of the proposal, the anticipated effect of the proposal on competition among market participants and efficiency in the market, and alternative approaches considered by FINRA). In response, however, one commenter stated that ''[d]eciding to excise the fee analysis, in the face of overwhelming negative commentary, belies FINRA's claim to have provided a 'detailed analysis of the Proposal's anticipated costs and benefits.' '' *See* Bloomberg Letter V, at 4. *See also* Section III.C. *infra.*

[69] *See* Response Letter, at 10.

[70] *See id.*

[71] *See id.* However, one commenter stated that FINRA offers no reason why vendors would continue to fund their own research in addition to paying for FINRA's information. *See* Bloomberg Letter V, at 3.

[72] *See supra* notes 52–54 and accompanying text.

[73] *See* Response Letter, at 10–11. Specifically, with respect to the Tabb Study cited by certain commenters, FINRA stated that it is not clear what TRACE data was used for the analysis or which point in time during the trading day was used to compare TRACE data with the vendor's data. In addition, FINRA states that the analysis does not explain which of the two sources (TRACE or the vendor) were deemed accurate (it only references ''reconciliation differences'') or whether the differences included cases where data was not present yet in either system. *See id.* In response, one commenter stated that FINRA's response is ''puzzling'' as the Tabb Study states that it used the ''initial release'' of FINRA's own ''TRACE Corporate and Agency Master file,'' and stated that neither FINRA nor any other commenter contests that the concern is with the inaccuracy of FINRA's data. *See* Bloomberg Letter V, at 2.

[74] *See id.* at 11.

also stated that it would expect substantially fewer reconciliation differences if the proposal is approved because FINRA believes a number of the differences found in the analysis may have resulted from data fields that are not currently system-validated.[75] In contrast, FINRA stated that the corporate bond new issue reference data fields would become system-validated under this proposal, as FINRA would employ systemic and operational checks for all of the data fields to determine if any fields are either missing or not conforming to expected format or standards at the time of submission.[76]

C. Fees

Commenters asserted that in order to meet its obligations under Section 15A(b)(5) of the Act,[77] FINRA must provide more information to justify the fees[78] it proposed to charge subscribers of the new issue reference data service.[79] One of these commenters further stated that the data should either be available for free, or at a ''truly low cost.'';[80] Another commenter asserted that the $6,000 per month fee for redistribution could be ''a considerable additional expense'' for its members.[81]

In response to these comments, in Amendment No. 2, FINRA withdrew the proposed subscription fees for receipt of corporate new issue reference data from the proposal.[82] FINRA stated that, based on questions raised in the comments, FINRA is further evaluating the appropriate fee structure for the proposed data service and will submit a separate filing to establish fees related to the new issue reference data service at a future date and will implement the service after those fees become effective.[83]

A number of commenters believed that removal of fees from the proposal was problematic.[84] These commenters stated that the proposed fees form a critical part of FINRA's proposed newly issued bond-reference data service and that the Commission and the public cannot assess whether the benefits of the proposal outweigh the costs and competitive burdens without knowing the fees that FINRA would charge for the service.[85] In addition, these commenters stated that eliminating the fees from the proposal amounts to procedural maneuvering in order to avoid scrutiny, as any subsequent fee filing submitted by FINRA will be immediately effective upon filing with the Commission.[86]

In response, FINRA stated that it did not withdraw the fees from the current proposal to avoid subjecting the fees to further public comment.[87] FINRA stated that any new fees would be filed with the Commission in advance of the implementation of the newly issued corporate bond new issue reference data service and would be subject to applicable Commission rule filing requirements under the Act.[88]

D. Requested Modifications and Clarifications to the Proposal

Several commenters requested that FINRA make various modifications or clarifications to its proposal. One commenter noted that the reference data ''would allow for efficient functioning of trading'' but stated that it could be challenging for underwriters to provide all of the data elements prior to the first trade and instead requested that underwriters only be required to report certain information prior to the first trade and that the remaining information should be reported within 60 minutes of the first trade.[89] Two commenters requested that FINRA clarify the meaning of the ''prior to the first transaction'' deadline for reporting reference data to FINRA.[90]

In the Response Letter, FINRA stated that it believes it is important to maintain the proposal's pre-first transaction reporting requirement and that, on balance, the significant benefits of requiring all data fields to be reported pre-first trade outweigh the additional burdens on underwriters.[91] FINRA stated that the purpose of the pre-first trade requirement is to facilitate the collection and dissemination of all proposed new issue reference data fields before secondary trading in a security begins, and recognized supporting comments on this point.[92] In response to comments requesting clarification on what the term ''first transaction'' means, FINRA stated that ''it means the time of execution of the first transaction of the offering (*i.e.,* the time of execution for the first reported primary transaction in the security), as specified currently in Rule 6760.'' [93]

Several commenters requested FINRA make modifications to and/or provide further clarity regarding certain data fields.[94] One commenter stated that while it did not disagree with FINRA's proposed data fields, FINRA should provide information to support its selections of each of the proposed data fields.[95] In its comment letter, FIMSAC provided supporting rationale for the data fields included in the proposal [96] and recommended that FINRA combine certain proposed data fields and include six additional data fields.[97]

[75] *See id.*

[76] *See id.* In response, one commenter stated that FINRA's reliance on unspecified ''system-validated'' data is not enough to refute the historical evidence of ''a high error rate for comparatively simple data.'' *See* Bloomberg Letter V, at 3.

[77] Section 15A(b)(5) of the Act requires that the rules of a national securities association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls. 15 U.S.C. 78*o*–3(b)(5).

[78] *See supra* note 18.

[79] *See* Chamber Letter, at 3–4; Healthy Markets Letter, at 5–6; SIFMA Letter, at 3–4; Bloomberg Letter, at 6–9; Harris Letter, at 7; Committee Letter, at 1–2; Heritage Letter II at 3. *See also* Bloomberg Letter III, at 3–4; Bloomberg Letter IV, at 6.

[80] *See* Harris Letter, at 7.

[81] *See* Credit Roundtable Letter, at 1.

[82] *See* Amendment No. 2, at 4.

[83] *See* Amendment No. 2, at 4.

[84] *See* Bloomberg Letter IV, at 6–9; Chamber Letter III at 2–3; Committee Letter II at 2–3; Heritage Letter III, at 2–3; Healthy Markets Letter III at 2; SIFMA Letter III at 3–4; and Bloomberg Letter V, at 4–5.

[85] *See id.*

[86] *See id.* Some commenters pointed to the Commission's recent proposed rule change to amend Regulation NMS to rescind a provision that allows a proposed amendment to a national market system plan (''NMS plan'') that establishes or changes a fee or other charge to become effective upon filing, and argued that the concerns voiced by the Commission in that proposal are applicable to FINRA's current proposal. *See* Bloomberg Letter IV, at 8; Chamber Letter III at 2; Committee Letter II at 2–3 (citing to Commission, Proposed Rule, ''Rescission of Effective-Upon Filing Procedure for NMS Plan Fee Amendments,'' 84 FR 54794 (Oct. 11, 2019) (''Proposed Regulation NMS Fee Amendment'')).

[87] *See* Response Letter, at 12, n.35. However, one commenter responded that the problem is not that FINRA could entirely avoid subjecting the fees to public comment, but that the fee filing would be immediately effective before Commission scrutiny, and that this ''would flip the burden of securing Commission intervention from FINRA to affected market participants.'' *See* Bloomberg Letter V, at 4.

[88] *See id.*

[89] *See* SIFMA Letter, at 1–2. *See also* Credit Roundtable Letter, at 1 (cautioning that any data provision requirements on underwriters not impede their ability to make markets in the new issue as soon as possible).

[90] *See* ICE Data Letter, at 2; ICE Bonds Letter, at 2.

[91] *See* Response Letter, at 14. FINRA stated that ''[b]ased on conversations with underwriters, FINRA understands that underwriters do not anticipate incurring significant costs for reporting under this proposal.'' *See* Notice, at 13982.

[92] *See* Response Letter, at 14 (citing to ICE Bonds Letter, at 2; and ICE Data Letter).

[93] *See* Response Letter, at 14. FINRA stated that it believes this position is consistent with the recommendation from ICE Data to provide clarification for the term ''first transaction'' consistent with MSRB Rule G–34. *See* Response Letter at 14, n.45 (citing to ICE Data Letter, at 2).

[94] *See* Credit Roundtable Letter, at 1; ICE Data Letter, at 2–3; SIFMA Letter, at 3; FIMSAC Letter, at 14; SIFMA Letter II, at 2; SIFMA Letter III, at 2–3.

[95] *See* Healthy Markets Letter, at 6; Healthy Markets Letter III, at 2.

[96] *See* FIMSAC Letter at 2–3 and Schedule A.

[97] *See* FIMSAC Letter, at 7–8, 10, 12–13. This commenter proposed combining the Maturity and Perpetual Maturity indicators into one existing field

In response, FINRA stated that it agrees with the FIMSAC's additional supporting rationale for the data fields and, in Amendment No. 2, FINRA incorporated this rationale into its filing.[98] In addition, in Amendment No. 2, FINRA added the six additional data fields suggested by the FIMSAC.[99] FINRA stated that it agrees that these six new fields are useful and appropriate to include in the proposal as they are important for settlement and valuation of floating rate notes and convertible bonds.[100] FINRA further stated that it believes the six new fields would not materially increase the costs of the proposal on underwriters.[101] In addition, in response to comments requesting clarification of certain data fields, Amendment No. 2 included additional detail relating to certain data fields.[102] In particular, FINRA stated that it (i) provided additional guidance to clarify that the ratings data field does not require reporting specific ratings, but rather whether the security is Investment Grade or Non-Investment Grade, as those terms are defined in Rule 6710; and (ii) clarified the information to be reported for the security type, first coupon period type, minimum increment, and minimum piece/denomination data fields.[103] FINRA further stated that it recognizes that commenters have requested further clarification of several data fields,[104] and that FINRA believes such requests can be addressed with guidance provided in the customary course of new rule implementation, and FINRA will continue to engage with market participants as required to provide such guidance.[105]

One commenter requested FINRA clarify the process for underwriters to correct erroneously reported reference data.[106] Two commenters made technical suggestions regarding the methods for supplying and redistributing the required data.[107]

In its Response Letter, FINRA stated that if the proposal is approved, FINRA will continue to engage with market participants on the appropriate business requirements for the reporting process.[108] In addition, FINRA stated that it intends to implement functionality to allow for underwriters to correct previously submitted data to FINRA for a significant period after receiving the initial Rule 6760 submission.[109] FINRA also stated that it may take a phased approach to implementation to promote compliance and data accuracy.[110]

IV. Discussion and Commission Findings

After carefully reviewing the proposed rule change, the comment letters, and the Response Letter, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[111] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act, which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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;[112] and Section 15A(b)(9) of the Act, which requires that FINRA rules not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[113]

A. Justification for the Proposal

Several commenters argued that FINRA has not provided a sufficient justification under the Act for the proposal, and that, in particular, there is no market structure problem that requires regulatory intervention.[114] The Commission disagrees; the record provides ample evidence supporting the proposed new issue reference database. In particular, as discussed below, the record demonstrates two things clearly: (1) Many market participants, including investors, trading platforms, and data vendors, do not have accurate, complete and timely access to corporate bond new issue reference data on the day a

(Maturity Date) and the 144A Eligible and Regulation S indicators into one new field (Series). In addition, this commenter recommended requiring the following additional data fields: First Conversion Date; First Conversion Ratio; Spread; Reference Rate; Floor; and Underlying.

[98] *See* Response Letter, at 12; Amendment No. 2, at 5 and Exhibit 3.

[99] *See* Amendment No. 2, at 5 and Exhibit 3. *See also* Response Letter, at 13.

[100] *See* Amendment No. 2, at 5 and Exhibit 3; Response Letter, at 13. FINRA stated that it also agrees with FIMSAC's recommendation to combine the Maturity and Perpetual Maturity indicators into one existing field (Maturity Date) and marked the amended Exhibit 3 to reflect that the maturity and perpetual maturity indicator fields will be tied together as combined fields for purposes of reporting the information, although they remain noted in Exhibit 3 as separate data fields to reflect that FINRA included the perpetual maturity indicator field based on its industry outreach. *See* Amendment No. 2, at 5, n.9, and Exhibit 3; Response Letter, at 13, n.41. With respect to FIMSAC's recommendation to combine the 144A Eligible and Regulation S indicator fields into a single ''Series'' field, FINRA stated that it believes it will be easier operationally to maintain the separate fields to limit potential confusion about other security offering types or issuances that may meet more than one offering type. *See id.*

[101] *See* Response Letter, at 13.

[102] *See* Amendment No. 2, at 5 and Exhibit 3; Response Letter, at 12–13.

[103] *See* Amendment No. 2, at 5, n.10, and Exhibit 3; Response Letter, at 12–13, n.39.

[104] *See, e.g.,* SIFMA Letter III, at 2–3.

[105] *See* Response Letter, at 12–13.

[106] *See* IHS Markit Letter, at 2–3.

[107] *See* SIFMA Letter, at 2; ICE Data Letter, at 3; SIFMA Letter III, at 2.

[108] *See* Response Letter, at 14.

[109] *See id.* at 14–15.

[110] *See id.* at 15.

[111] In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). The Commission addresses comments about economic effects of the proposed rule change on efficiency and competition in Sections IV.A.1, IV.B. and IV.C. below. The Commission does not believe that FINRA's proposal implicates capital formation in a notable way. However, to the extent capital formation is implicated, the Commission believes that the proposal would promote capital formation and, as discussed in more detail below with respect to the proposal's impact on efficiency and competition, FINRA's proposal could promote improved liquidity and price discovery in the secondary market by enabling more market participant participation in the secondary market on the first day a bond trades. As such, an investor may be more likely to participate in primary bond offerings if they are confident that they can resell the bond in the secondary market at an efficient price. If more investors are more likely to participate in primary bond offerings, corporations would have a broader investor base for raising capital in the corporate bond market.

[112] 15 U.S.C. 78*o*–3(b)(6).

[113] 15 U.S.C. 78*o*–3(b)(9).

[114] *See supra* notes 27–31 and accompanying text. Commenters also argued that FINRA provided no evidence the proposal would reduce broken trade errors or reduce costs or duplicated efforts. *See supra* notes 29 and 31. In contrast, other commenters and market participants stated that FINRA's proposed data service would reduce costs, eliminate duplicated efforts, and reduce trading errors, as market participants would no longer have to source data from multiple vendors or enter data manually. *See supra* note 25; *infra* notes 122–124. *See also* Harris Letter at 2 (noting the current process for underwriters to provide data is ''tedious, prone to transcription errors, and must be repeated for every bond in which the reference data vendor or the end user is interested''); Charles River Letter at 2 (stating that ''the creation of the data service will enhance operational efficiencies for buy-side investors by ensuring reliable, consistent and timely access to data, necessary for the seamless trading and settlement of new issue corporate data'' and ''the proposed data service will help buy-side investors better manage their risk,'' including ''the reduced need for manual entries and overrides.'') As further discussed below, the Commission believes the proposal would benefit the corporate bond market by helping to ensure all market participants have access to consistent, timely and accurate reference data regarding newly issued corporate bonds, which the Commission believes, among other things, may result in a reduction in costs for participants in the market and potentially a reduction in trading errors. *See infra* notes 125–128 and accompanying text.

new issue begins trading in the secondary market; and (2) the proposed data elements to be included in the FINRA database could provide such access, as they encompass data that allow for the identification, valuation, and settlement of newly issued corporate bonds.

As discussed further below, providing all market participants with basic information concerning a newly issued bond that market participants need in order to identify and value corporate bonds and settle corporate bond transactions should improve the corporate bond market's overall function by enabling a broader array of market participants and service providers to engage in this market on the day a newly issued corporate bond begins trading in the secondary market. As a result, the Commission finds that FINRA's proposal is consistent with Section 15A(b)(6) of the Act. The proposed corporate bond new issue reference database is designed to promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, corporate bond new issuances, and is also designed to remove impediments to and perfect the mechanism of a free and open market in such securities.

1. *The Proposal Is Reasonably Designed To Address Gaps in the Availability of Accurate, Complete and Timely Access to Corporate Bond New Issue Reference Data*

The Commission believes that the record supports the conclusion that today many market participants, including investors, trading platforms, and data vendors, do not have accurate, complete and timely access to corporate bond new issue reference data to identify, value, and settle a bond at the time secondary market trading commences in a newly issued corporate bond. Several commenters specifically identified problems that currently exist with the availability, accuracy, and distribution of new issue corporate bond reference data, and believed that the proposal would address these problems.[115] For example, one commenter stated that ''[t]he information asymmetry which exists today adversely impacts the liquidity in the secondary markets for the first few hours or days of trading when significant trading occurs'' and that ''[t]he timely dissemination of complete reference data will allow retail investors to have more timely access to newly issued bonds for purchase and/or price discovery, eliminating unnecessary information asymmetry.''[116]

In addition, as discussed at the October 29, 2018 FIMSAC meeting, current gaps exist in the market for fixed income reference data[117] and thus the FIMSAC unanimously adopted the Recommendation on which the proposal is based.[118] Specifically, currently in the U.S. corporate bond market, neither underwriters nor issuers are required to submit a full set of new issue reference data sufficient to identify, value, and settle a bond[119] to a central depository for public dissemination,[120] and without a full set of reference data fields, trading platforms are unable to list a bond for trading.[121] In addition, currently no universal automated means exists for underwriters or issuers to distribute new issue data to corporate bond market participants.[122] Furthermore, there is currently no requirement that underwriters or issuers provide information about a new issue to all reference data providers at the same time.[123]

Current gaps in the availability of new issue reference data increase transaction costs and impede competition in the corporate bond markets.[124] As a result

[115] *See, e.g.,* ICE Bonds Letter, at 2 (''Without a level playing field for new issue reference data, these retail investors and the broker dealers servicing them are disadvantaged by not being able to participate in the secondary markets during the critical time after a security is available to trade.''); Charles River Letter, at 2 (''Currently, phased reporting of data elements is permitted, causing material inefficiencies in the intake and consumption of data. Eliminating the phased reporting approach will lead to the availability of more complete and consistent reference data.'') *See also supra* notes 22–25 and accompanying text.

[116] *See* ICE Bonds Letter, at 2.

[117] *See* Recommendation, at 1–2. *See also* Transcript from the October 29, 2018 Meeting of the FIMSAC (''FIMSAC Transcript''), Comments from Richard McVey, MarketAxess, at 0064–64 (stating that, following research and deliberations over the past quarter, ''we identified that there are indeed gaps in corporate bond fixed income reference data, both in the timing of when that data is available with different reference data providers, as well as sometimes the accuracy'' and that ''we consider both of those to be significant issues'').

[118] FIMSAC comprises experts and interested persons representing a broad array of fixed income market perspectives, including investors, issuers, dealers, trading venues, quantitative trading firms, SROs, service providers, and market observers. *See supra* note 11. In addition, the Recommendation states that input was considered from reference data providers, underwriters, the Municipal Securities Rulemaking Board (''MSRB''), and FINRA. *See* Recommendation, at 1.

[119] It is the Commission's understanding that such reference data include issuer and issue identifiers and details, such as maturity, coupon, par value, payment frequency, amortization details, call schedule and convertibility, among other terms and conditions. *See* Recommendation, at 1.

[120] *See id.* at 2. Under current FINRA Rule 6760, members that are underwriters of an initial offering of a TRACE-Eligible Security are required to submit certain specified information to FINRA prior to the execution of the first transaction of the offering to facilitate trade reporting and dissemination of transactions. *See* FINRA Rule 6760. The information required by the rule generally is limited to the fields needed to set up a bond on TRACE for trade reporting purposes, and does not include the more detailed data required to price and settle a bond trade. *See* Notice, at 13978. FINRA disseminates some of this new issue information as part of the Corporate Security Daily List; however, electronic trading platforms generally require more information to make new issues available to trade. *See id.*

[121] *See* FIMSAC Letter, at 1. The FIMSAC noted that the research of the Subcommittee indicated that ''the immediate trading of newly issued bonds is hampered by the lack of broad distribution of the required data fields . . .'' and that ''[i]n practice, each reference data provider is able to collect and disseminate new issue reference data at different speeds that vary by a few hours to several days.'' *See id.*

[122] *See* Recommendation, at 2. *See also* FIMSAC Transcript, Comments from Spencer Gallagher, ICE Data Services, at 0069–72 (''Distribution [of new issue reference data] is not consistent in both completeness of the content or timeliness of the delivery. . . . All said, none of the avenues [for securing new issue reference data], underwriter emails, new issue publishing announcement or issuer websites provide a comprehensive coverage in a timely manner. We piece all of this together as available to us. On the few cases where we see no information, we will see the data on Edgar, usually via prospectus. But that is well after the pricing event and clearly not sufficient for pre-trade and trade workflows.'')

[123] *See* FIMSAC Letter, at 2. *See also* FIMSAC Transcript, Comments from Spencer Gallagher, ICE Data Services, at 0068 (''[T]here is one area that no investment or no level of ingenuity can solve and that is equal access to new issue reference data at or prior to first trade execution. . . . [A]ccess and timeliness to fixed income reference data has a significant impact on the efficiency and inter-operability of the corporate bond markets.''); Comments from Bob LoBue, J.P. Morgan, at 0081 (''We do undertake some communications, and various dealers do it differently. I can comment on JP Morgan. We tend to not disseminate data to third party vendors off the corporate platform. I think the point of inaccuracies is the reason for that. So, we tend to use Bloomberg as our let's ensure it is accurate, and then people can source that information from that venue.'')

[124] *See* Recommendation at 2. *See also* FIMSAC Transcript, Comments from Frederic Demesy, Refinitiv, at 0078 (''[A]t the moment, we see that there are some market anomalies where some of the vendors have access to information much earlier than other vendors. And that creates basically competitive advantage on certain platforms, which is in my view not ideal for having a transparent market. It also incurs higher costs for our customers. The first one would be on vendors. Market participants will have to source the data from multiple vendors to ensure that all the information is available, so [there are] duplicating costs. There is also an operational cost related in terms of data quality. So, when you onboard multiple feeds, ICE Data Service and Refinitiv data is not automatically in the same format. So, the customer has to develop operational efficiency tools to standardize the data on their platform. And third is when the market participant gets things wrong, it can have a huge impact, missing trade opportunities but also reputational risks that would be the worst.''); Comments from Bob LoBue, J.P. Morgan, at 0080–81 (''And I think the Refinitiv team and the ICE team intimating a competitive advantage for Bloomberg, there is no question that we do undertake getting our securities set up on the Bloomberg trading platform because that is what the industry predominately uses to book our tickets.'')

of these market structure issues, in the Commission's view, having a single source of new issue reference data would benefit the corporate bond market.[125] Among other things, reliable and timely reference data is necessary to support the efficient trading and settlement of corporate bonds; [126] access to accurate and timely reference data is of growing importance as fixed income market participants increasingly rely on electronic trading platforms; [127] and in order to support the trading of newly issued bonds on electronic platforms, it is necessary that all platform participants price and trade bonds based on consistent and accurate information.[128]

FINRA's proposal was also informed by FINRA's outreach to a diverse set of market participants—including several data providers, underwriters and trading platforms—and that responses from these market participants ''demonstrated a regulatory need for consistent, uniform, and timely corporate bond new issue reference data.'' [129] Based on this outreach, FINRA observed that various market segments may be lacking accurate, complete and timely reference data, including smaller traders that may not afford multiple data vendor subscriptions and electronic trading platforms.[130] The Commission believes that the results of FINRA's outreach give credence to FIMSAC participants' complaints and commenters' statements concerning the lack of timely reference data and the resultant impact on their participation in the market on the first day a new issue trades in the secondary market.

In sum, the record reflects that a gap currently exists in the market of newly issued corporate bond reference data—*i.e.,* the lack of broadly available and accessible new issue reference data on the first day of secondary market trading. And this gap can impede the efficiency and competition in the current marketplace. FINRA's proposal is reasonably designed to address this regulatory gap in the current market to the benefit of the marketplace.

The proposal would require that all data elements for new issues in corporate debt securities be reported prior to the first transaction in the security.[131] FINRA stated this approach—to require uniform pre-first trade reporting—would allow FINRA to collect and make all of the data available immediately to market participants, resulting in a more consistent, timely and complete data set that will support more efficient pricing, trading and settlement of bonds.[132] As discussed further below, the data required to be reported will allow market participants to identify, value and settle corporate bond transactions.[133] For this reason, it is important for all such data fields to be reported to FINRA prior to the first transaction in the security. Furthermore, the Commission recognizes that there may be an incremental burden on underwriters; however, the Commission believes this burden will be mitigated both by the existence of current reporting infrastructures to FINRA and the fact that the data elements to be reported are likely already in the possession of underwriters, given the use of this information in the newly issued bond's primary offering.[134]

FINRA has put forth a reasonable basis for requiring pre-first trade reporting of the reference data (*i.e.,* to facilitate the collection and dissemination of all proposed new issue reference data fields before secondary trading begins), and we believe that FINRA's proposed reporting requirements and dissemination protocol of such data are reasonably designed to address a gap in the current market by facilitating access to timely and accurate new issue corporate bond reference data, consistent with Section 15A(b)(6) of the Act. The reporting of the reference data prior to the first transaction in the security and FINRA's dissemination of such information will enable FINRA to provide all market participants with the ability to have the information concerning a newly issued corporate bond in order to participate in the secondary market effectively when the bond begins trading, promoting market efficiency and fair competition among all market participants.

Currently, the inability of market participants that lack reference data to trade newly issued corporate bonds reduces the breadth of participation in the secondary market, thereby

[125] *See* Recommendation at 2.

[126] *See* Recommendation, at 1. *See also* FIMSAC Transcript, Comments from Alex Sedgwick, T. Rowe Price, at 0084–85 (''Electronic market-makers ultimately need this information to provide accurate pricing and accurate valuation for the prices that they are pushing out to the market. If this information is not available, that ultimately means that there are liquidity providers that may not be able to provide liquidity to us when those new issues are free to trade.''); (So, when . . . we are trading on the desk, we need to be able to measure our execution against benchmarks. If it takes more than a couple of hours or even more than a day for those benchmarks to become available, that is an area where we may not be able to do accurate trade cost analysis. And that is a very important sort of supporting piece of information as we think about best execution on the trading desk.'')

[127] *See* Recommendation, at 1. *See also* FIMSAC Transcript, Comments from Frederic Demesy, Refinitiv, at 0077–78 (''[W]e see a transformation in the bond markets where in the past market participants were expecting the data to be available at the end of day or the timeliness was not as important as it is now. Now, a market participant wants to have the information when the bond prices to set up their platforms to be able to trade. They want to have updates intraday, and that is a very big difference from what happened maybe two, three or five years ago where end of day updates was enough for them to operate. Now, the market participants want information intraday. And that forces market vendors . . . to rethink the way we distribute the reference data. And obviously the more the bond trades electronically, the more market participants would want to have this information on time.''); Comments from Alex Sedgwick, T. Rowe Price, at 0084 (''Historically, we have noticed cases where a new issue does take time to get set up on some of our electronic trading platforms, and that means that we can't necessarily go and use those electronic trading platforms right away. So, we have to trade them via voice or another venue.'')

[128] *See* Recommendation, at 1. *See also* FIMSAC Transcript, Comments from Alex Sedgwick, T. Rowe Price, at 0085 (''I think from our perspective, we are supportive of the proposal. Our focus is primarily on the automated delivery of accurate and timely data and ultimately minimizing secondary dependencies on the desk.'')

[129] *See* Response Letter, at 4. *See also* Notice, at 13980–81. The concerns of market participants, including data vendors, trading venues, and investors, regarding the lack of timely reference data are described in detail above. *See supra* Section III.A. and this Section IV.A.1.

[130] *See* Response Letter, at 4. *See also* Notice, at 13980. In response to one commenter who presented data concerning ATS trading in new issues purporting to suggest that there is no current access problem relating to new issue bond reference data, FINRA reviewed TRACE data concerning ATSs and conducted its own analysis, which FINRA stated suggests that some ATSs may not be receiving reference data in a timely fashion to allow them to begin trading a newly issued corporate bond. *See* Response Letter, at 6–7. *See also supra* note 30. The same commenter disputed FINRA's analysis as flawed. *See supra* note 49. In the Commission's view, any analysis of electronic trading in corporate new issues by ATSs is necessarily limited, as there are a number of electronic bond trading platforms that are not registered as ATSs and there are a number of other types of market participants, including investors, intermediaries and data vendors that may not have timely access to newly issued bond reference data to identify, value and settle bonds on the first day of trading in the secondary market. Therefore, the analyses provided by the commenter and FINRA, which focus on ATS trading in new issues, is not reflective of the market for newly issued corporate bonds as a whole.

[131] Currently, for information reported under Rule 6760 for trade reporting purposes, the rule allows phased reporting in some cases. Specifically, for an offering of a security that is priced and begins trading on the same business day between 9:30 a.m. and 4:00 p.m. Eastern Time, Rule 6760 requires certain information to be reported before the first trade in the security and remaining information within 15 minutes of the time of the first trade. Otherwise, the current rule requires all information to be reported before the first trade in the security. *See* Rule 6760.

[132] *See* Notice, at 13979. FINRA noted that the Recommendation stated that managing underwriters should be required to report the data elements to FINRA no later than reporting such data elements to any third party not involved in the offering, including reference data vendors. *See* Recommendation, at 3.

[133] *See infra* Section IV.A.2.

[134] *See infra* Section IV.B.

impacting liquidity, market efficiency and price competition.[135] FINRA's proposal is designed to provide all investors with timely access to the same information to allow for the identification, valuation, and settlement of newly issued corporate bonds, promoting equitable principles of trade and protecting investors from the negative impacts of information asymmetry. As such, the Commission believes that the availability of the required newly issued corporate bond reference data to all market participants at the same time will in turn support the fair and efficient trading, valuation, and settlement of new issue corporate bonds by all market participants. For these reasons, the Commission believes that FINRA's proposal is consistent with Section 15A(b)(6) of the Act as it promotes just and equitable principles of trade and fosters cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitates transactions in newly issued corporate bonds.

In addition, and as noted by FINRA, the FIMSAC, and commenters, in considering the need for improved corporate new issue reference data, it is informative to look to the municipal bond market, which currently has a centralized reference data service.[136] Specifically, pursuant to MSRB Rule G–34, underwriters must submit new issue information for municipal bonds to the New Issue Information Dissemination Services (''NIIDS''), which is operated by the Depository Trust and Clearing Corporation (''DTCC''). The information required to be reported includes all data elements that must be populated for DTCC to mark the issue as ''trade eligible.'' [137] NIIDS then makes this new issue data immediately available to reference data providers that provide or sell such information to market participants.[138] The FIMSAC found that the municipal bond market has largely avoided reference data access problems due to this structure.[139]

Some commenters argued that the proposal is materially unlike the MSRB's NIIDS, which should not be relied on by FINRA as precedent, because the circumstances surrounding the development and the implementation of the NIIDS were very different than those surrounding FINRA's proposal.[140] But regardless of the development and implementation, the substance of FINRA's proposal is similar to the MSRB's NIIDS. At the time the MSRB proposed the rule requiring underwriters to report certain new issue reference data to NIIDS, it stated that such requirement was ''intended to ensure that the information reaches information vendors and is further re-disseminated for use in automated trade processing systems by the time that trade executions begin in a new issue.'' [141] The MSRB articulated many of the same concerns noted by FINRA's proposal and raised by FIMSAC and other market participants, recognizing that access to necessary securities information depended not only on links with information vendors, but also on whether or not information vendors have information concerning the new issue.[142] In particular, concern was expressed that not all information vendors had the necessary reference data at the time of the first trade because obtaining such information often required the voluntary cooperation of underwriters.[143]

These very same concerns are at the core of FINRA's proposal and FIMSAC's recommendation with respect to the corporate bond market. The Commission therefore finds the impact of NIIDS informative for purposes of FINRA's proposal, and as market participants have noted, the NIIDS has had a positive impact on the market for new issue municipal bonds.[144] As a result, taking into account the positive experience of market participants with the NIIDS, the Commission is further convinced that FINRA's proposal, which is similar to the NIIDS, is reasonably designed to achieve the purposes of Section 15A(b)(6) of the Act, including to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market for new issue corporate bonds.

2. The Proposed Data Elements Allow for the Identification, Valuation, and Settlement of Newly Issued Corporate Bonds

The proposed data elements to be included in the database are appropriate and will allow for market participants to be able to participate in the secondary market of a newly issued corporate bond on the first day that bond trades. FINRA's proposal would require all underwriters to report to FINRA 32 new data elements for all new issues in Corporate Debt Securities. The required data fields proposed to be reported and disseminated, together with data fields already specified in the current rule, reflect all but one of the fields that were described in the Recommendation and in the supplemental FIMSAC Letter,[145] and include additional data fields identified by FINRA during its supplemental industry outreach.[146] As noted by FINRA, several fields specified in the proposed rule change are already required to be reported or are reported voluntarily on the FINRA TRACE New Issue Form.[147] In addition to the

[135] *See e.g.,* Recommendation at 2 (noting that ''common access to timely and accurate corporate bond reference data would increase the efficiency and interoperability of the corporate bond market and promote fair competition among all market participants.'')

[136] *See* Notice, at 13982–83; Recommendation, at 1–2; ICE Data Letter, at 2 (''The current system for submitting and disseminating new issue information for municipal bonds established under MSRB Rule G–34 provides a successful model and we support the Proposal's intent to similarly collect and disseminate data for corporate bond new issues.'').

[137] The FIMSAC notes that this information includes ten data elements required to set up an issue in the NIIDS, as well as up to 70 additional data elements. *See* Recommendation, at 1.

[138] *See* MSRB Rule G–34(a)(ii)(C).

[139] *See* Recommendation, at 2. *See also* FIMSAC Transcript, Comments from Spencer Gallagher, ICE Data Services, at 0070–74 (''Conversely, in the muni market, we do not have this problem. We can clearly state when a reference data is available on municipal new issues. The award date and time is established and the data is made available prior to the first execution. For municipals, new issue reference data dissemination is mandated . . . . This was a positive transformation in the way municipal content was made available. We re-tooled our products to make sure our clients had increased access to data to fit the more efficient new issue dissemination and trade reporting requirements. This had a significant impact on the muni market as it could now depend [sic] sufficient content to execute pre-trade and trade activities without a scramble to secure the required new issue reference data.'')

[140] *See* Bloomberg Letter, at 14–15; Chamber Letter II, at 3–4.

[141] *See* Securities Exchange Act Release No. 57131 (January 11, 2008), 73 FR 3295 (January 17, 2008) (MSRB–2007–08) (''MSRB NIIDS Proposal''), at 3297.

[142] *See* MSRB NIIDS Proposal, *supra* note 141.

[143] *See id.* at 3296.

[144] *See supra* notes 136 and 139 and accompanying text.

[145] *See* Recommendation at Schedule A; FIMSAC Letter at Schedule A. The one field from the Recommendation that FINRA did not include is ''Calculation Types (CALT).'' FINRA stated that it understands from industry outreach that this field leverages calculation methodology that is specific to one data vendor's protocols and may not be readily available to all underwriters that would be required to report information to FINRA under Rule 6760, or to consumers of the data. *See* Notice, at 13978, n.8.

[146] FINRA stated these additional fields were indicated by market participants as important in liquidity and risk assessment. *See* Notice, at 13978–79. *See also* Amendment No. 2, Exhibit 3.

[147] *See* Notice, at 13978. The FINRA TRACE New Issue Form is used by firms to set up securities pursuant to firms' existing obligations either under Rule 6760 or 6730 (Transaction Reporting). It allows for the submission of data fields required by these rules as well as additional data fields that underwriters often report voluntarily. As part of the proposal, FINRA would codify in Rule 6760 the specific fields that have been deemed necessary under current Rule 6760(b) and therefore are mandatory for successful submission of the TRACE New Issue Form. *See* Notice, at 13978, n.9.

FIMSAC,[148] a number of commenters agreed with the required data fields put forth by FINRA.[149] FINRA set forth a detailed description of each new required data field [150] and the rationale for including the field, as follows: [151]

• ISIN Number—needed to uniquely identify securities that are traded and settled internationally outside of North America.

• Currency—necessary for settlement purposes in order to determine the currency of the principal, interest, or premium that will be paid or received at the time of distribution or settlement of a trade.

• Issue Date/First Settlement Date—needed for settlement purposes; it is required in order to populate the first settlement date of the bond; and when trading new issues, this field is needed in order to settle the bond trade between counterparties.

• Interest Accrual Date—necessary for settlement and valuation purposes; this field is needed in order to start the cash flow period of the coupon.

• Day Count Description—necessary for settlement and valuation purposes; this field is needed to calculate the purchase accrued interest and coupon of the security.

• Coupon Frequency—necessary for settlement and valuation purposes; this field is needed to determine how often the coupon payment is made within the year and to calculate the purchase accrued interest and coupon payments.

• First Coupon Payment Date—necessary for settlement and valuation purposes; this field is needed to determine whether the coupon will have a short or long stub on its first coupon payment.

• Regulation S Indicator—this field is necessary for settlement purposes; this field is needed to distinguish Regulation S securities for non-U.S. entities.

• Security Type –needed to identify the type of security being traded and its terms/features.

• Bond Type—necessary for valuation purposes; this field is needed as the bond classification dictates the payout order in the event of an issuer default; this field determines the liquidation preference which specifically affects the valuation of the security.

• First Coupon Period Type—necessary for settlement and valuation purposes; this field will denote whether the coupon will have a short or long stub on its first coupon payment depending on the security's issue date.

• Convertible Indicator—necessary for valuation purposes; this indicator is necessary to understand if the bond is convertible and to allow set up with the underlying equity and conversion price/conversion ratio.

• First Conversion Date—necessary for valuation purposes as it is needed to determine when the bond may be converted into stock.

• First Conversion Ratio—necessary for valuation purposes as it is needed to determine the number of shares into which each convertible bond can be converted.

• Call Indicator—necessary for valuation purposes; this field is needed in order to know if the bond has call feature(s); this is needed when the security is created and will also have an effect on its valuation.

• First Call Date—necessary for valuation purposes; this field is needed in order to know the first call date of the security and will have an effect on bond valuation.

• Put Indicator—necessary for valuation purposes; this field is needed in order to know if the bond has puttable feature(s); this is needed when the security is created and will also have an effect on its valuation.

• First Put Date—necessary for valuation purposes; this field is needed in order to know the first put date of the security and will have an effect on bond valuation.

• Minimum Increment—necessary for settlement purposes; needed in order to understand the minimum incremental amount of bonds that an entity can buy and settle at the depository.

• Minimum Piece/Denomination—necessary for settlement purposes; needed in order to understand the minimum tradeable amount of bonds that an entity can buy and settle at the depository.

• Spread; Reference Rate & Floor—necessary for settlement and valuation purposes; needed to build a cash flow table for the security which determines the coupon for the period; directly affects the purchase accrued interest and future interest distributions; needed to calculate the purchase and interest accrued.

• Underlying Entity Ticker—necessary for valuation purposes; needed to value convertible bonds.

• Issuance Amount—addresses the size of the deal, which is a data attribute for index inclusion criteria across most every fixed income index; would have influence on ETF, liquidity, etc.

• First Call Price & First Put Price—critical for option adjusted spread (OAS) and average life calculations; represent important fields for most clients (especially retail investors) when they gauge re-investment risk.

• Coupon Type—field denotes potential complexity and predictable cash flow data.

• Rating (TRACE Grade)—important to assess risk; FINRA utilizes ratings to determine TRACE grade (Investment Grade or Non-Investment Grade) which determines dissemination volume caps.

• Perpetual Maturity Indicator—field is used in pre-trade compliance; yield calculations generally use first call on perpetual securities.

• PIK Indicator—field used in pre-trade compliance as it indicates cash flow implications and risk for many investors.

As set forth above, FINRA has explained (and commenters have agreed) [152] that each data field is required to either identify, settle or value a newly issued corporate bond. FIMSAC confirmed FINRA's rational for including each data field.[153] The Commission agrees with FINRA, and believes that because the proposed data fields allow for the identification, valuation and settlement of newly issued corporate bonds, the proposal for collecting and disseminating such data will ''promote just and equitable principles of trade, foster cooperation and coordination with persons engaged

[148] *See supra* note 145 and accompanying text.

[149] *See, e.g.,* Harris Letter, at 6 (''The fields on the FINRA list are sufficient to value most bonds. . . . I believe that FINRA chose the fields wisely.''); ICE Data Letter, at 2 (''ICE Data Services believes the scope of the Proposal is appropriate and we support the inclusion of the 30 data fields enumerated in the Proposal's Exhibit 3.'').

[150] FINRA Rule 6760 currently requires underwriters to report to FINRA the following information: Issuer; Coupon; CUSIP Number; Maturity; 144A Eligibility Indicator; the time that a new issue is priced and, if different, the time that the first transaction in the offering is executed; a brief description of the issue; and such other information as FINRA deems necessary to properly implement the reporting and dissemination of a TRACE-Eligible Security. FINRA's proposal will require that these data elements be reported to FINRA prior to the first transaction in the security in all instances.

[151] *See* Amendment No. 2, Exhibit 3. Similar rationale for each data field was also put forth by the FIMSAC. *See* FIMSAC Letter, at Schedule A. In addition, in Amendment No. 2, FINRA set forth its rationale for including certain data fields currently required to be reported under Rule 6760, as follows: Issuer—necessary for settlement and valuation purposes; the investor needs to know the issuing entity of the bond; Coupon—needed for settlement and valuation purposes; the coupon rate is needed for accrual/interest/cash flow calculations; CUSIP Number—needed to uniquely identify securities that trade, clear, and settle in North America, particularly in the United States; Maturity—necessary for settlement and valuation purposes; this field is necessary in order to understand when the bond is due to pay back its principal at par; this field is used to back populate accruals and cash flows; and 144A Eligible Indicator—necessary for settlement purposes; this field is needed to distinguish 144A securities for QIB eligible investors. *See* Amendment No. 2, Exhibit 3. *See also* FIMSAC Letter, at Schedule A.

[152] *See supra* notes 148–149.

[153] *See* FIMSAC Letter, at 2–3 and Schedule A.

in regulating, clearing, settling, processing information with respect to, and facilitating transactions in'' newly issued corporate bonds, and ''remove impediments to and perfect the mechanism of a free and open market'' with respect to the market in such securities, consistent with Section 15A(b)(6) of the Act.

B. Burden on Underwriters

As noted above, FINRA's proposal would require pre-first transaction reporting by all underwriters to FINRA of 40 data elements for all new issues in Corporate Debt Securities, which includes 32 new data elements not currently required. Some commenters raised concerns regarding increased burdens on underwriters due to such reporting requirements, and on small underwriters in particular.[154] FINRA stated that ''[b]ased on conversations with underwriters, FINRA understands that underwriters do not anticipate incurring significant costs for reporting under this proposal.'' [155] In addition, FINRA acknowledged the concern that underwriters that underwrite fewer deals may be disproportionally burdened if there are fixed costs associated with amending an underwriter's reporting system to meet the additional requirements of the proposal, but stated that any such additional burden ''may be alleviated because reporting to FINRA would reduce or eliminate the need for underwriters to report to other parties, or by the fact that underwriters can leverage investments already made in the existing reporting system necessary under Rule 6760.'' [156] Furthermore, the FIMSAC stated that they heard from underwriters that it would be relatively easy for them to report the new issue reference data to FINRA given the current established reporting mechanisms to TRACE.[157]

The Commission agrees that any increased burdens on underwriters, including smaller underwriters, would be limited. Underwriters, including small underwriters, are already required to report some information related to new issue bonds to FINRA.[158] That means that all underwriters of Corporate Debt Securities have already developed data reporting mechanisms to FINRA for purposes of transmitting required data concerning these securities. Indeed, the purpose behind FIMSAC's recommendation to have FINRA establish this database, as opposed to another entity, was to minimize any burdens on underwriters by utilizing existing reporting infrastructures.[159] While the proposed rule would require underwriters to report a larger number of data elements allowing for the identification, valuation, and settlement of a bond, the proposal itself merely expands upon an existing reporting requirement in FINRA's rules and requires underwriters to report additional data fields.[160] The Commission recognizes that there may be an incremental burden on underwriters due to reporting additional data fields; however, the Commission believes this burden will be mitigated both by the existence of current reporting infrastructures to FINRA and the fact that the data elements to be reported are likely already in the possession of underwriters, given the need for this information by investors in the newly issued bond's primary offering. Furthermore, as discussed herein, the Commission believes that the proposal would benefit the corporate bond market by, among other things, reducing costs for participants in the market, and such benefits would outweigh any increased burdens on underwriters due to the proposal.[161]

C. Competition

A number of commenters raised concerns that the proposal would diminish competition among private sector reference data providers by displacing existing for-profit competition with a regulator-provided service.[162] On the other hand, FINRA, along with a number of other commenters,[163] stated that the proposal would actually promote competition among data providers by reducing costs and barriers to entry.[164] The proposal would require underwriters to report a limited set of data that will allow for the identification, valuation and settlement of new issue corporate bonds, leaving data vendors with space to continue competing on a variety of value-added services. Indeed, as noted by one commenter, data vendors currently sell reference data products that provide data in addition to FINRA's proposed required data fields, and these additional data presumably provide value to their customers.[165]

[154] *See supra* notes 32–33. One commenter presented evidence of the size of underwritten investment grade corporate bonds in 2019, stating that ''through October 7, 33 underwriters have each underwritten more than $1 billion (notional year to date, while 59 other underwriters also have priced issues during 2019—overwhelmingly for small issues of less than $25 million'' and stated that FINRA has failed to address the differential impact of the proposed new compliance burden on different sized underwriters. *See* Bloomberg Letter IV, at 5, n.10. Other commenters supported the proposal's pre-first transaction reporting requirement. *See* ICE Bonds Letter, at 2 (''In order to avoid disadvantaging ATS subscribers and their clients, we believe it is critical for the rule to establish conditions that allow ATS providers to access the data required to trade and settle a transaction in a new issue corporate bond prior to the start of secondary market trading''). *See also* ICE Data Letter, at 2.

[155] *See* Notice, at 13982.

[156] *See id. See also* FIMSAC Transcript, Comments from Spencer Gallagher, ICE Data Services, at 0074 (''Possibly, the centralization will work out in [the underwriters'] benefit as underwriters are distributing through just one pipe instead of the multiple pipes that they do today.'')

[157] *See* FIMSAC Letter, at 3. *See also* FIMSAC Transcript, Comments from Bob LoBue, J.P. Morgan, at 0080 (''We have a 15-minute window post-pricing to deliver the pricing information of FINRA for trace eligibility. And we could talk about . . . while we are delivering to FINRA, I think both FINRA and ourselves would say we could probably populate that a little bit deeper.'').

[158] *See* FINRA Rule 6760.

[159] *See* Recommendation *supra* note 12.

[160] In response to commenter concerns about underwriters facing potential liability for errors in reporting, the Commission recognizes that underwriters may be subject to antifraud liability. However, the Commission notes that the information to be provided to FINRA under this proposal is a subset of the information underwriters currently provide to investors in the primary offering. For this reason, the Commission believes that the risk of potential additional liability for reporting this subset of information to FINRA is minimized.

[161] *See supra* notes 114; 122–128 and accompanying text. Additionally, FINRA stated in its Response Letter that it believes it is important to maintain the proposal's pre-first transaction reporting requirement and that ''on balance, the significant benefits of requiring all data fields to be reported pre-first trade outweigh the additional burdens on underwriters.'' *See* Response Letter, at 14.

[162] *See supra* notes 51–54 and accompanying text. These commenters were further concerned that diminished competition would result in a lack of innovation, poor data quality, and a potential single point of failure. *See id. See also supra* note 71. The Commission notes that FINRA's proposal is designed to provide information that will allow for the identification, valuation, and settlement of corporate bonds broadly to the market before such bonds begin trading in the secondary market. As discussed below, the Commission believes that data vendors will likely continue to compete based on differing value added services related to the required information and also based on additional data fields, data updates, and data quality and that such competition should continue to spur innovation and allay concerns regarding a single point of failure and error rates. Furthermore, FINRA has stated that the required data fields would be system validated fields, meaning that FINRA would employ systemic and operational checks for all of the data fields to determine if any fields are missing or not conforming to expected format or standards at the time of submission, and therefore the instance of reconciliation differences should be reduced. *See supra* notes 75–76 and accompanying text.

[163] *See supra* notes 56–58 and accompanying text.

[164] *See* Response Letter, at 8–9.

[165] *See* Harris Letter at 4 (noting that such additional data includes ratings and indications of whether an issuer is currently in default, in an agreement to merge, or negotiating such an agreement). One commenter who argued the proposal would diminish competition amongst reference data providers nevertheless stated that market participants currently demand more reference data fields than FINRA is proposing to collect. *See* Bloomberg Letter, at 13–14. In addition,

We conclude that, as the FIMSAC noted, the limited set of data proposed to be reported and disseminated to allow for the identification, valuation and settlement of new issue corporate bonds would not supplant the demand for a more comprehensive reference database with enhanced data sets that contain additional fields not reported to or disseminated by FINRA.[166] For example, reference data providers could continue to provide the same data as would be disseminated by FINRA, while offering additional value add-ons with respect to such data, such as additional data concerning the newly issued bond, enhanced presentation, ease of access, and integration to other data.[167] Moreover, any reference data provider that sources its initial reference data fields from FINRA would also have the opportunity to provide a value-added service by scrubbing the FINRA data before redistributing to its own subscribers to ensure acceptable data quality for its customers.[168]

this commenter noted that since FINRA's proposal was filed, competition in this area has increased. *See supra* note 30.

[166] *See* FIMSAC Letter, at 3. There are many other data provided by reference data providers concerning a bond issue, such as issuer information (*e.g.,* fundamentals data, capital structure data), specific bond rating, bond trade and selling restrictions, classification data (industry, legal entity, etc.), corporate action data, ESG (Environmental, Social & Governance) data, dividend data, instrument analytics data, and security ownership data. *See e.g.,* IHS Markit Reference Data Bonds Factsheet, available at *https://cdn.ihs.com/www/pdf/Reference-Data-Bonds-factsheet.pdf;* Bloomberg Reference Data Content and Data, available at *https://www.bloomberg.com/professional/product/reference-data/.*

[167] *See* Response Letter, at 9.

[168] Commenters have expressed concerns about FINRA's proposed reference database in light of evidence that the commenters believe show that FINRA's current collection of bond data contains a high incidence of errors. *See supra* notes 52–54. In response, FINRA has stated that the Tabb Study cited by certain commenters is not clear as to what TRACE data was used for the analysis or which point in time during the trading day was used to compare TRACE data with the vendor's data, and that the analysis does not explain which of the two sources (TRACE or the vendor) were deemed accurate (it only references ''reconciliation differences'') or whether the differences included cases where data was not yet present in either system. *See* Response Letter, at 10–11. *See also supra* notes 73–76 and accompanying text. In response, one commenter stated that FINRA's response is ''puzzling'' as the Tabb Study states that it used the ''initial release'' of FINRA's own ''TRACE Corporate and Agency Master file,'' and the commenter stated that neither FINRA nor any other commenter contests that the concern is with the inaccuracy of FINRA's data. *See* Bloomberg Letter V, at 2. The Commission is not persuaded that error rates (whatever they may be) in TRACE data call into question the reliability of FINRA's proposed reference database. In this regard, FINRA has stated that it will engage with market participants on the appropriate business requirements for the reporting process, it intends to implement functionality to allow for underwriters to correct previously submitted data to FINRA for a significant period after receiving the initial Rule 6760 submission, it may take a phased approach to implementation to promote compliance and data accuracy, and data reported to FINRA will be system-validated. *See* Response Letter, at 11–15. The Commission believes that these statements indicate that FINRA is committed to establishing a reliable reference database.

Furthermore, the proposal only applies to new issue corporate bond data and does not contemplate collecting and disseminating updates to this data throughout the life of the bond. The Commission believes that while FINRA's proposal will provide certain basic information for a bond allowing for the identification, valuation, and settlement of newly-issued bonds, market participants will continue to require additional data and value-added services from reference data providers beyond what will be provided by FINRA. As such, the Commission believes that reference data providers will continue to compete and innovate in order to meet the additional needs of their customers. Furthermore, because of the limited scope of the data required to be reported pursuant to the proposal and the range of services provided by data vendors, the Commission believes that any negative competitive impact would be minimal. Finally, the potential benefits of the proposal discussed above, including furtherance of the purposes of Section 15A(b)(6), justify the minimal competitive burden on reference data vendors that may result from this proposal. The Commission thus finds that the proposal is consistent with Section 15A(b)(9) of the Act, and does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

D. Fees

A number of commenters asserted that FINRA did not provide enough information to justify the fees it proposed to charge subscribers of the new issue reference data service under Section 15A(b)(5) of the Act.[169] In response, FINRA withdrew the proposed subscription fees from the proposal and stated that it will submit a separate filing to establish fees related to the new issue reference data service at a future date and will implement the service after those fees are adopted.[170] Several commenters objected to the withdrawal of fees, stating that the proposed fees from a critical part of the proposal without which the Commission and the public cannot assess the costs of the proposal, and that filing such fees at a later date will cause such fees to be immediately effective upon filing, thus allowing FINRA to avoid regulatory and public scrutiny of the fees.[171]

The Commission disagrees that separating the fee proposal into a subsequent filing would allow FINRA to avoid regulatory and public scrutiny of the proposed fees. FINRA cannot charge fees for the proposed data service until the Commission receives a proposed rule change that complies with the Act and Commission rules concerning proposed fee changes. All proposed rule changes, including proposed fee changes, are subject to public notice and comment and must be consistent with the Act. As required by Section 19(b)(1) of the Act, the Commission must publish notice of all proposed rule changes and must give interested persons an opportunity to comment, whether or not such proposed rule change is immediately effective or not. The instructions to Form 19b–4 state that the form ''is intended to elicit information necessary for the public to provide meaningful comment on the proposed rule change . . . and for the Commission to determine whether the proposed rule change . . . is consistent with the requirements of the Act and the rules and regulations thereunder . . . as applicable to the self- regulatory organization and in accordance with the requirements for each type of filing.'' A proposed fee filing must fully and fairly describe the operation of the applicable fee (including its effect on market participants) and do so in sufficient detail so that the public can understand the proposal sufficiently to provide meaningful comment and the Commission can determine whether the proposal is consistent with the Act.

A proposed fee filing by a national securities association such as FINRA must also address all relevant statutory requirements, including Section 15A(b)(5) of the Act which requires that ''[t]he rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons

[169] *See supra* notes 79–81 and accompanying text.

[170] *See* Amendment No. 2, at 4.

[171] *See supra* notes 84–86. SROs are required by Section 19(b) of the Act and Rule 19b–4 thereunder to file proposed rule changes with the Commission on Form 19b–4. The Act provides that a proposed rule change may not take effect unless it is approved by the Commission pursuant to Section 19(b)(2) of the Act, or it becomes immediately effective upon filing pursuant to Section 19(b)(3)(A) of the Act. Rule 19b–4(f) under the Act specifies the types of proposed rule changes that may become immediately effective upon filing with the Commission, and includes those properly designated by the SROs as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization.'' *See* Rule 19b–4(f)(2) under the Act.

using any facility or system which the association operates or controls;'' Section 15A(b)(6) of the Act, which requires, in part, that the rules of an association are ''not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;'' and Section 15A(b)(9) of the Act, which requires, in part, that the rules of an association ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.'' Regardless of whether a fee proposed by FINRA is effective upon filing with the Commission, the Commission assesses whether or not the fee proposal is consistent with the Act.[172] If the Commission determines that a fee filing merits further review, which may be informed by the required notice and comment process, the Commission may temporarily suspend it and issue an order instituting proceedings to determine whether to approve or disapprove the proposal.[173]

The Commission further disagrees that it cannot adequately assess the proposal's consistency with the Act and its economic effects without knowing the fees that FINRA will charge for the proposed reference data service. As discussed above, the proposal is intended to provide accurate, complete, and timely access to basic information regarding newly issued corporate bonds and FINRA has stated that the proposal was modeled as a regulatory utility. The Commission's consideration of the proposal, including the burden on underwriters, the proposal's impact on competition among market participants, including other data vendors, and its impact on efficiency and capital formation, is based upon the understanding that the fees assessed will be consistent with these representations. And, based on that understanding, the Commission finds that the proposal is consistent with the Act. The Commission will also evaluate FINRA's eventual fee application based on this understanding.

Finally, while the Commission outlined various concerns relating to effective-upon-filing fee changes for NMS plans under Rule 608(b) in the Proposed Regulation NMS Fee Amendment, we do not believe those concerns call into question our approach here. Fee filings in this context would, of course, be governed by Section 19 of the Act rather than Rule 608. More importantly, as stated above, the Commission assesses whether or not any fee proposal filed under Section 19 of the Act is consistent with the Act. If the Commission determines that a fee filing merits further review, which may be informed by the required notice and comment process, the Commission may temporarily suspend it and issue an order instituting proceedings to determine whether to approve or disapprove the proposal. And, again, the Commission will make that assessment in the context of FINRA's assertion that the new database was modeled as a regulatory utility.

V. Conclusion

The Commission has carefully considered the proposal, as modified by Amendment No. 2, the comment letters received, and FINRA's Response Letter, and, for the reasons discussed throughout, finds that the proposal is consistent with Sections 15A(b)(6) and 15A(b)(9) of the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[174] that the proposed rule change (SR–FINRA–2019–008), as modified by Amendment No. 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[175]

Jill M. Peterson,

Assistant Secretary.

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BILLING CODE 8011–01–P

[172] Furthermore, in contrast to one commenter's assertion, FINRA has the burden of demonstrating that a proposed fee is consistent with the Act and the rules and regulations thereunder, regardless of whether the proposed fee is effective upon filing with the Commission. *See* Securities and Exchange Commission Rules of Practice, Rule 700 (b)(3) (17 CFR 201.700(b)(3)). *See also supra* note 87.

[173] *See* Section 19(b)(3)(C) of the Act, authorizing the Commission at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act, to summarily temporarily suspend the change in the rules of an SRO 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, and Section 19(b)(2)(B) of the Act, setting forth a notice and hearing procedure for an order instituting proceedings.

[174] 15 U.S.C. 78s(b)(2).

[175] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 10971]

30-Day Notice of Proposed Information Collection: Application To Determine Returning Resident Status

ACTION: Notice of request for public comment.

SUMMARY: The Department of State (Department) is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) January 9, 2020.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Taylor Beaumont, who may be reached at (202) 485–7586 or *PRA_BurdenComments@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Application to Determine Returning Resident Status.
- *OMB Control Number:* 1405–0091.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–117.
- *Respondents:* Immigrant Visa Petitioners.
- *Estimated Number of Respondents:* 4,400.
- *Estimated Number of Responses:* 4,400.
- *Average Time per Response:* 30 Minutes.
- *Total Estimated Burden Time:* 2,200 Hours.
- *Frequency:* Once.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

Under Section 101(a)(27)(A) of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1101, a special immigrant is defined as an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad. INA § 203(b)(4) generally authorizes issuance of an immigrant visa to such ''special immigrants'' as defined in INA § 101(a)(27). Department of State regulations at 22 CFR 42.22 provide that such applicants may be issued a returning resident special immigrant visa if he or she remained out of the United States for a protracted period due to reasons outside of his or her control for which he or she was not responsible. 22 CFR 42.22. The DS–117 is used, in addition to a personal interview, to collect information necessary to determine a returning resident's eligibility for a special immigrant visa.

Methodology

Applicants will submit the DS–117 electronically via email, or print the form and submit it at the time of their interview at a U.S. embassy or consulate.

Edward J. Ramotowski,

Deputy Assistant Secretary.

[FR Doc. 2019–26512 Filed 12–9–19; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 10970]

Request for Information for the 2020 Trafficking in Persons Report

ACTION: Notice; request for information.

SUMMARY: The Department of State (''the Department'') requests written information to assist in reporting on the degree to which the United States and foreign governments meet the minimum standards for the elimination of trafficking in persons (''minimum standards'') that are prescribed by the Trafficking Victims Protection Act of 2000, as amended (''TVPA''). This information will assist in the preparation of the Trafficking in Persons Report (''TIP Report'') that the Department submits annually to the U.S. Congress on governments' concrete actions to meet the minimum standards. Foreign governments that do not meet the minimum standards and are not making significant efforts to do so may be subject to restrictions on nonhumanitarian, nontrade-related foreign assistance from the United States, as defined by the TVPA. Submissions must be made in writing to the Office to Monitor and Combat Trafficking in Persons at the Department of State by January 15, 2020. Please refer to the *Addresses, Scope of Interest,* and *Information Sought* sections of this Notice for additional instructions on submission requirements.

DATES: Submissions must be received by 5 p.m. on January 15, 2020.

ADDRESSES: Written submissions and supporting documentation may be submitted by the following methods:

• *Email (preferred): tipreport@state.gov* for submissions related to foreign governments and *tipreportUS@state.gov* for submissions related to the United States.

• *Mail, Express Delivery, Hand Delivery and Messenger Service:* U.S. Department of State, Office to Monitor and Combat Trafficking in Persons (J/TIP), 2201 C Street NW, SA–09 Suite NE3054, Washington, DC 20520–0903. Please note that materials submitted by mail may be delayed due to security screenings and processing.

Scope of Interest: The Department requests information relevant to assessing the United States' and foreign governments' concrete actions to meet the minimum standards for the elimination of trafficking in persons during the reporting period (April 1, 2019–March 31, 2020). The minimum standards are listed in the *Background* section. Submissions must include information relevant to efforts to meet the minimum standards and should include, but need not be limited to, answering the questions in the *Information Sought* section. Submissions need not include answers to all the questions; only those questions for which the submitter has direct professional experience should be answered and that experience should be noted. For any critique or deficiency described, please provide a recommendation to remedy it. Note the country or countries that are the focus of the submission.

Submissions may include written narratives that answer the questions presented in this Notice, research, studies, statistics, fieldwork, training materials, evaluations, assessments, and other relevant evidence of local, state/provincial, and federal/central government efforts. To the extent possible, precise dates and numbers of officials or citizens affected should be included.

Written narratives providing factual information should provide citations of sources, and copies of and links to the source material should be provided. Please send electronic copies of the entire submission, including source material. If primary sources are used, such as research studies, interviews, direct observations, or other sources of quantitative or qualitative data, provide details on the research or data-gathering methodology and any supporting documentation. The Department does not include in the TIP Report, and is therefore not seeking, information on prostitution, migrant smuggling, visa fraud, or child abuse, unless such crimes also involve the elements of sex or labor trafficking.

Confidentiality: Please provide the name, phone number, and email address of a single point of contact for any submission. It is Department practice not to identify in the TIP Report information concerning sources to safeguard those sources. Please note, however, that any information submitted to the Department may be releasable pursuant to the provisions of the Freedom of Information Act or other applicable law. Submissions related to the United States will be shared with U.S. government agencies, as will submissions relevant to efforts by other U.S. government agencies.

Response: This is a request for information only; there will be no response to submissions.

SUPPLEMENTARY INFORMATION:

1. Background

The TIP Report: The TIP Report is the most comprehensive worldwide report on governments' efforts to combat trafficking in persons. It represents an annually updated, global look at the nature and scope of trafficking in persons and the broad range of government actions to confront and eliminate it. The U.S. government uses the TIP Report to engage in diplomacy, to encourage partnership in creating and implementing laws and policies to combat trafficking, and to target resources on prevention, protection, and prosecution programs. Worldwide, the TIP Report is used by international organizations, foreign governments, and nongovernmental organizations as a tool to examine where resources are most needed. Prosecuting traffickers, protecting victims, and preventing trafficking are the ultimate goals of the TIP Report and of the U.S government's anti-trafficking policy.

The Department prepares the TIP Report using information from across the U.S. government, foreign government officials, nongovernmental and international organizations, survivors of trafficking in persons, published reports, and research trips to every region. The TIP Report focuses on concrete actions that governments take to fight trafficking in persons, including prosecutions, convictions, and sentences for traffickers, as well as victim identification and protection measures and prevention efforts. Each TIP Report narrative also includes recommendations for each country. These recommendations are used to assist the Department in measuring governments' progress from one year to the next and determining whether governments meet the minimum standards for the elimination of trafficking in persons or are making significant efforts to do so.

The TVPA creates a four-tier ranking system. Tier placement is based principally on the extent of government action to combat trafficking. The Department first evaluates whether the government fully meets the TVPA's minimum standards for the elimination of trafficking. Governments that do so are placed on Tier 1. For other governments, the Department considers the extent of such efforts. Governments that are making significant efforts to meet the minimum standards are placed on Tier 2. Governments that do not fully meet the minimum standards and are not making significant efforts to do so are placed on Tier 3. Finally, the Department considers Special Watch List criteria and, when applicable, places countries on Tier 2 Watch List. For more information, the 2019 TIP Report can be found at *www.state.gov/reports/2019-trafficking-in-persons-report/.*

Since the inception of the TIP Report in 2001, the number of countries included and ranked has more than doubled; the 2019 TIP Report included 187 countries and territories. Around the world, the TIP Report and the promising practices reflected therein have inspired legislation, national action plans, policy implementation, program funding, protection mechanisms that complement prosecution efforts, and a stronger global understanding of this crime.

Since 2003, the primary reporting on the United States' anti-trafficking activities has been through the annual Attorney General's Report to Congress and Assessment of U.S. Government Activities to Combat Human Trafficking (''AG Report'') mandated by section 105 of the TVPA (22 U.S.C. 7103(d)(7)). Since 2010, the TIP Report, through a collaborative interagency process, has included an assessment of U.S. government anti-trafficking efforts in light of the minimum standards to eliminate trafficking in persons set forth by the TVPA.

II. Minimum Standards for the Elimination of Trafficking in Persons

The TVPA sets forth the minimum standards for the elimination of trafficking in persons as follows:

(1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.

(2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.

(3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

(4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

The following factors should be considered as indicia of serious and sustained efforts to eliminate severe forms of trafficking in persons:

(1) Whether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons, and convicts and sentences persons responsible for such acts, that take place wholly or partly within the territory of the country, including, as appropriate, requiring incarceration of individuals convicted of such acts. For purposes of the preceding sentence, suspended or significantly reduced sentences for convictions of principal actors in cases of severe forms of trafficking in persons shall be considered, on a case-by-case basis, whether to be considered as an indicator of serious and sustained efforts to eliminate severe forms of trafficking in persons. After reasonable requests from the Department of State for data regarding investigations, prosecutions, convictions, and sentences, a government which does not provide such data, consistent with the capacity of such government to obtain such data, shall be presumed not to have vigorously investigated, prosecuted, convicted, or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and on June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.

(2) Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims.

(3) Whether the government of the country has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons, measures to establish the identity of local populations, including birth registration, citizenship, and nationality, measures to ensure that its nationals who are deployed abroad as part of a diplomatic, peacekeeping, or other similar mission do not engage in or facilitate severe forms of trafficking in persons or exploit victims of such trafficking, a transparent system for remediating or punishing such public officials as a deterrent, measures to prevent the use of forced labor or child labor in violation of international standards, effective bilateral, multilateral, or regional information sharing and cooperation arrangements with other countries, and effective policies or laws regulating foreign labor recruiters and holding them civilly and criminally liable for fraudulent recruiting.

(4) Whether the government of the country cooperates with other governments in the investigation and prosecution of severe forms of trafficking in persons and has entered into bilateral, multilateral, or regional law enforcement cooperation and coordination arrangements with other countries.

(5) Whether the government of the country extradites persons charged with acts of severe forms of trafficking in persons on substantially the same terms and to substantially the same extent as persons charged with other serious crimes (or, to the extent such extradition would be inconsistent with the laws of such country or with international agreements to which the country is a party, whether the government is taking all appropriate measures to modify or replace such laws and treaties so as to permit such extradition).

(6) Whether the government of the country monitors immigration and emigration patterns for evidence of severe forms of trafficking in persons and whether law enforcement agencies of the country respond to any such evidence in a manner that is consistent with the vigorous investigation and prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally recognized human right to leave any country, including one's own, and to return to one's own country.

(7) Whether the government of the country vigorously investigates, prosecutes, convicts, and sentences public officials, including diplomats and soldiers, who participate in or facilitate severe forms of trafficking in persons, including nationals of the country who are deployed abroad as part of a diplomatic, peacekeeping, or other similar mission who engage in or facilitate severe forms of trafficking in persons or exploit victims of such trafficking, and takes all appropriate measures against officials who condone such trafficking. A government's failure to appropriately address public allegations against such public officials, especially once such officials have returned to their home countries, shall be considered inaction under these criteria. After reasonable requests from the Department of State for data regarding such investigations, prosecutions, convictions, and sentences, a government which does not provide such data consistent with its resources shall be presumed not to have vigorously investigated, prosecuted, convicted, or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.

(8) Whether the percentage of victims of severe forms of trafficking in the country that are non-citizens of such countries is insignificant.

(9) Whether the government has entered into effective, transparent partnerships, cooperative arrangements, or agreements that have resulted in concrete and measurable outcomes with

(A) domestic civil society organizations, private sector entities, or international nongovernmental organizations, or into multilateral or regional arrangements or agreements, to assist the government's efforts to prevent trafficking, protect victims, and punish traffickers; or

(B) the United States toward agreed goals and objectives in the collective fight against trafficking.

(10) Whether the government of the country, consistent with the capacity of such government, systematically monitors its efforts to satisfy the criteria described in paragraphs (1) through (8) and makes available publicly a periodic assessment of such efforts.

(11) Whether the government of the country achieves appreciable progress in eliminating severe forms of trafficking when compared to the assessment in the previous year.

(12) Whether the government of the country has made serious and sustained efforts to reduce the demand for

(A) commercial sex acts; and

(B) participation in international sex tourism by nationals of the country.

III. Information Sought Relevant to the Minimum Standards

Submissions should include, but need not be limited to, answers to relevant questions below for which the submitter has direct professional experience. Citations to source material should also be provided. Note the country or countries that are the focus of the submission. Please see the *Scope of Interest* section above for detailed information regarding submission requirements.

1. How have trafficking methods and trends changed in the past 12 months? For example, are there victims from new countries of origin? Have new vulnerable groups at particular risk of human trafficking emerged? Is internal trafficking or child trafficking increasing? Has sex trafficking changed, for example from brothels to private apartments? Is labor trafficking now occurring in additional types of industries or agricultural operations? Is forced begging a problem? Does child sex tourism occur in the country or involve its nationals abroad, and if so, what are their destination countries?

2. What were the government's major accomplishments in addressing human trafficking?

3. What were the greatest deficiencies in the government's anti-trafficking efforts? What were the limitations on the government's ability to address human trafficking problems in practice?

4. In what ways have the government's efforts to combat trafficking in persons changed in the past year? What new laws, regulations, policies, and implementation strategies exist (*e.g.,* substantive criminal laws and procedures, mechanisms for civil remedies, and victim-witness security, generally and in relation to court proceedings)? Have government policies undermined or otherwise negatively impacted anti-trafficking efforts within that country? Does the country's legislation require proof of force, fraud, or coercion (the ''means'') even in the case to meet the legal definition of sex trafficking for minors?

5. Please provide observations regarding the implementation of existing laws, policies, and procedures. Are there laws criminalizing those who knowingly solicit or patronize a trafficking victim to perform a commercial sex act and what are the prescribed penalties?

6. Are the anti-trafficking laws and sentences strict enough to reflect the nature of the crime (*e.g.,* commensurate with crimes such as rape or kidnapping)?

7. Please provide observations on overall anti-trafficking law enforcement efforts and the efforts of police and prosecutors to pursue trafficking cases. Were any trafficking cases investigated and/or prosecuted, and any traffickers convicted during the reporting period? Is the government equally vigorous in pursuing labor trafficking and sex trafficking, internal and transnational trafficking, and crimes that involve its own nationals or foreign citizens? Please note any efforts to investigate and prosecute suspects for knowingly soliciting or patronizing a sex trafficking victim to perform a commercial sex act.

8. Do government officials understand the nature of all forms of trafficking? If not, please provide examples of misconceptions or misunderstandings.

9. Do judges appear appropriately knowledgeable and sensitized to trafficking cases? What sentences have

courts imposed upon traffickers? How common are suspended sentences and prison time of less than one year for convicted traffickers? How does this compare to other crimes such as rape and kidnapping?

10. What was the extent of official complicity in trafficking crimes? Were officials, government contractors, or government grantees condoning trafficking in persons, operating as traffickers (whether subjecting persons to forced labor and/or sex trafficking offenses), enabling traffickers, or taking actions that may facilitate trafficking (including accepting bribes to allow undocumented border crossings or suspending active investigations of suspected traffickers, etc.)? Was there a policy or pattern of trafficking in government-funded programs? Were there examples of trafficking occurring in state institutions (*e.g.,* prisons, orphanages or child foster homes, institutions for mentally or physically disabled persons, camps, compounds, or outposts)? What proactive measures did the government take to prevent official complicity in trafficking in persons crimes? How did the government respond to reports of complicity that arose during the reporting period? Has the government made efforts to investigate, prosecute, convict, and sentence complicit officials?

11. Has the government vigorously investigated, prosecuted, convicted, and sentenced nationals of the country deployed abroad as part of a diplomatic, peacekeeping, or other similar mission who engage in or facilitate trafficking, including domestic servitude?

12. Has the government investigated, prosecuted, convicted, and sentenced members of organized crime groups that are involved in trafficking?

13. Did government officials engage in, support, or otherwise facilitate the unlawful recruitment and use of children in armed forces or security forces? [*Note:* this can include combat roles as well as support roles, but please be specific in this regard if possible.] Did any government-supported organizations or armed groups engage in the unlawful recruitment and use of children in such roles? Does the government have any children held in military detention due to their suspected roles as child soldiers? Do international monitoring organizations (*e.g.,* United Nations, International Committee of the Red Cross, Human Rights Watch) have unhindered access to interview these detained children and/or child soldiers and monitor the conditions of their detention? Does the government have any hand-over procedures to transfer these children to civilian authorities? Describe the conditions of military detention of child soldiers and/or children accused of association with armed groups, including: (1) The typical length of time the children are held; (2) access to legal aid and rehabilitation services; (3) the conditions of the detention facility including food, sanitation, crowding, etc. and whether children are segregated from adults and by gender; (4) allegations of suspected sexual exploitation while in detention, including of female child soldiers; and (5) allegations children and/or child soldiers are used for labor, intelligence gathering, or to screen other detained persons.

14. Please provide observations regarding government efforts to address the issue of unlawful child soldiering. Describe the government's efforts to disarm and demobilize child soldiers, to provide protection services and reintegrate former child soldiers, and to monitor the wellbeing of such children after reintegration.

15. Did the government make a coordinated, proactive effort to identify victims of all forms of trafficking? Did officials effectively coordinate among one another and with relevant nongovernmental organizations to refer victims to care? Is there any screening conducted before deportation or when detaining migrants, including unaccompanied minors, to determine whether individuals were subjected to trafficking? Were such individuals referred for protection services? Does the government also partner with nongovernmental organizations to conduct screenings? What happens if a potential case of human trafficking is identified?

16. What victim services are provided (legal, medical, food, shelter, interpretation, mental health care, employment, training, etc.)? Who provides these services? If nongovernment organizations provide the services, does the government support their work either financially or otherwise? Are these service providers required to be trained on human trafficking and victim identification?

17. What was the overall quality of victim care? How could victim services be improved? Was government funding for trafficking victim protection and assistance adequate? Are there gaps in access to victim services? Are services available regardless of geographic location within the country? Are services victim-centered and trauma-informed?

18. Are services provided adequately to victims of both labor and sex trafficking? Adults and children, including men and boys? Citizens and noncitizens? LGBTI persons? Persons with disabilities? Were such benefits linked to whether a victim assisted law enforcement or participated in a trial, or whether a trafficker was convicted? Could adult victims leave shelters at will? Could victims seek employment and work while receiving assistance?

19. Do service providers and law enforcement work together cooperatively, for instance to share information about trafficking trends or to plan for services after a raid? What is the level of cooperation, communication, and trust between service providers and law enforcement?

20. Were there means by which victims could obtain restitution from defendants in criminal cases or file civil suits against traffickers for damages, and did this happen in practice? Did prosecutors request and/or courts order restitution in all cases where it was required?

21. How did the government encourage victims to assist in the investigation and prosecution of trafficking? How did the government protect victims during the trial process? If a victim was a witness in a court case, was the victim permitted to obtain employment, move freely about the country, or leave the country pending trial proceedings? How did the government work to ensure victims were not re-traumatized during participation in trial proceedings? Can victims provide testimony via video or written statements? Were victims' identities kept confidential as part of such proceedings?

22. Did the government provide, through a formal policy or otherwise, temporary or permanent residency status, or other relief from deportation, for foreign victims of human trafficking who may face retribution or hardship in the countries to which they would be deported? Were victims given the opportunity to seek legal employment while in this temporary or permanent residency? Were such benefits linked to whether a victim assisted law enforcement, participated in a trial or whether there was a successful prosecution? Does the government repatriate victims who wish to return home? Does the government assist with third country resettlement? Are victims awaiting repatriation or third country resettlement offered services? Are victims indeed repatriated or are they deported?

23. Does the government effectively assist its nationals exploited abroad? Does the government work to ensure victims receive adequate assistance and support for their repatriation while in

destination countries? Does the government provide adequate assistance to repatriated victims after their return to their countries of origin, and if so, what forms of assistance?

24. Does the government inappropriately detain or imprison trafficking victims? Does the government punish, penalize, or detain trafficking victims for unlawful acts committed as a result of being subjected to trafficking, such as forgery of documents, illegal immigration, unauthorized employment, prostitution, theft, or drug production or transport? Does law enforcement screen for trafficking victims when arresting individuals in prostitution?

25. What efforts has the government made to prevent human trafficking? Are there laws prohibiting employers or labor agents from confiscating workers' passports or travel documents, switching contracts without the workers' consent, or withholding payment of salaries as a means of keeping workers in a state of compelled service? Are these laws implemented to hold violators accountable and/or are such crimes investigated by law enforcement as potential indicators of trafficking?

26. Do authorities conduct criminal investigations when indicators of trafficking are identified in the context of labor inspections?

27. Does the government operate a hotline for potential victims? If so, how many calls did the hotline receive? What are the hours of operation? What languages are spoken? How many potential victims were identified and cases referred to law enforcement as a result of calls to the hotline?

28. Has the government entered into effective bilateral, multilateral, or regional information-sharing and cooperation arrangements that have resulted in concrete and measurable outcomes?

29. Did the government provide assistance to other governments in combating trafficking in persons through trainings or other assistance programs?

30. Does the government have effective policies or laws regulating foreign labor recruitment, including the activities of recruitment and placement agencies and individual recruiters, both licensed and unlicensed? What did the government do to regulate recruitment practices that are known to contribute to trafficking in persons? Specifically, did the government prohibit (in any context) charging workers recruitment fees? Also indicate if the government prohibited the recruitment of workers through knowingly fraudulent job offers (including misrepresenting wages, working conditions, location, or nature of the job), contract switching, confiscating or otherwise denying workers access to their identity documents, or recruitment of workers in hazardous or unsafe work? What steps did the government take to minimize the trafficking risks faced by migrant workers departing from or arriving in the country and to raise awareness among potential labor migrants about the risks of human trafficking, legal limits on recruitment fees, or their rights while abroad? What agreements does the government have with either sending or receiving countries of migrant labor regarding safe and responsible recruitment? Are domestic workers (both nationals of the country and foreign nationals) protected under existing labor laws?

31. What measures has the government taken to reduce the participation by nationals of the country in international and domestic child sex tourism? If any of the country's nationals are perpetrators of child sex tourism, do the country's child sexual abuse laws allow the prosecution of suspected sex tourists for crimes committed abroad?

32. What measures did the government take to establish the identity of local populations, including birth registration and issuance of documentation, citizenship, and nationality?

33. Did the government fund any anti-trafficking information, education, or awareness campaigns or training? Were these campaigns or trainings targeting potential trafficking victims, potential first responders or other trusted authorities, known trafficking sectors or vulnerabilities, and/or the demand for human trafficking (*e.g.* buyers of commercial sex or goods produced with forced labor)? Does the government provide financial support to nongovernment organizations working to promote public awareness?

34. Were there government policies, regulations, and agreements relating to migration, labor, trade, and investment that had an impact, positive or negative, on forced labor or sex trafficking or vulnerabilities to such crimes? Please describe how this has impacted anti-trafficking efforts.

35. Please provide additional information and/or recommendations to improve the government's anti-trafficking efforts.

36. Please highlight effective strategies and practices that other governments could consider adopting.

Kari A. Johnstone,

Acting Director, Office to Monitor and Combat Trafficking in Persons, Department of State.

[FR Doc. 2019–26520 Filed 12–9–19; 8:45 am]

BILLING CODE 4710–17–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0104, Notice 1]

Spartan Motors USA, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Spartan Motors USA, Inc. (Spartan), has determined that certain model year (MY) 2017–2019 Spartan Emergency Response Gladiator and Metro Star chassis do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 121, *Air Brake Systems.* Spartan filed a noncompliance report dated December 26, 2018, subsequently petitioned NHTSA on November 12, 2018, and amended on July 31, 2019, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of petition and offers the opportunity for public comment.

DATES: The closing date for comments on the petition is January 9, 2020.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number and notice number cited in the title of this notice and may be submitted by any of the following methods:

• *Mail:* Send comments by mail addressed to the 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 comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.

• *Electronically:* Submit comments electronically by logging onto the

Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.

• Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision also will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. Overview: Spartan has determined that certain MY 2017–2019 Spartan Emergency Response Gladiator and Metro Star chassis cabs do not fully comply with paragraph S5.3.3.1(a) of FMVSS No. 121, *Air Brake Systems* (49 CFR 571.121). Spartan filed a noncompliance report dated December 26, 2018, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Spartan subsequently petitioned NHTSA on November 12, 2018 (and amended this petition on July 31, 2019) seeking exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Spartan's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

II. Chassis Cabs Involved: Approximately 15 MY 2017–2019 Spartan Emergency Response Gladiator and Metro Star chassis cabs manufactured between November 16, 2016, and October 30, 2018, are potentially involved.

III. Noncompliance: Spartan described the noncompliance as the service brake application timing exceeds the 0.45 timing requirement as specified in paragraph S5.3.3.1(a) of FMVSS No. 121.

IV. Rule Requirements: Paragraph S5.3.3 of FMVSS No. 121 includes the requirements relevant to this petition. Each service brake system shall meet the requirements of paragraph S5.3.3.1(a). With an initial service reservoir system air pressure of 100 psi, the air pressure in each brake chamber shall, when measured from the first movement of the service brake control, reach 60 psi in not more than 0.45 seconds in the case of trucks and buses.

V. Summary of Spartan's Petition: Spartan described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it related to motor vehicle safety.

In support of its petition, Spartan submitted the following reasoning:

1. Section 5.3.3.1 of FMVSS No. 121 defines the amount of pressure (60 psi) that must be achieved in front brake chambers. Further, it also defines a ''not to exceed'' time (0.45 seconds) in which that pressure at the brake chamber must be achieved. This is not interpreted to mean brakes are to be applied at 60 psi but rather a certain pressure at the brake chamber will be achieved. Brakes will be applied nearly instantaneously after actuation of the treadle valve.

2. Spartan conducted three tests on a sample chassis cab of similar brake system configuration to those subject to the identified noncompliance. The reported average was used to determine the actual results in comparison to the requirements. By rounding the average of the three tests for each sample, Spartan identified it exceeds the requirements by 0.04–0.05 seconds.

3. The measurement of time, in this case, is for when air pressure at the chamber reaches 60 psi. As stated, the brakes are still being applied irrespective of achieving the 60 psi pressure at the front brake chambers. The impact of being 0.044 to 0.05 seconds above the requirement of 0.45 seconds would have very little impact (approximately 4ft @60 mph) to stopping distance of the vehicle and would not impede the capability of the vehicle being able to stop.

4. According to the Driver's License Manual, stopping distance is impacted by driver perception distance and reaction distance. Other factors include speed and gross weight of the vehicle. These attributes would appear to have a more significant impact on overall stopping distance, than 0.05 seconds of timing, for the air pressure to reach 60 psi at the front brake chambers.

5. From a speed of 60 mph, vehicles affected by this condition are required to achieve a complete stop in 310 feet. It would take approximately 3.52 seconds for vehicles to stop at this rate of speed. Vehicles affected by the condition that has resulted in the identified noncompliance as capable of stopping, within the distance of 310 feet, as prescribed by FMVSS No. 121 and would still be able to stop within the required stopping distance.

Spartan concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Spartan no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Spartan notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2019–26527 Filed 12–9–19; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2017–0157]

Pipeline Safety: Request for Special Permit; Alaska Gasline Development Corporation

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice.

SUMMARY: PHMSA is publishing this notice to solicit public comment on a request for special permit, seeking relief from compliance with certain requirements in the Federal pipeline safety regulations (PSRs). At the conclusion of the 60-day comment period, PHMSA will review the comments received from this notice as part of its evaluation to grant or deny the special permit request.

DATES: Submit any comments regarding this special permit request by February 10, 2020.

ADDRESSES: Comments should reference the docket number for the specific special permit request and may be submitted in the following ways:

• *E-Gov website: http://www.Regulations.gov*. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

• *Fax:* 1–202–493–2251.

• *Mail:* Docket Management System: 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:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov.*

Note: There is a privacy statement published on *http://www.Regulations.gov*. Comments, including any personal information provided, are posted without changes or edits to *http://www.Regulations.gov.*

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 Code of **Federal Register** (CFR) § 190.343, you may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Kay McIver, DOT, PHMSA PHP–80, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this matter.

FOR FURTHER INFORMATION CONTACT:

General: Ms. Kay McIver by telephone at 202–366–0113, or by email at *kay.mciver@dot.gov.*

Technical: Mr. Joseph Sieve by telephone at 202–366–5064, or by email at *joseph.sieve@dot.gov.*

SUPPLEMENTARY INFORMATION:

PHMSA received a special permit request from the Alaska Gasline Development Corporation (AGDC) to deviate from the PSRs in 49 CFR 193.2167 and 193.2173 in order to use pipe-in-pipe (PIP) technology at various segments of their proposed liquefied natural gas (LNG) product and LNG quench lines.

AGDC is proposing to construct, own, and operate one integrated natural gas pipeline with gas pre-treatment facilities, interdependent interconnection gas delivery points, and a liquefaction and marine export facility, (collectively known as the Alaska LNG Project) for the purpose of liquefying supplies of natural gas from Alaska. Gas would be supplied from the Point Thomson Unit and Prudhoe Bay Unit production fields on the North Slope, and provide opportunities for in-state deliveries of natural gas and export of LNG in foreign commerce. PHMSA has prescribed the minimum PSRs for LNG facilities in compliance with 49 U.S.C. 60101 et. seq. Those standards are codified in 49 CFR part 193 and apply to the siting, design, construction, operation, maintenance, and security of LNG facilities.

The Alaska LNG Terminal would include LNG rundown lines, which would transfer LNG from the liquefaction units to the LNG storage tanks. These lines would be constructed using PIP technology, which would be designed to contain releases from the inner pipe within an enclosed secondary outer pipe. The three 20-inch diameter PIP rundown lines would start at the outlet line of each liquefaction train and combine to a 30-inch diameter rundown header, which transfers LNG to the storage tanks. The 30-inch diameter PIP rundown header transitions to conventional stainless steel piping in the LNG storage tank area before branching to two (2) tank loading lines. Additionally, AGDC proposes to use PIP technology for four (4) LNG quench lines (two (2) supply and two (2) return lines) that would be used to cool down the boil-off gas. Four-inch (4-inch) diameter quench lines would be connected to the dual 28-inch diameter LNG marine cargo transfer lines using fabricated PIP tees. The quench lines would continue to the northern edge of the boil-off gas compressor unit spill collection area where the PIP transitions to conventional stainless steel piping near the boil-off gas compressors.

The request, proposed special permit with conditions, and Draft Environmental Assessment (DEA) for the AGDC LNG Terminal pipeline are available for review and public comment in the Docket No. PHMSA–2017–0157. We invite interested persons to review and submit comments on the special permit request and DEA in the docket. Please include any comments on potential safety and environmental impacts that may result if the special permit is granted. Comments may include relevant data.

Before issuing a decision on the special permit request, PHMSA will evaluate all comments received on or before the comment closing date. Comments received after the closing date will be evaluated if it is possible to do so without incurring additional expense or delay. PHMSA will consider each relevant comment we receive in making our decision to grant or deny this request.

Issued in Washington, DC on December 4, 2019, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2019–26559 Filed 12–9–19; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2019–0197]

Pipeline Safety: Request for Special Permit; Transcontinental Gas Pipe Line Company, LLC

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice.

SUMMARY: PHMSA is publishing this notice to solicit public comment on a request for special permit, which is seeking relief from compliance with certain requirements in the Federal pipeline safety regulations. At the conclusion of the 30-day comment period, PHMSA will review the comments received from this notice as part of its evaluation to grant or deny the special permit request.

DATES: Submit any comments regarding this special permit request by January 9, 2020.

ADDRESSES: Comments should reference the docket number for the specific special permit request and may be submitted in the following ways:

- *E-Gov website: http://www.Regulations.gov*. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System: 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:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov*.

Note: There is a privacy statement published on *http://www.Regulations.gov*. Comments, including any personal information provided, are posted without changes or edits to *http://www.Regulations.gov*.

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 Code of Federal Regulations (CFR) § 190.343, you may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Kay McIver, DOT, PHMSA–PHP–80, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this matter.

FOR FURTHER INFORMATION CONTACT:

General: Ms. Kay McIver by telephone at 202–366–0113, or by email at *kay.mciver@dot.gov.*

Technical: Mr. Steve Nanney by telephone at 713–272–2855, or by email at *steve.nanney@dot.gov.*

SUPPLEMENTARY INFORMATION: PHMSA received a special permit request from the Transcontinental Gas Pipe Line Company, LLC (Transco), a subsidiary of the Williams Company. Transco operates interstate gas transmission pipelines and is seeking a waiver from the requirements of 49 CFR 192.611, Change in class location: Confirmation or revision of maximum allowable operating pressure. The Class 1 to Class 3 location change occurred in 2018. This special permit is being requested in lieu of pipe replacement or pressure reduction for one (1) special permit segment of 0.02 miles (112 feet) located on the 42-inch diameter Mainline D Pipeline in Fayette County, Georgia. Mainline D Pipeline is an 820-mile interstate pipeline in the 10,500-mile Transco system that begins in Texas, and runs northeast along the eastern side of the Appalachian Mountains to New York, New York. Mainline D Pipeline was installed in 1966 and transports natural gas from the Gulf of Mexico and the Marcellus region of Pennsylvania to population centers, industrial customers, and other pipelines. The maximum allowable operating pressure for the Mainline D Pipeline in the special permit segment is 800 pounds per square inch gauge.

The request, proposed special permit with conditions, and Draft Environmental Assessment (DEA) for the Transco pipeline are available for review and public comment in the Docket No. PHMSA–2017–0197. We invite interested persons to review and submit comments on the special permit request and DEA in the docket. Please include any comments on potential safety and environmental impacts that may result if the special permit is granted. Comments may include relevant data.

Before issuing a decision on the special permit request, PHMSA will evaluate all comments received on or before the comment closing date. Comments received after the closing date will be evaluated if it is possible to do so without incurring additional expense or delay. PHMSA will consider each relevant comment we receive in making our decision to grant or deny this request.

Issued in Washington, DC, on December 4, 2019, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2019–26560 Filed 12–9–19; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Revision; Submission for OMB Review; Licensing Manual

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 take this opportunity to comment on a revised information collection as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning the revision of its information collection titled ''Licensing Manual.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received on or before January 9, 2020.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible.

You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, 1557–0014, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0014'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0014, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to *oira_submission@omb.eop.gov*.

You may review comments and other related materials that pertain to this information collection [1] following the close of the 30-day comment period for this notice by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov*. Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0014'' or ''Licensing Manual.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. 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 hearing impaired, 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 comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks that OMB approve this revision to its collection.

Title: Licensing Manual.

OMB Control No.: 1557–0014.

Description: The Licensing Manual sets forth the OCC's policies and procedures for the formation of a national bank, federal savings association, or federal branch or agency, entry into the federal banking system by other institutions, and corporate expansion and structural changes by existing national banks or federal savings associations. The Manual includes sample documents to assist the applicant in understanding the types of information the OCC needs in order to process a filing. An applicant may use the format of the sample documents or any other format that provides sufficient information for the OCC to act on a particular filing, including the OCC's electronic filing system, the Central Application Tracking System (CATS).

The OCC will no longer consider National Historic Preservation Act matters and National Environmental Policy Act matters as a part of the review of applications and is removing references to them in its branching and relocation forms.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals; Businesses or other for-profit.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,715.

Estimated Total Annual Burden: 12,533 hours.

Comments: On September 30, 2019, the OCC issued a notice for 60 days of comment concerning the revision to this collection, 84 FR 51711. No comments were received. Comments continue to be requested on:

(a) Whether the information collections are necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(b) The accuracy of the OCC's estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology.

[1] On September 30, 2019, the OCC published a 60-day notice for this information collection, 84 FR 51711.

Dated: December 4, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–26484 Filed 12–9–19; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 720–CS, Carrier Summary Report, Form 720–TO, Terminal Operator Report, and Form 8809–EX, Request for Extension of Time To File an ExSTARS Information Return

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning Form 720–CS, Carrier Summary Report, Form 720–TO, Terminal Operator Report, and Form 8809–EX, Request for Extension of Time to File an ExSTARS Information Return.

DATES: Written comments should be received on or before February 10, 2020 to be assured of consideration.

ADDRESSES: Direct all written comments to Dr. Philippe Thomas, at 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 LaNita Van Dyke at (202) 317–6009, or at Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 720–CS, Carrier Summary Report, Form 720–TO, Terminal Operator Report, and Form 8809–EX, Request for Extension of Time to File an ExSTARS Information Return.

OMB Number: 1545–1733.

Form Numbers: 720–CS, 720–TO, and 8809–EX.

Abstract: Representatives of the motor fuel industry, state governments, and the Federal government are working to ensure compliance with excise taxes on motor fuels. This joint effort has resulted in a system to track the movement of all products to and from terminals. Form 720–CS is an information return that will be used by carriers to report their monthly deliveries and receipts of products to and from terminals. Form 720–TO is completed by bulk transport carriers (barges, vessels, and pipeline) who deliver fuel product to the terminals. Form 8809–EX is used to request a 30-day extension of time to file an Excise Summary terminal Activity Reporting System (ExSTARS) information report (Form 720CS, Carrier Summary Report or Form 720TO, Terminal operator Report).

Current Actions: There is no change at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 544,380.

Estimated Time Per Respondent: 5 hours, 15 minutes.

Estimated Total Annual Burden Hours: 2,530,383.

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, 2019.

Dr. Philippe Thomas,

Supervisory Tax Analyst.

[FR Doc. 2019–26513 Filed 12–9–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0144]

Agency Information Collection Activity: HUD/VA Addendum to Uniform Residential Loan Application

AGENCY: Veterans Benefits Administration; Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 9, 2020.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov* . Please refer to ''OMB Control No. 2900–0144'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Danny S. Green at (202) 421–1354.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: HUD/VA Addendum to Uniform Residential Loan Application, VA Form 26–1802a.

OMB Control Number: 2900–0144.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–1802a, Department of Housing and Urban Development (HUD)/Department of Veterans Affairs (VA) Addendum to Uniform Residential Loan Application, serves as the lender's and the veteran's application for home loans authorized by 38 U.S.C.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 84 FR 189 on September 30, 2019, pages 51726 and 51727.

Affected Public: Individuals or Households.

Estimated Annual Burden: 35,000 hours.

Estimated Average Burden per Respondent: 6 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 350,000.

By direction of the Secretary:

Danny S. Green,

VA Interim Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2019–26483 Filed 12–9–19; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 84 Tuesday,

No. 237 December 10, 2019

Part II

Securities and Exchange Commission

17 CFR Parts 275 and 279

Investment Adviser Advertisements; Compensation for Solicitations; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA–5407; File No. S7–21–19]

RIN: 3235–AM08

Investment Adviser Advertisements; Compensation for Solicitations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (the ''Commission'' or the ''SEC'') is proposing amendments under the Investment Advisers Act of 1940 (the ''Advisers Act'' or the ''Act'') to the rules that prohibit certain investment adviser advertisements and payments to solicitors, respectively. The proposed amendments to the advertising rule reflect market developments since the rule's adoption in 1961. The proposed amendments to the solicitation rule update its coverage to reflect regulatory changes and the evolution of industry practices since we adopted the rule in 1979. The Commission is also proposing amendments to Form ADV that are designed to provide the Commission with additional information regarding advisers' advertising practices. Finally, the Commission is proposing amendments under the Advisers Act to the books and records rule, to correspond to the proposed changes to the advertising and solicitation rules.

DATES: Comments should be received on or before February 10, 2020.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number S7–21–19 on the subject line.

Paper Comments

• Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–21–19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Matthew Cook, Emily Rowland, or James Maclean, Senior Counsels; or Thoreau Bartmann or Melissa Roverts Harke, Senior Special Counsels, at (202) 551–6787 or *IArules@sec.gov,* Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment amendments to 17 CFR 275.206(4)–1 (rule 206(4)–1), 17 CFR 275.206(4)–3 (rule 206(4)–3), and 17 CFR 275.204–2 (rule 204–2) under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 *et seq.*] (the ''Advisers Act''),[1] and amendments to Form ADV [17 CFR 279.1] under the Advisers Act.

Table of Contents

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

I. Introduction

We are proposing reforms of two rules under the Advisers Act relating to how advisers advertise to and solicit clients and investors. First, we are proposing a rule addressing advertisements by investment advisers that would replace the rule that we adopted in 1961, rule 206(4)–1, which we have not changed substantively since adoption.[2] The proposed rule would replace the current rule's broadly drawn limitations with principles-based provisions. The proposed rule contains general prohibitions of certain advertising practices, as well as more tailored restrictions and requirements that are reasonably designed to prevent fraud with respect to certain specific types of advertisements. This approach permits the use of testimonials and endorsements, and third-party ratings, subject to certain conditions. This approach also permits the presentation of performance with tailored requirements based on an advertisement's intended audience.[3] The proposal recognizes developments in technology, changing profiles of investment advisers registered with the Commission, and our experience administering the current rule.

Additionally, we are proposing to amend the Advisers Act cash solicitation rule, rule 206(4)–3, to update its coverage to reflect regulatory changes and the evolution of industry practices since we adopted the rule in 1979. We are proposing to expand the rule to cover solicitation arrangements involving all forms of compensation, rather than only cash compensation, eliminate requirements duplicative of other rules, and tailor the required disclosures solicitors would provide to investors. The proposed rule would also refine the existing provisions regarding disciplinary events that would disqualify a person or entity from acting as a solicitor.

Finally, we are proposing related amendments to Form ADV that are designed to provide additional information regarding advisers' advertising practices, and amendments to the Advisers Act books and records rule, rule 204–2, related to the proposed changes to the advertising and solicitation rules.

A. Advertising Rule Background

Advertisements are a useful tool for investment advisers seeking to obtain new investors and to retain existing investors.[4] Investment advisers disseminate advertisements about their services to inform prospective investors and to persuade them to obtain and pay for those services or to learn more about the advisers. Similarly, advertisements can provide existing investors with information about new or revised services. Accordingly, advertisements can provide existing and prospective investors with useful information as they choose among investment advisers and advisory services. At the same time, advertisements present risks of misleading existing and prospective investors because the investment adviser's interest in attracting or retaining them may conflict with their interests, and the adviser is in control of the design, content, format, media, timing, and placement of its advertisements with a goal of obtaining or retaining business. This goal may create an incentive for advertisements to mislead existing and prospective investors about the advisory services they would receive, including indirectly through the services provided to pooled investment vehicles.

The Commission recognized the potential harm to investors from misleading advertisements when it adopted the current advertising rule in 1961.[5] The Commission explained when it proposed the current rule that investment advisers generally must adhere to a stricter standard of conduct in advertisements than that applicable to ''ordinary merchants'' because securities ''are intricate merchandise,'' and investors ''are frequently unskilled and unsophisticated in investment matters.'' [6] These concerns have motivated the Commission to adopt other rules on advertising investment services and products, including for registered investment companies (''RICs'').[7]

In adopting the current rule, the Commission used its authority under section 206(4) of the Advisers Act to target advertising practices that it believed were likely to be misleading by imposing four *per se* prohibitions.[8] First, the current rule prohibits testimonials concerning the investment adviser or its services.[9] Second, the current rule prohibits direct or indirect references to specific profitable recommendations that the investment adviser has made in the past (''past

[2] The current rule has been amended once, when the Commission revised the introductory text of paragraph (a) as part of a broader amendment of several rules under the Advisers Act to reflect changes made by the National Securities Market Improvement Act of 1996. Rules Implementing Amendments to the Investment Advisers Act of 1940, Release No. IA–1633 (May 15, 1997) [62 FR 28112, 28135 (May 22, 1997)].

[3] As discussed below, we are proposing to define clients and investors that are ''qualified purchasers'' or ''knowledgeable employees'' as ''Non-Retail Persons'' and to define all other clients and investors as ''Retail Persons.'' Similarly, we are proposing to define advertisements directed at Non-Retail Persons as ''Non-Retail Advertisements'' and all other advertisements as ''Retail Advertisements.''

[4] As discussed below, we are proposing to apply the rule to advertisements disseminated by investment advisers to their clients and prospective clients as well as to investors and prospective investors in pooled investment vehicles that those advisers manage. For purposes of this release, we refer to any of these advertising recipients as ''investors,'' unless we specify otherwise.

[5] Advertisements by Investment Advisers, Release No. IA–121 (Nov. 1, 1961) [26 FR 10548 (Nov. 9, 1961)] (''Advertising Rule Adopting Release'').

[6] Investment Advisers Notice of Proposed Rulemaking, Release No. IA–113 (Apr. 4, 1961) [26 FR 3070, 3071 (Apr. 11, 1961)] (''Advertising Rule Proposing Release'').

[7] *See* 17 CFR 230.482 (regulating advertising with respect to securities of RICs and business development companies (''BDCs'')); 17 CFR 230.156 (regulating investment company sales literature).

[8] *See* Section 206(4) of the Advisers Act (authorizing the Commission to define and prescribe ''means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative'').

[9] Rule 206(4)–1(a)(1) (prohibiting publication, circulation, or distribution of any advertisement ''which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser'').

specific recommendations'').[10] Third, the current rule prohibits representations that any graph or other device being offered can by itself be used to determine which securities to buy and sell or when to buy and sell them.[11] Fourth, the current rule prohibits any statement to the effect that any service will be furnished free of charge, unless such service actually is or will be furnished entirely free and without any condition or obligation.[12]

In addition to the four *per se* prohibitions, the current rule prohibits any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading.[13] This prohibition operates more generally than the specific prohibitions to address advertisements that do not violate any *per se* prohibition but still may be fraudulent, deceptive, or manipulative and, accordingly, be misleading.

The concerns that motivated the Commission to adopt the current rule still exist today and are echoed in the rules adopted under other regulatory and self-regulatory regimes governing the use of communications by financial professionals.[14] However, in the nearly 60 years since the current rule's adoption, issues and questions have arisen about the current rule's application, particularly the application of the prohibitions of testimonials and past specific recommendations. Additionally, some of the most common questions related to the current rule (and the anti-fraud provisions of the Advisers Act) relate to the appropriate presentation of performance in advertisements, which the current rule does not explicitly address. The breadth of the current rule's prohibitions, as well as the lack of explicit prescriptions related to the presentation of performance in the rule, can present compliance challenges and potentially have a chilling effect on advisers' ability to provide useful information in communications that are considered advertisements.

Moreover, changes that have occurred since the current rule's adoption lead us to believe providing a more principles-based approach would be beneficial. Specifically, in our development of the proposed rule, we have considered changes in the technology used for communications, the expectations of investors shopping for advisory services, and the nature of the investment advisory industry, including the types of investors seeking and receiving investment advisory services. These changes have informed not only how we propose to update the rule to address current technology, expectations, and market practice but also our general approach of proposing principles-based rules in order to accommodate the continual evolution and interplay of technology and advice.[15]

Advances in Technology. Advances in technology have altered the ways in which service providers, including advisers, interface with consumers generally, including with existing and prospective investors. These advances have also changed the manner in which those consumers evaluate products and services. In the decades since the current rule was adopted, the use of the internet, mobile applications, and social media [16] has become an integral part of business communications. These advances in technology have led to significant growth in the nature and volume of information available to individuals and businesses,[17] for example, by allowing them to access and share user reviews. However, websites and social media can create challenges in complying with the current rule's prohibition on testimonials, particularly for advisers that rely heavily on electronic platforms to communicate with existing and prospective investors.[18]

Expectations of Consumers Shopping for Services. Consumers today often rely on the internet to obtain information when considering buying goods and services across the world, including advisory services and those of other financial professionals. Many websites allow potential buyers to compare and contrast the goods and services being offered, including through reviews and ratings provided by those who have previously bought the relevant goods and services. We believe that consumers' ability to seek out reviews and other information, as well as their interest in doing so, when evaluating

[10] Rule 206(4)–1(a)(2) (prohibiting publication, circulation, or distribution of any advertisement ''which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person'' but providing that an advertisement may set out or offer to furnish a list of all recommendations within the immediately preceding period of not less than one year under certain conditions).

[11] Rule 206(4)–1(a)(3) (prohibiting publication, circulation, or distribution of any advertisement ''which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy, sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use'').

[12] Rule 206(4)–1(a)(4) (prohibiting publication, circulation, or distribution of any advertisement ''which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly'').

[13] Rule 206(4)–1(a)(5).

[14] For example, the Financial Industry Regulatory Authority's (''FINRA'') rule 2210 governs broker-dealers' communications with the public, including communications with retail and institutional investors, and provides standards for the content, approval, recordkeeping, and filing of communications with FINRA. *See* Advertising Regulation, *available at http://www.finra.org/industry/advertising-regulation.* The Commodity Futures Trading Commission likewise regulates certain types of advertising by commodity pool operators, commodity trading advisors, and their respective principals. 17 CFR 4.41 Advertising by Commodity Pool Operators, Commodity Trading Advisors, and the Principals Thereof (prohibiting, in part, any advertisements that employ any device, scheme or artifice to defraud any client or prospective client). The Municipal Securities Rulemaking Board regulates advertisements concerning the products or services of certain brokers, dealers, and municipal securities dealers, and, beginning in 2019, will regulate advertisements by municipal advisers. Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change, Consisting to Amendments to Rule G–21, on Advertising, Proposed New Rule G–40, on Advertising by Municipal Advisers, and a Technical Amendment to Rule G–42, on Duties of Non-Solicitor Municipal Advisers, Release No. 34–83177 (May 7, 2018) [83 FR 21794 (May 10, 2018)]. MSRB Rule G–40 became effective on August 23, 2019.

[15] *See, e.g.,* Modernization of Regulation S–K Items 101, 103, and 105, Release No. 33–10668 (Aug. 8, 2019) [84 FR 44358 (Aug. 23, 2019)] (discussing the role of ''principles-based'' disclosure requirements in articulating a disclosure concept rather than a specific line-item requirement).

[16] ''Social media'' is an umbrella term that encompasses various activities that integrate technology, social interaction, and content creation. Social media may use many technologies, including, but not limited to, blogs, microblogs, wikis, photos and video sharing, podcasts, social networking, and virtual worlds. The terms ''social media,'' ''social media sites,'' ''sites,'' and ''social networking sites'' are used interchangeably in this release.

[17] *See* Report on the Review of the Definition of ''Accredited Investor'' (Dec. 18, 2015) (''Accredited Investor Staff Report''), *available at https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf,* at 5 (noting ''increased informational availability'' and ''changes in the way investors communicate'' since adoption of the ''accredited investor'' definition in 1982).

[18] *See also* Guidance on the Testimonial Rule and Social Media, Division of Investment Management Guidance Update No. 2014–04 (Mar. 2014) (''IM Staff Social Media Guidance''), in which our staff discussed its views on application of the current rule to various situations involving social media. Any staff guidance or no-action letters discussed in this release represent the views of the staff of the Division of Investment Management. They are not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved their content. Staff guidance has no legal force or effect; it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

products and services has changed since the adoption of the current rule.

Profiles of the Investment Advisory Industry. The variety of advisers subject to the advertising rule has changed since the current rule's adoption. Specifically, the type of advisory services provided by advisers generally has changed over time, from impersonal investment advice distributed to many prospective investors in the form of newsletters and other periodicals to more personalized advisory services. The ways advisers and investors interact and engage has also changed; some investors today rely on digital investment advisory programs, sometimes referred to as ''robo-advisers,'' for investment advice, which is provided exclusively through electronic platforms using algorithmic-based programs.[19] In addition, passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'')[20] required many investment advisers to private funds[21] that were previously exempt from registration to register with the Commission and become subject to more provisions of the Advisers Act.[22]

Additionally, the diversity in types of investors seeking and receiving advisory services has increased since the current rule's adoption.[23] When adopting the current rule, the Commission stated ''clients or prospective clients of investment advisers are frequently unskilled and unsophisticated in investment matters.''[24] Changes in the investor population since the current rule's adoption suggest we should reconsider some specific provisions of the current rule and consider how best to address new issues. For example, assets under management for institutional clients have increased in recent years.[25] These types of investors often have their own teams of in-house investment professionals to manage their assets or oversee the retention of outside managers. They therefore often want and have the resources to evaluate information that the current rule may restrict. At the same time, household and individual participation in the capital markets through intermediaries, like investment advisers, has increased. As a result, more individuals who are not themselves professional investors may be seeking or receiving advertisements for these services. Accordingly, rather than the ''one-size-fits-all'' approach of the current rule, we believe it is appropriate for the rule to reflect the intended audience of the advertisement, including investors' access to resources for assessing advertising content for advisory services, such as presentation of hypothetical performance.

In light of the Commission's decades of experience in administering the current rule and the other developments described above, as well as extensive outreach by Commission staff to investor advocacy groups, adviser groups, legal practitioners, and others, we are proposing significant changes to the current rule as discussed below. Specifically, we are proposing a restructured and more tailored rule that: (i) Modifies the definition of ''advertisement'' to be more ''evergreen'' in light of ever-changing technology; (ii) replaces the current four *per se* prohibitions with a set of principles that are reasonably designed to prevent fraudulent or misleading conduct and practices; (iii) provides certain additional restrictions and conditions on testimonials, endorsements, and third-party ratings; and (iv) includes tailored requirements for the presentation of performance results, based on an advertisement's intended audience. The proposed rule also would require internal review and approval of most advertisements and require each adviser to report additional information regarding its advertising practices in its Form ADV.

B. Cash Solicitation Rule Background

Another way that advisers attract clients and investors,[26] beyond advertising communications, is through compensating firms or individuals to solicit new investors. Some investment advisers directly employ individuals to solicit new investors on their behalf, and some investment advisers arrange for related entities or third parties, such as broker-dealers, to solicit new investors. The person or entity compensated, commonly called the ''solicitor,'' has a financial incentive to recommend the adviser to the investor. Without appropriate disclosure, this compensation creates a risk that the investor would mistakenly view the solicitor's recommendation as being an unbiased opinion about the adviser's ability to manage the investor's assets and would rely on that recommendation more than he or she otherwise would if the investor knew of the incentive.

We adopted rule 206(4)-3, the cash solicitation rule, in 1979 to help ensure that clients become aware that paid solicitors have a conflict of interest.[27] The current rule makes the adviser's payment of a cash fee for referrals of

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[19] *See, e.g.,* Robo-Advisers, Division of Investment Management Guidance Update No. 2017–02 (Feb. 2017); *see also* Concept Release on Harmonization of Securities Offering Exemptions, Release No. IA–5256 (June 18, 2019) [84 FR 30460 (June 26, 2019)] (''2019 Concept Release'') (describing the use of robo-advisers as part of the broad availability ''in recent years'' of investment advisory services to retirement investors).

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

[21] *See* 15 U.S.C. 80b–2(a)(29) (defining a ''private fund'' as ''an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940, but for section 3(c)(1) or 3(c)(7) of that Act'').

[22] As part of the Dodd-Frank Act, the Private Fund Investment Advisers Registration Act of 2010 (enacted as Title IV of the Dodd-Frank Act) repealed the ''private fund adviser exemption'' from registration under section 203(b)(3) of the Advisers Act, on which many advisers to private funds had relied to remain outside the purview of the Advisers Act. As a result, the Commission saw an increase in the number of registered investment advisers servicing private funds. Based on a review of Form ADV data between June 2012 and August 2019, the number of investment advisers to private funds registered with the Commission increased from approximately 4,050 to approximately 4,856. The number of private funds advised by registered investment advisers has increased during that same time period, from 24,476 in June 2012 to 37,004 in August 2019. The Dodd-Frank Act created a narrower set of exemptions for advisers that advise exclusively venture capital funds and advisers solely to private funds with less than $150 million in assets under management in the United States. *See* section 203(l) and section 203(m) of the Advisers Act.

[23] We have previously indicated the diversity in types of clients that receive investment advisory services. *See, e.g.,* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA–5248 (June 5, 2019) (''Standard of Conduct Release'') (noting the large variety of clients served by investment advisers ''from retail clients with limited assets and investment knowledge and experience to institutional clients with very large portfolios and substantial knowledge, experience, and analytical resources'').

[24] Advertising Rule Adopting Release, *supra* footnote 5.

[25] As discussed below, *see infra* section III.B.1, a substantial percentage of assets under management at investment advisers is held by institutional clients.

[26] As discussed below, we are proposing to apply the rule to compensation by investment advisers to solicitors to obtain clients and prospective clients as well as investors and prospective investors in private funds that those advisers manage. For purposes of this release, we refer to any of these persons as ''investors,'' unless we specify otherwise.

[27] *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Release No. 688 (July 12, 1979) [44 FR 42126 (Jul. 18, 1979)] (the ''1979 Adopting Release''). When we proposed the rule, we noted that referral arrangements in the investment advisory industry are ''fraught with possible abuses'' and we considered prohibiting investment advisers from making referral payments to persons not directly employed by the firm. *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Release No. 615 (Feb. 11, 1978) [43 FR 6095 (Feb. 13, 1978)] (the ''1978 Proposing Release''), at 6096; 1979 Adoption Release, *id.,* at 42126. However, we concluded that investors' interests could be protected if the conflicts of interest are properly disclosed to advisory clients and certain other regulatory safeguards are met. *See* 1979 Adopting Release, *id.,* at 42126.

advisory clients unlawful unless the solicitor and the adviser enter into a written agreement that, among other provisions, requires the solicitor to provide the client with a current copy of the investment adviser's Form ADV brochure and a separate written solicitor disclosure document.[28] The solicitor disclosure must contain information highlighting the solicitor's financial interest in the client's choice of an investment adviser.[29] In addition, the rule prescribes certain methods of compliance, such as requiring an adviser to receive a signed and dated client acknowledgment of receipt of the required disclosures.[30] The current rule also prohibits advisers from making cash payments to solicitors that have previously been found to have violated the Federal securities laws or have been convicted of a crime.[31]

The current solicitation rule has not been amended since adoption 40 years ago. In this time, advisory and referral practices have evolved, as has the regulatory framework for investment advisers. For example, advisers use various types of compensation, including non-cash compensation, in referral arrangements. Over time, we have gained a greater understanding of these arrangements, causing us to re-evaluate whether the rule should apply to all forms of compensation for referrals. In addition, as discussed above, the passage of the Dodd-Frank Act required many investment advisers to private funds that were previously exempt from registration to register with the Commission and become subject to additional provisions of the Advisers Act and the rules thereunder. Private funds and their advisers often hire solicitors to obtain investors in the funds.[32]

Additionally, the Commission has adopted other regulatory requirements for advisers since the current rule's adoption that are more principles-based. For example, the Act's compliance rule could broadly replace some of the rule's prescriptive requirements, such as the requirement to obtain written and signed acknowledgments of each solicitor disclosure.[33] In addition, the Act's brochure delivery rule may duplicate the current cash solicitation rule's requirement that the solicitor also deliver the adviser's brochure.[34] Finally, we believe it is appropriate to consider revising the solicitor disqualification provision to address certain types of conduct.

Therefore, we are proposing to expand the rule to cover solicitation arrangements involving all forms of compensation, rather than only cash compensation. We are proposing to expand the rule to apply to the solicitation of current and prospective investors in any private fund, rather than only to ''clients'' (including prospective clients) of the investment adviser. Our proposal would require solicitor disclosure to investors, which alerts investors to the effect of this compensation on the solicitor's incentive in making the referral. In addition, we are proposing changes to eliminate: (i) The requirement that solicitors provide the client with the adviser's Form ADV brochure; and (ii) the explicit reminders of advisers' requirements under the Act's special rule for solicitation of government entity clients and their fiduciary and other legal obligations. Our proposal would also eliminate the requirement that an adviser obtain a signed and dated acknowledgment from the client that the client has received the solicitor's disclosure, and instead would afford advisers the flexibility in developing their own policies and procedures to ascertain whether the solicitor has complied with the rule's required written agreement. We are also proposing two new exceptions to the solicitation rule, an exception for *de minimis* payments (less than $100 in any 12 month period) and one for nonprofit programs designed to provide a list of advisers to interested parties. Finally, we are proposing to refine the rule's solicitor disqualification provision to expand the types of disciplinary events that would trigger the rule's disqualification provision, while also providing a conditional carve-out for certain types of Commission actions.

II. Discussion

A. Proposed Amendments to the Advertising Rule

1. Structure of the Rule

The proposed advertising rule is organized as follows, as a means reasonably designed to prohibit fraudulent, deceptive or manipulative acts: (i) General prohibitions of certain advertising practices applicable to all advertisements;[35] (ii) tailored restrictions or conditions on certain practices (testimonials, endorsements, and third-party ratings) applicable to all advertisements;[36] (iii) tailored requirements for the presentation of performance results, based on the advertisement's intended audience;[37] and (iv) a compliance requirement that most advertisements be reviewed and approved in writing by a designated employee before dissemination.[38] The proposed rule would apply to all investment advisers registered, or required to be registered, with the Commission.[39]

2. Scope of the Rule: Definition of ''Advertisement''

a. Proposed Definition

The proposed rule would define ''advertisement'' as ''any communication, disseminated by any means, by or on behalf of an investment adviser, that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients or investors in any pooled investment vehicle advised by the investment adviser.'' The proposed

[28] *See* rule 206(4)-3(a)(2)(iii)(A). When the Commission proposed the solicitation rule, it did not include non-cash compensation in the rule. However, when the Commission adopted the rule, it noted that commenters suggested that a prohibition of cash solicitation fees altogether might lead to use of other, possibly undisclosed, methods of compensation, such as directed brokerage. 1979 Adopting Release, *supra* footnote 27, at n.6.

[29] 1978 Proposing Release, *supra* footnote 27. *See* rule 206(4)-3(b)(1) through (6). The solicitor disclosure must also include prescribed information about the cost that the client would bear in the advisory relationship as a result of the compensated referral.

[30] *See* rule 206(4)–3(a)(2)(iii)(B). Referrals by solicitors for impersonal advisory services and certain solicitors that are affiliated with the adviser are exempt from these requirements. *See* rule 206(4)–3(a)(2)(i) and (ii).

[31] *See* rule 206(4)–3(a)(1)(ii).

[32] *See* Section 7.B.(1)(A).28 (Private Fund Reporting) of Schedule D to Form ADV Part 1A (requiring advisers to private funds to list, among other things, the name of their marketer (including any solicitor)). As of September 30, 2019, approximately 33% of registered investment advisers that report that they advise one or more private funds on Form ADV also report that the private fund uses the services of someone other than the adviser or its employees for marketing purposes.

[33] *See* rule 206(4)–7; Compliance Programs of Investment Companies and Investment Advisers, Release No. IA–2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (''Compliance Program Adopting Release'').

[34] The same year we adopted the cash solicitation rule, we adopted for the first time the Form ADV brochure, which we have significantly amended over time. *See* 1979 Adopting Release, *supra* footnote 27, at n.14 and accompanying text. *See* Amendments to Form ADV, Release No. IA–3060 (July 28, 2010) [75 FR 155 (Aug. 12, 2010)] (''2010 Form ADV Amendments Release''), at section I. The Commission noted in the 1979 adopting release that ''delivery of a brochure by the solicitor will, in most cases, satisfy the investment adviser's obligation to deliver a brochure to the client under Rule 204–3.'' *See* 1979 Adopting Release, *supra* footnote 27.

[35] *See* proposed rule 206(4) 1(a).

[36] *See* proposed rule 206(4) 1(b).

[37] *See* proposed rule 206(4) 1(c).

[38] *See* proposed rule 206(4) 1(d).

[39] The proposed rule would not apply to advisers that are not required to register as investment advisers with the Commission, such as exempt reporting advisers or state-registered advisers.

definition of ''advertisement'' would not include the following four categories of communications:

(A) Live oral communications that are not broadcast on radio, television, the internet, or any other similar medium;

(B) A communication by an investment adviser that does no more than respond to an unsolicited request for specified information about the investment adviser or its services, other than (i) any communication to a Retail Person that includes performance results or (ii) any communication that includes hypothetical performance;

(C) An advertisement, other sales material, or sales literature that is about an investment company registered under the Investment Company Act of 1940 (the ''Investment Company Act'') or about a business development company (''BDC'') and that is within the scope of rule 482 or rule 156 under the Securities Act of 1933 (the ''Securities Act''); or

(D) Any information required to be contained in a statutory or regulatory notice, filing, or other communication.

The proposed rule is intended to define ''advertisement'' so that it is flexible enough to remain relevant and effective in the face of advances in technology and evolving industry practices.[40] This proposed definition reflects several differences from the current rule. One difference is the expansion of the types of communications addressed to reflect evolving methods of communication, rather than the methods that were most common when the current rule was adopted (*e.g.,* newspapers, television, and radio).[41] Second, the proposed definition applies explicitly to advertisements disseminated to investors in pooled investment vehicles, with a carve-out for publicly offered investment companies. Third, the proposed definition does not retain the current rule's ''more than one person'' element, but, consistent with the effect of that element, does not apply to non-broadcast live oral communications or responses to certain unsolicited requests.[42] Finally, the rule carves out information required by existing statutory or regulatory requirements. These differences are intended to update the current rule to reflect modern methods of communication and to be sufficiently flexible to address future methods of dissemination, as well as clarify investment advisers' obligations with respect to all communications intended to obtain or retain investors in pooled investment vehicles. We discuss below the specific provisions of and specific exclusions from the proposed rule's definition.

We request comment generally on the proposed rule's definition of ''advertisement,'' with more specific requests on particular elements of the proposed definition in the sections that follow.

• Generally, does the proposed rule's definition of ''advertisement'' sufficiently describe the types of communications that should be subject to the requirements of the proposed rule? Are there types of communications that should be subject to the requirements of the proposed rule but are excluded from the proposed definition?

• Conversely, does the proposed rule's definition of ''advertisement'' include communications that should not be subject to the requirements of the proposed rule?

b. Specific Provisions

i. Dissemination by Any Means

The proposed rule would define ''advertisement'' to include communications ''disseminated by any means.'' This would replace the current rule's requirement that it be a ''written'' communication or a notice or other announcement ''by radio or television.'' This proposed revision would change the scope of the rule to encompass all promotional communications regardless of how they are disseminated, with the exception of certain communications discussed below. Communications may be disseminated through emails, text messages, instant messages, electronic presentations, videos, films, podcasts, digital audio or video files, blogs, billboards, and all manner of social media, as well as by paper, including in newspapers, magazines and the mail. We recognize that electronic media (including social media and other internet communications) and mobile communications play a significant role in current advertising practices. While we considered including specific references to such media in the proposed definition, we believe that ''by any means'' incorporates such media while better focusing the proposed rule on the goal of the communication, and not its method of delivery. We also believe this revision will help the proposed definition remain evergreen in the face of evolving technology and methods of communication.

We request comment on the proposed definition's inclusion of a communication disseminated by any means.

• Would the proposed definition's approach have our intended effect of being evergreen in the face of changing technologies? Is there an alternative approach that would better produce this intended effect?

• The proposed rule's restrictions would not distinguish between, for example, a print advertisement and a social media post. Is our approach in this respect appropriate or should we treat communications differently depending on the medium? If so, how should we reflect that treatment? Would additional definitions be appropriate or useful? If we adopt a definition that lists specific media, how should we address our goal of having the definition apply to new media in the future?

• The proposed definition would capture advertisements that are nominally directed at one person but in fact widely disseminated (such as robo-calls or emails), in order to prevent any evasion of a rule covering communications ''addressed to'' one person. Would the proposed rule's approach have this intended anti-evasion effect? Is there an alternative approach to the proposed definition that would better produce this intended effect?

[40] The proposed definition of ''advertisement'' is distinct from a communication that would be considered general solicitation or general advertising of an offering for purposes of Regulation D under the Securities Act. *See* 17 CFR 230.502(c) (describing limitations on the manner of offering or selling securities under Regulation D). The proposed definition would also be distinct from a communication that would be considered a public offering for purposes of section 4(a)(2) of the Securities Act. *See* 17 U.S.C. 77d(a)(2). However, in determining whether a communication would constitute a general solicitation, the Commission has historically interpreted the term ''offer'' broadly, and has explained that ''the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer.'' *See* Securities Offering Reform, Release No. 33–8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)], at n. 88. Thus an advertisement under the proposed rule would need to be assessed to determine whether it may be a communication that is considered a general solicitation, advertising, or a public offering for purposes of Regulation D or section 4(a)(2).

[41] *See* proposed rule 206(4)-1(e)(1) (defining ''advertisement'' as, in part, ''any communication, disseminated by any means''). In contrast, the current rule defines ''advertisement,'' in part, to include ''any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television.'' Rule 206(4)–1(b).

[42] *See* proposed rule 206(4)–1(e)(1) (defining ''advertisement'' as, in part, any communication ''that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients or investors in any pooled investment vehicle advised by the investment adviser''). In contrast, the current rule defines ''advertisement,'' in part, to include ''any notice, circular, letter or other written communication addressed to more than one person.'' Rule 206(4)–1(b).

• Should we have different requirements for advertisements depending on how broadly the adviser disseminates them? For example, the FINRA communications rule differentiates between ''retail communications,'' which are those available to more than 25 investors, and ''correspondence,'' which are those available to 25 or fewer investors. Would this kind of differentiation be useful or appropriate in rule 206(4)–1?

ii. By or on Behalf of an Investment Adviser

The proposed rule would define ''advertisement'' to include all communications ''by or on behalf of an investment adviser.'' [43] We understand that investment advisers often provide to intermediaries, such as consultants and solicitors, advertisements for dissemination,[44] and the proposed rule would treat those as communications ''by or on behalf of'' the advisers.[45] Communications disseminated by an affiliate of the investment adviser would similarly be treated as communications ''by or on behalf of'' the adviser. For example, a communication prepared by the adviser to an affiliated private fund but disseminated for the adviser by the private fund through its consultants would be a communication ''by or on behalf of'' the adviser for purposes of the proposed rule. If an advertisement were disseminated without the adviser's authorization, however, such an unauthorized communication would not be ''by or on behalf'' of the adviser.[46]

We believe communications that investment advisers use to offer or promote their services have an equal potential to mislead—and should be subject to the proposed rule—regardless of whether the adviser disseminates such communications directly or through an intermediary. Including communications ''on behalf of'' an investment adviser also is intended to reflect the application of the current rule to communications provided by investment advisers through intermediaries.[47] Accordingly, we believe that investment advisers should be able to comply with this element of the proposed rule through the practices they currently use in communicating with prospective clients through intermediaries.[48]

Additionally, content created by or attributable to unaffiliated third parties, such as investors, could be considered by or on behalf of an investment adviser, depending on the investment adviser's involvement. Whether a communication is ''by or on behalf of'' an investment adviser when the communication involves content from an unaffiliated third party would require a facts and circumstances analysis. We believe that whether third-party information is attributable to an adviser under the ''by or on behalf of'' standard depends upon whether the adviser has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information.

This issue may commonly arise in the context of an adviser's use of its website or other social media. For example, an adviser might incorporate third-party content into the adviser's communication by including a hyperlink to an independent web page on which third-party content sits in the adviser's communication. Or an adviser might allow third parties to post commentary on the adviser's website or social media page. In both cases, the third-party content may be a communication ''by or on behalf of'' the adviser, and therefore an ''advertisement'' subject to the restrictions in the proposed rule.

We believe third-party content is ''by or on behalf of'' an adviser when the adviser takes affirmative steps with respect to the third-party content. For example, third-party content could be by or on behalf of the investment adviser if the investment adviser: (i) Drafts, submits, or is otherwise involved substantively in the preparation of the content; (ii) exercises its ability to influence or control the content, including editing, suppressing, organizing, or prioritizing the presentation of the content; or (iii) pays for the content. If an investment adviser helps draft comments that an investor posts on a third-party website or social media page, the comments could be an advertisement under the proposed definition, and the proposed rule's requirements could apply. For instance, if the adviser edits a third party's discussion of the adviser on a third-party website, then the content could be a communication by or on behalf of the adviser. As noted above, if the adviser pays for the content—including if the adviser provides non-cash compensation such as rewards or other incentives for a third party to provide content—the content could be considered to be by or on behalf of the adviser.[49] Such incentives could include, for example, compensated advisory services and cross-referrals (*e.g.,* the adviser refers investors to the third-party site).

On the other hand, there are several circumstances in which we generally would not view third-party content as by or on behalf of an adviser, and therefore the content would not be within the proposed rule's scope. For example, an adviser's hyperlink to third-party content within the adviser's press release generally would not, by itself, make the hyperlinked content part of the advertisement, provided that the third party, and not the adviser or its affiliate, drafted the hyperlinked content and is free to modify it.[50] At the same time, an adviser's hyperlink to third-party content that the adviser knows or has reason to know contains an untrue statement of material fact or materially misleading information would be fraudulent or deceptive under section 206 of the Act.

Content regarding the investment adviser on third-party hosted platforms that solicit users to post information, including positive and negative reviews of the adviser, generally would not be

[43] Proposed rule 206(4)–1(e)(1).

[44] *See, e.g.,* Investment Company Institute, SEC Staff No-Action Letter (Sept. 23, 1988) (''ICI Letter'') (staff stated that it would not recommend enforcement action regarding an investment adviser's provision of performance information to consultants for advisory clients under certain conditions).

[45] *See infra* section II.B for a discussion of the proposed solicitation rule. In many cases, a compensated testimonial or endorsement would be subject to both the proposed advertising rule and the proposed solicitation rule. This could be the case even if the adviser does not give the adviser's advertising content to the person providing the testimonial or endorsement. *See infra* section II.B.

[46] That is, we intend ''by or on behalf of'' to require affirmative steps by the adviser.

[47] *See, e.g., In re* Profitek, Inc., Release No. IA–1764 (Sept. 29, 1998) (settled order) (the Commission brought an enforcement action against an investment adviser, asserting that it directly or indirectly distributed materially false and misleading advertisements, including by submitting performance information in questionnaires submitted to online databases that were made available to subscribers nationwide and by providing misleading performance information to newspaper that reported the performance in article); *see also* ICI Letter.

[48] The Commission has previously indicated an expectation that an adviser's policies and procedures, at a minimum, should address certain issues to the extent they are relevant to that adviser, which may include marketing advisory services, including the use of solicitors. *See* Compliance Program Adopting Release, *supra* footnote 33.

[49] For many advertisements, paid content also may be considered a paid testimonial or endorsement, which would be subject to specific disclosure requirements (*see* proposed rule 206(4)–1(b)(1)). *See infra* section II.A.4.b.

[50] We previously stated that an adviser should consider the application of rule 206(4)–1, including the prohibition on testimonials, before including hyperlinks to third-party websites on its website or in its electronic communications. *See* Interpretive Guidance on the Use of Company websites, Release No. IC–28351 (Aug. 1, 2008) [73 FR 45862 (Aug. 7, 2008)]. The proposed rule would provide an approach that is more flexible than our 2008 interpretive guidance to evaluating the use of hyperlinks to third-party content, as the proposed rule would not prohibit testimonials.

''by or on behalf of'' the investment adviser unless the adviser took affirmative steps to influence the content of those reviews or posts, such as providing a user with wording to submit as a review or editing the content of a post.[51]

Determining whether content posted by third parties on an adviser's own website or social media page is by or on behalf of the investment adviser will thus turn on the extent to which the adviser has involved itself in the presentation of such content.[52] For example, the fact that an adviser permits all third parties to post public commentary to the adviser's website or social media page would not, by itself, render such content attributable to the investment adviser, so long as the adviser does not selectively delete or alter the comments or their presentation. We believe such treatment for third-party content on the adviser's own website or social media page is appropriate even if the adviser has the ability to influence control over the commentary but does not exercise it.[53] Likewise, we would not consider an adviser that merely permits the use of ''like,'' ''share,'' or ''endorse'' features on a third-party website or social media platform to implicate the proposed rule.

Conversely, if the investment adviser took affirmative steps to involve itself in the preparation of the comments or to endorse or approve the comments, those comments could be communications ''by or on behalf of'' the adviser. For example, if an adviser substantively modifies the presentation of comments posted by others by deleting negative comments or prioritizing the display of positive comments, then we believe the adviser is exercising sufficient control over third-party comments with the goal of promoting its advisory business that the content would be ''by or on behalf of'' the investment adviser and would likely be considered an advertisement under the proposed rule. We request comment on the proposed definition's inclusion of communications ''on behalf of'' an investment adviser, including our views above on when third-party content would be considered a communication by or on behalf of an investment adviser.

- Is the ''on behalf of'' element of the proposed definition sufficiently clear based on our description above? Should we further clarify any specific indicia to determine when a communication is disseminated ''on behalf of'' an investment adviser, particularly circumstances when an adviser might have exercised sufficient influence over third-party content? Should we use a different standard such as, for example, the prohibition in rule 156 under the Securities Act of ''directly or indirectly'' using sales literature?
- Should the proposed rule explicitly define or provide examples when third-party content would be considered an advertisement for which the investment adviser is responsible and when it is not? How should we incorporate such provisions?
- Do investment advisers routinely use intermediaries or other third parties to disseminate communications to the advisers' clients and prospective clients? How do investment advisers to private funds and other pooled investment vehicles currently use intermediaries, for example through capital introduction programs, to advertise those vehicles? Do commenters agree that investment advisers would be able to comply with the ''on behalf of'' element through practices they currently use in communicating through intermediaries?
- Should the proposed rule apply specific criteria to circumstances where investment advisers provide information to third-party news organizations? Are there circumstances under which investment advisers interact with third-party news organizations under the current rule that should be addressed specifically in the proposed rule? Are there specific challenges that investment advisers have encountered under the current rule in providing information to third-party news organizations? To what extent do investors rely on information provided by third-party news organizations in assessing the capabilities and experience of investment advisers that may be hired?
- In our view, if an adviser were to modify the presentation of third-party comments, such an action would likely make the communication by or on behalf of the adviser. Should we consider providing additional guidance to allow an adviser to edit third-party content solely on the basis that it is profane or unlawful without such editing causing the content to be ''by or on behalf'' of the adviser? If so, how should we define profane or unlawful content? Would it be necessary to give an audience notice that such third-party content had been edited in such a way, and if so, how would such notice best be provided? Would such guidance have the effect of evading the intent of the proposed rule, considering that comments with profane content may indicate negative views of the adviser?
- Should we provide that editing the presentation of third-party comments pursuant to a set of neutral pre-established policies and procedures would not make such content ''by or on behalf of the adviser''? For example, should we allow an adviser to determine in advance that it will delete all comments that are older than five years, or that include spam, threats, personally identifiable information, or demonstrably factually incorrect information? If so, should we require advisers to publically disclose the pre-established criteria for editing such comments?

iii. Offer or Promote Advisory Services or Seek To Obtain or Retain Clients or Investors

The proposed rule would define ''advertisement'' to include communications that are disseminated ''to offer or promote'' the investment adviser's investment advisory services or that seek to ''obtain or retain'' investors.[54] The ''offer or promote'' clause is meant to focus the proposed definition on the goal of the communication and on communications that we believe are commonly considered advertisements. The ''offer or promote'' clause reflects the current rule's application, which has excluded communications that do not ''offer'' advisory services from advertisements under rule 206(4)–1.[55] Such communications are still subject to the anti-fraud provisions in sections 206(1), (2), and (4) and rule 206(4)–8.

Unlike the ''offer'' clause, the ''promote'' clause is not included in the text of the current rule. We believe that it is appropriate to include in the proposed definition communications that promote advisory services because we believe that advertisements are generally considered to be promotional materials, even if the communication

[51] The provision of investment advisory services would not constitute such affirmative steps.

[52] Other content on an adviser's own website or social media page would likely meet the definition of ''advertisement'' in the proposed rule.

[53] For example, if the social media platform allows the investment adviser to sort the third-party content in such a way that more favorable content appears more prominently, but the investment adviser does not actually do such sorting, then the ability to sort content would not render such content attributable to the adviser.

[54] *See supra* footnote 4.

[55] For example, our staff has indicated that it would not recommend enforcement action under the current rule with respect to written communications by an adviser to an existing client about the performance of securities in the client's account because such communications would not be ''offers'' of advisory services, and instead are ''part of'' those advisory services (unless the context in which the communication is provided suggests otherwise). *See* Investment Counsel Association of America, Inc., SEC Staff No-Action Letter (Mar. 1, 2004) (''ICAA Letter'').

does not explicitly ''offer'' services.[56] Other rules governing financial firms similarly regulate ''promotional'' communications.[57]

Additionally, we believe that defining an ''advertisement'' as a communication that ''offers or promotes'' services would allow investment advisers to continue to deliver to existing investors account statements or transaction reports that are intended to provide only details regarding those accounts and investments without those communications being considered advertisements.[58] In the usual course, a communication to an existing investor about the performance of the investor's account would not be for promoting the adviser's services or be used to obtain or retain investors.[59] Accordingly, we would not view information typically included in an account statement, such as inflows, outflows, and account performance, as qualifying as advertisements under the proposed rule.

In addition, we would not view materials that provide general educational information about investing or the markets as offering or promoting an adviser's services or seeking to obtain or retain investors. For example, an adviser that disseminates a newspaper article about the operation of investment funds or the risks of certain emerging markets would generally be circulating educational materials and not offering or promoting the adviser's own services.

However, investment advisers also may choose to deliver to existing investors communications that include promotional information that is neither account information nor educational material. Such additional promotional information may make the communication an advertisement, if that additional information ''offers or promotes'' the adviser's advisory services under the facts and circumstances. For example, a communication to existing investors that includes the adviser's own market commentary or a discussion of the adviser's investing thesis may be considered to be ''offering or promoting'' the adviser's services depending on the facts and circumstances of the relevant communication.[60]

The proposed definition of ''advertisement'' includes communications disseminated ''to obtain or retain'' investors. We would expressly include communications that are intended to retain existing investors because communications to existing investors may be used to mislead or deceive in the same manner as communications to prospective investors.[61] Accordingly, we believe it is appropriate to regulate the use of such communications as a means reasonably designed to prevent fraudulent, deceptive, or misleading acts, practices, or courses of business.[62]

We request comment on this aspect of the proposed definition:

• Are there types of communications that ''offer or promote'' investment advisory services or that seek to ''obtain or retain'' investors that should not be treated as ''advertisements''?

• Should the proposed rule address communications that ''offer or promote'' anything besides investment advisory services? Do investment advisers seek to ''offer or promote'' other goods or services that should be addressed explicitly in the proposed rule as an exclusion from the definition or otherwise? Should the definition be further limited to communications that offer or promote investment advisory services that ''relate to securities''?

• Should we clarify any specific indicia to determine whether investment advisory services are being ''offered'' or ''promoted''? Are there any challenges that investment advisers might face in determining whether a communication is ''offering or promoting'' advisory services?

• The proposed rule would explicitly include communications meant to ''retain'' existing clients. Is it appropriate to treat communications as ''advertisements'' when the persons receiving them already are ''clients'' of the investment adviser and benefit from the other protections of the Federal securities laws? Similarly, is it appropriate to treat communications as ''advertisements'' when the persons receiving them already are investors in pooled investment vehicles advised by the investment adviser and benefit from applicable protections of the Federal securities laws?

• Should the proposed rule treat communications to existing investors differently from communications to prospective investors?

• Does the definition provide sufficient clarity to permit advisers to communicate with their existing investors about their accounts or about pooled investment vehicles in which they are invested, in the usual course of business without those communications being considered advertisements?

[56] *See SEC* v. *C.R. Richmond & Co.,* 565 F.2d 1101, 1105 (9th Cir. 1977) (''SEC v Richmond'') (''Investment advisory material which promotes advisory services for the purpose of inducing potential clients to subscribe to those services is advertising material within [the current rule].''); *see also* Denver Investment Advisors, Inc., SEC Staff No-Action Letter (July 30, 1993) (indicating the staff's view that a communication provided to consultants, but not necessarily to prospective clients, to allow the consultants to evaluate the adviser as part of the consultants' own services to their own clients is an ''advertisement'' under the current rule because the communication is provided ''for the ultimate purpose of maintaining existing clients and soliciting new ones''). *See also infra* section II.D (regarding the potential withdrawal of this letter).

[57] *See, e.g.,* FINRA rule 2210(c)(3)(A) (requiring a member to file retail communications that ''promote or recommend'' certain investment companies); MSRB rule G–21(a) (defining ''advertisement'' as, in part, ''any written or electronic promotional literature''); *see also* Amendments to Investment Company Advertising Rules, Release No. IC–26195 (Oct. 3, 2003) [68 FR 57760 (Oct. 6, 2003)] (''Final Investment Company Advertising Release'') (noting that when an investment company offers its shares to the public, ''its promotional efforts become subject to the advertising restrictions of the Securities Act'').

[58] Their exclusion from the proposed definition would not prevent these account statements or transaction reports from being subject to the other provisions of the Federal securities laws, including section 17(a) of the Securities Act or section 10(b) of the Securities Exchange Act of 1934 (the ''Exchange Act'') (and rule 10b–5 thereunder), to the extent those provisions would otherwise apply.

[59] *See also* ICAA Letter (stating the staff's view that, ''[i]n general, written communications by advisers to their existing clients about the performance of the securities in their accounts are not offers of investment advisory services but are part of the adviser's advisory services.''). A communication to an existing investor in a pooled investment vehicle about the performance of the pooled investment vehicle would not be treated as promoting the adviser's services or be used to obtain or retain investors for purposes of rule 206(4)–1.

[60] *See* ICAA Letter (indicating that where an adviser writes a letter that discussed its past specific recommendations concerning securities not held or not recently held by some of the clients to whom the letter was directed ''would suggest that a purpose of the communication was to promote the advisory services of the adviser'').

[61] Our staff has indicated its view that materials designed to maintain existing clients should be considered to be advertisements under the current rule's definition, *see* Munder Capital Management, SEC Staff No-Action Letter (May 17, 1996), and we are proposing to incorporate this approach in the proposed rule. *See also In re* Spear & Staff, Inc., Release No. IA–188 (Mar. 25, 1965) (settled order) (''Spear'') (the Commission brought an enforcement action against investment adviser, asserting, in part, that the current rule applied to direct mail and newspaper advertising that the adviser conducted ''[t]o induce persons to enter *or renew* subscriptions'' for market letters containing the adviser's securities recommendations) (emphasis added); *SEC* v. *Richmond & Co.,* 565 F.2d at 1106 (''The court below found that [the adviser] advertised in a manner which led *clients and prospective clients* to believe that the use of [the adviser's] services would lead to imminent and sizable profits with minimum risks.'') (emphasis added).

[62] *See* Advertising Rule Adopting Release, *supra* footnote 5 (''The Commission believes that this rule, foreclosing the use of advertisements which have a tendency to mislead or deceive *clients or prospective clients,* is necessary to implement the statutory mandate contained in Section 206(4) of the Act, as amended.'') (emphasis added).

iv. Investors in Pooled Investment Vehicles

The proposed rule's definition would expressly include communications that are intended to offer or promote the investment adviser's investment advisory services provided indirectly to existing and prospective investors in a pooled investment vehicle advised by the investment adviser,[63] subject to the exclusion for RICs and BDCs discussed below. This express inclusion of pooled investment vehicles is generally consistent with our approach in rule 206(4)–8 under the Advisers Act.[64] In particular, section 206(4) of the Advisers Act authorizes the Commission to adopt rules and regulations that ''define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.'' [65] We believe expressly applying the proposed rule to advertisements concerning pooled investment vehicles when used to obtain or retain investors in those vehicles would help expand protections to such investors, and not just to the adviser's ''clients,'' which are the pooled investment vehicles themselves.[66]

We recognize that advisers to pooled investment vehicles are prohibited from making misstatements or materially misleading statements to investors in those vehicles under rule 206(4)–8,[67] and accordingly there may be some overlap between the prohibition in rule 206(4)–8 and the proposed rule. The proposed rule provides more specificity, however, regarding what we believe to be false or misleading statements that advisers to pooled investment vehicles must avoid in their advertisements.[68] In particular, the proposed rule contains certain protective requirements, including for Non-Retail Persons that are invested in private funds.[69] We believe that these requirements, such as those regarding presentation of performance, would protect private fund investors. We believe that any additional costs to advisers to pooled investment vehicles as a result of potential overlap between the proposed rule and rule 206(4)–8 with respect to advertisements will be minimal, as an advertisement that would raise issues under rule 206(4)–8 might also raise issues under a specific provision of the proposed rule. We are proposing this rule under the same authority of section 206(4) of the Advisers Act on which we relied in adopting rule 206(4)–8.[70]

The proposed rule would exclude advertisements, other sales materials, or sales literature about RICs and BDCs that are within the scope of rule 482 or rule 156 under the Securities Act, as described below.[71] This would result in a departure from rule 206(4)–8, which applies to investment advisers with respect to any ''pooled investment vehicle,'' including RICs and BDCs.[72] We are proposing to exclude certain communications about RICs and BDCs, which are already subject to specific restrictions and requirements for communications to their investors under the Securities Act and the Investment Company Act, including rules that cover the same areas addressed by the proposed rule and that are designed to protect investors in those funds. For example, rule 482 under the Securities Act and the applicable registration form impose specific requirements on the presentation and computation of performance results for certain registered funds.[73] Rule 156 under the Securities Act describes certain practices that may be misleading when used in sales literature in connection with the offer or sale of securities issued by an investment company.[74]

When we adopted rule 206(4)–8, we noted its similarity to existing anti-fraud laws and rules that ''depending upon the circumstances, may also be applicable to the same investor communications,'' including those applicable to RICs and BDCs.[75] We expressed assurance that investment advisers to pooled investment vehicles would be able to comply with rule 206(4)–8 and those existing laws and rules, in part because rule 206(4)–8 was adopted to impose obligations similar to those imposed under sections 206(1) and 206(2) of the Advisers Act.[76] We also noted that ''the nature of the duty to communicate without false statements [was] so well developed in current law'' that the similar duty imposed by rule 206(4)–8 would neither be unduly broad nor have a ''chilling effect'' on investor communications.[77]

Rule 206(4)–8 establishes a broad anti-fraud standard on communications

[63] For this purpose, ''pooled investment vehicle'' would be defined in the same way as the definition in rule 206(4)–8 under the Investment Advisers Act of 1940. *See* proposed rule 206(4)–1(e)(9). Rule 206(4)–8 defines ''pooled investment vehicle'' as ''any investment company as defined in section 3(a) of the Investment Company Act of 1940 or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act.'' Rule 206(4)–8(b).

[64] *See* Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Release No. IA–2628 (Aug. 3, 2007) [72 FR 44756 (Aug. 9, 2007)] (''Rule 206(4)–8 Adopting Release'') (''The rule clarifies that an adviser's duty to refrain from fraudulent conduct under the federal securities laws extends to the relationship with ultimate investors and that the Commission may bring enforcement actions under the Advisers Act against investment advisers who defraud investors or prospective investors in those pooled investment vehicles.'').

[65] 15 U.S.C. 80b–6(4).

[66] *See Goldstein* v. *SEC,* 451 F.3d 873 (D.C. Cir. 2006). There are circumstances under which an investor in a pooled investment vehicle is also a client of the investment adviser—for example, when the investor has its own investment advisory agreement with the investment adviser. Under those circumstances, communications to that person would also be addressed as ''advertisements'' under the proposed rule.

[67] Rule 206(4)–8(a)(1).

[68] For example, rule 206(4)–8 prohibits investment advisers to pooled investment vehicles from engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle. The proposed rule would include more specific provisions in the context of advertisements. *See* proposed rule 206(4)–1(b) and 206(4)–1(c). To the extent that an advertising practice would violate a specific restriction imposed by the proposed rule, it is possible that such a practice may already be prohibited under rule 206(4)–8. Investment advisers to pooled investment vehicles may benefit from the clarity provided by the proposed rule, to the extent that it prohibits conduct that may otherwise be prohibited under the general principles of rule 206(4)–8. We request comment below on whether rule 206(4)–8 itself should be amended.

[69] One commenter addressed private fund advertising in connection with the Commission's recent concept release on exempt offerings. *See* 2019 Concept Release, *supra* footnote 19; *see also* Comment Letter of the Investment Company Institute on the 2019 Concept Release (Sept. 24, 2019), at n.62 (''We recommend that the Commission adopt restrictions for private fund advertising beyond the anti-fraud requirements of Section 206(4) of the Advisers Act and Rule 206(4)–8 thereunder. If those regulations alone were enough to dispel investor confusion and prevent misleading solicitation, then the myriad rules and staff guidance applicable to regulated funds that the Commission and staff as well as FINRA have developed over decades would not be necessary.'').

[70] *See* Rule 206(4)–8 Adopting Release, *supra* footnote 64.

[71] *See infra* section II.A.2.c.iii. The proposed rule would exclude from the ''advertisement'' definition only those communications within the scope of rule 482 or rule 156 under the Securities Act.

[72] *See supra* footnote 63.

[73] 17 CFR 230.482(b)(3) (imposing disclosure requirements on advertisements that include performance data of an open-end management investment company or a trust account); 17 CFR 230.482(d) (imposing requirements on performance information in the case of an open-end management investment company or a trust account); 17 CFR 230.482(e) (imposing requirements on performance data for money market funds); 17 CFR 230.482(g) (establishing standards for the timeliness of performance data in advertisements).

[74] 17 CFR 230.156. *See also* 17 CFR 270.34b–1 (imposing requirements on sales literature for investment companies).

[75] *See* Rule 206(4)–8 Adopting Release, *supra* footnote 64 (citing, in part, rule 156 under the Securities Act and section 34 of the Investment Company Act).

[76] Rule 206(4)–8 Adopting Release, *supra* footnote 64 (noting that sections 206(1) and 206(2) were ''commonly accepted as imposing similar requirements on communications with investors in a fund'').

[77] *Id.*

with investors in pooled investment vehicles, whether publicly or privately offered, that we believe can exist comfortably alongside the specific prohibitions and restrictions that govern the public offering of funds. The proposed rule, in contrast, applies specific prohibitions and restrictions that address the same areas already governed by specific requirements in rule 482 and rule 156. Accordingly, we believe excluding from the proposed rule certain communications about RICs and BDCs, as described below, is appropriate.

We request comment on the proposed definition of ''advertisement'' expressly including communications that are disseminated to obtain or retain ''investors in pooled investment vehicles.''

- Are there any particular burdens or difficulties that investment advisers may bear in treating as ''advertisements'' communications designed for investors in pooled investment vehicles—that is, investors who may not be clients of the investment advisers?
- Are there communications that investment advisers currently disseminate to investors in pooled investment vehicles that otherwise satisfy the proposed definition of ''advertisement'' but should not be treated as such? What types of communications, and why should they not be treated as advertisements?
- Would investment advisers to pooled investment vehicles prefer that we address our concerns regarding advertisements through an amendment to rule 206(4)–8 instead of through the proposed rule? For example, should we incorporate the proposed rule's requirements and prohibitions into rule 206(4)–8? Would there be any costs or benefits if we used that approach or a similar approach instead?
- Should the proposed rule apply to communications to investors in pooled investment vehicles other than those that are ''pooled investment vehicles'' as defined in rule 206(4)–8—*e.g.,* funds that are excluded from the definition of ''investment company'' by reason of section 3(c)(5) or 3(c)(11) of the Investment Company Act? Which other vehicles, and why or why not? Should we consider not defining ''pooled investment vehicle'' for purposes of the proposed rule? [78] Why or why not?

c. Specific Exclusions

The proposed rule would specifically exclude four types of communications from the definition of ''advertisement'': (i) Non-broadcast live oral communications; (ii) responses to certain unsolicited requests; (iii) communications relating to RICs and BDCs; and (iv) information required by statute or regulation. Although these types of communications would not be ''advertisements'' for purposes of the proposed rule, they would remain subject to all other applicable provisions in the Advisers Act and the rules thereunder and other applicable provisions of the Federal securities laws.[79]

i. Non-Broadcast Live Oral Communications

We are proposing to exclude from the definition of ''advertisement'' live oral communications that are not broadcast on radio, television, the internet, or any other similar medium. If such communications are broadcast, for example by webcast, social media, video blog, or similar media, they would be ''advertisements'' under the proposed rule's definition.

This proposed exclusion is generally consistent with the approach under the current rule's definition of ''advertisement,'' which also excludes oral communications that are not ''on radio or television.'' [80] However, the proposed definition of ''advertisement'' is broader than the current rule's definition because it would capture oral communications that are widely disseminated, or ''broadcast,'' not just via radio or television (as under the current rule), but also via ''the internet or any other similar medium.'' [81] We believe this broader definition is appropriate in light of the continuously evolving means of mass communication available to advisers and should allow the proposed rule to remain evergreen in light of changing technologies. Accordingly, the proposed exclusion would not apply to communications that are ''broadcast,'' or widely disseminated. For example, an adviser that engages in a ''Facebook Live'' Q-and-A session that is available to the general public would be ''broadcasting'' the communication on the internet and that communication would not qualify for the proposed exclusion. Alternatively, a ''Facebook Live'' Q-and-A session that is available only to one person or a small group of people invited by the adviser would not be ''broadcast'' and so would qualify for the proposed exclusion.

We have also proposed to limit the exclusion to ''live'' oral communications to ensure that previously recorded oral communications are included in the proposed definition of ''advertisement.'' The live oral communication exclusion is designed to address situations where advisers are communicating to investors directly and where employee review and the other provisions of the proposed rule cannot be practically applied.[82] In cases where an adviser pre-records a message and then disseminates it, such a message would not be ''live'' and thus should be treated as an advertisement if it otherwise meets the requirements of the proposed definition.[83] Similarly, any script or storyboards, or other written materials prepared in advance for use during a live oral communication, as well as any slides or other written materials presented alongside or distributed as part of the live oral communication, would fall within the proposed definition of ''advertisement'' if those materials otherwise meet the definition of ''advertisement.'' [84] We believe that prepared written materials intended for use during a live oral communication are eligible for pre-use review and approval and should be subject to the other requirements of the proposed rule.

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[78] *See, e.g.,* rule 206(4)–2(a)(5).

[79] In particular, any such communication to a client or prospective client would remain subject to the general anti-fraud prohibitions of section 206 of the Advisers Act. In addition, communications that are excluded from the definition of ''advertisement'' would remain subject to any other applicable provisions in the Federal securities laws. *See, e.g.,* 15 U.S.C. 77q(a); 15 U.S.C. 78(j)(b); 17 CFR 240.10b–5.

[80] *See, e.g.,* rule 206(4)–(1)(b).

[81] Rule 206(4)–1(b) (defining as an advertisement certain notices or other announcements ''by radio or television''). *See* ICAA Letter (stating the staff's view that ''[t]he rule also applies to announcements in publications and to radio and television broadcasts, but does not apply to any other oral communications''). For the reasons discussed in this release, the Commission is proposing a different approach. As discussed in Section II.D., staff in the Division of Investment Management is reviewing staff no-action and interpretative letters to determine whether any such letters should be withdrawn in connection with any adoption of this proposal. If the rule is adopted, some of the letters may be moot, superseded, or otherwise inconsistent with the rule and, therefore, would be withdrawn.

[82] *See infra* section II.A.7 (discussing proposed employee review requirements). Communication need not be made ''face-to-face'' to qualify for the exclusion so long as it is live and oral. For example, a phone call or FaceTime communication between an adviser and a client could qualify for this exclusion.

[83] However, a voicemail message would qualify for the proposed exclusion (and thus would not be an advertisement), if the voicemail message was made ''live'' and the recording is not further disseminated by or on behalf of the adviser.

[84] This approach would mirror that under FINRA rule 2210(f), which distinguishes between certain public communications, including any ''radio or television interview,'' and the ''scripts, slides, handouts or other written (including electronic) materials used in connection with'' such communications. *See* FINRA Rule 2210(f)(1) and (f)(4); *see also supra* footnote 57 and accompanying text.

The proposed rule's definition of ''advertisement'' would include any communication that meets the proposed definition's criteria without regard to the number of people to whom the communication is addressed. This differs from the definition in the current rule, which includes written communications ''addressed to more than one person.'' The Commission limited the definition of ''advertisement'' in the current rule because of concerns that a broad definition could encompass even ''face to face conversations between an investment counsel and his prospective client.'' [85] The Commission stated in proposing the current rule's definition that it would not include a ''personal conversation'' with a client or prospective client.[86] As discussed above, we believe that by excluding live oral communications that are not broadcast, the proposed rule would retain advisers' ability to have these face-to-face communications with investors.[87]

At the same time, we recognize that the proposed rule could affect the ability of advisers to communicate directly with investors in writing, to the extent those writings are promotional. We considered excluding from the definition of ''advertisement'' any communication disseminated to only one person. However, we are concerned that this approach could allow the types of misleading communications we seek to prevent. For example, changes in technology now permit advisers to create communications that appear to be personalized to single clients and are ''addressed to'' only one person, but are actually widely disseminated to multiple persons.[88] The proposed rule therefore would prevent an adviser from communicating performance advertising solely to one person in writing outside the scope of the rule. To address the potential burdens that would arise from the proposed definition's inclusion of all one-on-one written communications that meet the proposed definition of advertisement, the proposed rule's internal review and approval requirements would not apply to these written communications.[89]

In addition, we recognize that applying the employee review and approval provisions of the proposed rule to live oral communications that are broadcast may not be practical. Accordingly, as discussed below, we are proposing to except live oral communications that are broadcast from the employee review and approval provisions, much as we are proposing to except one-on-one communications.[90] However, as discussed above, any script, storyboards, or other written materials prepared in advance for use during a broadcast live oral communication would fall within the proposed definition of ''advertisement'' if those materials otherwise meet the definition of ''advertisement,'' and we are not proposing to except such materials from the review process.

We considered including in the proposed definition of ''advertisement'' oral communications made by an investment adviser in non-broadcast public appearances, for example, an unscripted talk at a luncheon or a conference appearance. We recognize that excluding such public oral communications from the proposed definition of ''advertisement'' may result in many commonly used forms of promotional communication not being subject to the protections and requirements of the proposed rule. However, we believe that including such public appearances as advertisements could pose compliance difficulties, for example, maintaining records of the speech or applying the other substantive requirements of the proposed rule to such unscripted remarks.[91] Accordingly, the proposed rule would exclude these public appearances only to the extent they satisfy the requirements of the non-broadcast live oral communication exclusion.

We request comment on the proposed exclusion for non-broadcast live oral communications.

• As proposed, should we exclude live oral communications that are not broadcast from the definition of ''advertisement''? Should we extend the exclusion to live oral communications that are broadcast?

• As proposed, should we expand the types of broadcast communication methods included to the internet and other similar methods (along with radio and TV as under the current rule)?

• Are we correct that ''broadcast'' should be interpreted as ''widely disseminated''? Why or why not? Should we further define what qualifies as a ''broadcast'' communication? If so, how should we define it?

• What issues may result from the proposed exclusion of live oral communications that are not broadcast? In particular, what issues may result with respect to unscripted public appearances? If we were to include such unscripted public appearances in the definition of ''advertisement,'' would that create unique compliance difficulties, such as recordkeeping issues? If so, should we address those difficulties through an exception to the recordkeeping requirement for unscripted public appearances? How should we define such an unscripted public appearance?

• We believe our approach to oral communications is conceptually similar to FINRA's approach to ''public appearances'' in rule 2210,[92] which generally subjects members' unscripted public appearances to only the rule's general content standards,[93] and requires members to comply with all applicable provisions of the rule for any scripts, slides, handouts, or other written materials used in connection with the public appearance. Do commenters agree? Should the rules apply more similarly in this respect? Would another existing regulation provide an approach to such ''public appearance'' communications that we should consider for such an exclusion?

• Should we subject public appearance communications to the content provisions of the proposed rule, even if they are not defined as ''advertisements''? Should we define such public appearance communications as ''advertisements,'' but subject them only to a more limited set of requirements, such as just the

[85] *See* Prohibited Advertisements, Release No. IA–119 (Aug. 8, 1961) [26 FR 7552, 7553 (Nov. 15, 1961)].

[86] *Id.*

[87] In addition, we believe an adviser's ability to communicate directly with existing clients and investors would be preserved to the extent such communications do not ''offer or promote'' the adviser's services. *See supra* footnote 59 and accompanying text.

[88] For example, advisers today, like any other marketers, may be able to identify a group of prospective investors who have searched online for specific information about investment advice and then craft communications for those prospective investors that nominally are addressed to individual persons despite being otherwise identical to communications disseminated to the rest of the group. These types of communications, such as bulk emails or algorithm-based messages, are widely disseminated in the aggregate even though individually each is nominally directed at or ''addressed to'' one person.

[89] *See* proposed rule 206(4)–1(d)(1) (excepting ''communications that are disseminated only to a single person or household or to a single investor in a pooled investment vehicle''); *see also infra* section II.A.7. Widely disseminated communications (even if they appear to be personalized), however, would not qualify for the one-on-one exception to the review requirement. *See supra* footnote 88 and accompanying text.

[90] *See infra* section II.A.7.

[91] In addition, although not included within the proposed definition of ''advertisement,'' statements made during such live broadcasts would continue to be subject to the general anti-fraud prohibitions of section 206 of the Advisers Act and the relevant Federal securities laws.

[92] FINRA rule 2210(f)(1).

[93] FINRA rule 2210(d)(1).

proposed rule's general prohibitions but not the review requirement?

ii. Response to Unsolicited Request

The proposed rule would exclude from the definition of ''advertisement'' any communication by an investment adviser ''that does no more than respond to an unsolicited request'' for ''information, specified in such request, about the investment adviser or its services'' other than a communication to a Retail Person that includes performance results *or* a communication that includes hypothetical performance. Specifically, neither a communication to a Retail Person that includes performance results nor a communication to any person that includes hypothetical performance would qualify for this exclusion.[94] We believe this exclusion would appropriately allow persons affirmatively seeking specified information about an investment adviser or services to obtain that information when the investment adviser has not directly or indirectly solicited the request.[95]

In the case of an unsolicited request, an investor seeks specified information for that requester's own purposes, rather than responding to a communication disseminated by an adviser for the adviser's purpose of offering or promoting its services. The proposed exclusion would recognize this difference in the goal of the communication. In addition, the investment adviser's communication would be limited by the information requested and the fact that the investor has already established the parameters of the information he or she needs.[96]

The unsolicited request exclusion would not apply to a communication to a Retail Person to the extent it contains performance results.[97] As discussed below, the proposed rule would provide additional requirements and restrictions for presenting performance results because performance advertising raises special concerns.[98] To help ensure that Retail Persons receive the benefits of those requirements and restrictions, any communication to Retail Persons containing performance results would not qualify for the unsolicited request exclusion with respect to such results.[99] Accordingly, any such performance results that also met the definition of ''advertisement'' would be subject to the requirements of the proposed rule. Similarly, because of the specific concerns raised by hypothetical performance, communications to any person that contain hypothetical performance would not qualify for the unsolicited request exclusion to the extent it contains such results. Instead, communications with hypothetical performance must be presented in accordance with the requirements discussed below.

In addition, if the adviser were to include additional information beyond what was specifically requested, that additional information would not qualify for the exclusion if the additional information met the definition of ''advertisement.'' However, if the only additional information the adviser includes is information necessary to make the requested specified information not misleading, the additional information would not render the communication or that additional information an advertisement.

Finally, the unsolicited request exclusion would not apply to requests for information that are solicited by the investment adviser.[100] For example, any affirmative effort by the investment adviser intended or designed to induce an existing or prospective client or investor to request specified information would render the request solicited. In that case, a person requesting the information would be acting out of interest raised by the investment adviser, and the request would not be ''unsolicited.'' And, if the investment adviser subsequently disseminates a communication that qualifies for this exclusion to one or more other persons who do not make their own unsolicited requests, that same communication would not meet the exclusion's requirements with respect to those other persons.

We request comment on the proposed unsolicited request exclusion.

- Would the proposed unsolicited request exclusion have our intended effect of allowing persons requesting specified information from an investment adviser to receive that information? Is there an alternative approach to this exclusion that would better produce this intended effect? Would an alternative approach be more successful in preventing investment advisers from disseminating misleading or deceiving information?
- Are there types of information that an investment adviser should be prohibited from disseminating even in response to an unsolicited request? For example, should an adviser be prohibited from disseminating any advertisement that would, but for this exclusion, be prohibited by the proposed rule or the current rule? Should an adviser be prohibited from disseminating materials that are subject to any of the *per se* prohibitions in the current rule?
- Should the unsolicited request exclusion apply to communications presenting performance results to Retail Persons? Should it apply to communications presenting performance results to any person, not just Retail Persons? Why or why not? Would it be appropriate to exclude such communications from certain requirements of the proposed rule? Why or why not?
- Should the unsolicited request exclusion apply to communications that include hypothetical performance? Why or why not? Alternatively, should communications including hypothetical performance qualify for the unsolicited request exclusion if such communications are provided only to Non-Retail Persons or only to Retail Persons? Why or why not? Would it be appropriate to exclude such communications from certain requirements of the proposed rule? Why or why not?
- Are there other specific types of information that should be treated as an ''advertisement'' even in response to an unsolicited request?
- Should we provide in this exclusion additional flexibility for advisers to provide information in addition to the ''specified information'' sought by the requester, when the adviser determines that such information would be necessary to prevent the information provided from being false or misleading? Should we

[94] Proposed rule 206(4)–1(e)(1)(ii).

[95] Persons may seek information through, for example, requests for proposal, due diligence questionnaires, and requests for information. Information under this exclusion could also include unsolicited requests for information about an adviser's services, such as information about funds that it advises or its non-security related planning services.

[96] Our approach to this proposed exclusion is consistent with our staff's past approach when considering whether or not to take a no-action position in the context of past specific recommendations and testimonials. *See, e.g.,* ICAA Letter.

[97] Proposed rule 206(4)–1(e)(1)(ii)(A).

[98] *See infra* section II.A.5.

[99] The unsolicited request exclusion would not oblige the investment adviser to generate the requested information. The exclusion simply would allow investment advisers to provide requested information, if available, in response to unsolicited requests, without such information being considered an ''advertisement.''

[100] It is not our intent to disqualify from this exclusion every inquiry from an investor who was referred to the adviser by a solicitor *because* the investor was solicited. The act of soliciting under our proposed solicitation rule is separate and distinct from a client making an unsolicited request for information under the proposed advertising rule. Thus a client who was solicited to be a client may still make requests for specified information so long as that *specific request* was not solicited by the adviser or solicitor.

provide additional guidance regarding the term ''specified information''? If so, what additional guidance should we provide?

• Should we clarify any specific criteria by which an investment adviser can determine whether a request is ''unsolicited'' for purposes of the unsolicited request exclusion?

• Should we take the position that an existing or prospective client or investor may submit an unsolicited request to an investment adviser through an intermediary—for example, a consultant for the investment adviser or the requester?

iii. Advertisements, Other Sales Materials, and Sales Literature of RICs and BDCs

We are proposing to exclude from the definition of ''advertisement'' any advertisement, other sales material, or sales literature about a RIC or a BDC that is within the scope of rule 482 or rule 156 under the Securities Act.[101] As discussed above, this RIC and BDC exclusion would acknowledge that advertisements, other sales materials, and sales literature about RICs and BDCs are regulated under the Securities Act and Investment Company Act and subject to the specific prescriptions of the rules and forms adopted thereunder.[102] Those rules generally are consistent with the principles underlying the proposed rule.

The RIC and BDC exclusion would not encompass any communication by an investment adviser of a RIC or a BDC with respect to other advisory services or products offered by that adviser. Thus, a communication that does not satisfy the RIC and BDC exclusion but is otherwise an ''advertisement'' would still be subject to the proposed rule's requirements. For example, the exclusion would not extend to a communication by an investment adviser of a RIC or BDC if that communication is not within the scope of rule 482 or rule 156. Similarly, the exclusion would not extend to a communication by an investment adviser of a RIC or BDC to an investor in a pooled investment vehicle advised by the investment adviser when that communication is not within the scope of rule 482 or rule 156. The RIC and BDC exclusion is intended simply to allow advisers to RICs and BDCs, and affiliates of those advisers, to prepare their advertisements, other sales materials, and sales literature in connection with RICs and BDCs in accordance with the relevant rules and forms under the Securities Act and Investment Company Act.

We request comment on the proposed RIC and BDC exclusion.

• Are there communications with respect to RICs and BDCs that should be subject to the proposed rule? If so which communications and why?

• Is the description of the materials that are eligible for this RIC and BDC exclusion clear?

• Are there any restrictions that apply to RICs or BDCs under the Securities Act or the Investment Company Act and the rules thereunder that should be incorporated into the proposed rule?

• Should the scope of the exclusion include other fund communications that may not be subject to rule 156 or 482? For example should the annual reports of a closed-end fund that is not offering shares be included as an advertisement or excluded? Should we extend the scope to specifically exclude from the definition of ''advertisement'' any fund communication that is filed or deemed filed with the Commission for any reason?

iv. Information Required by Statute or Regulation

We are proposing to exclude from the definition of ''advertisement'' any information required to be contained in a statutory or regulatory notice, filing, or other communication—for example, information required by Part 2 of Form ADV or Form CRS.[103] This exclusion would apply to information that an adviser is required to provide to an investor under any statute or regulation under Federal or state law.[104] We do not generally believe that communications that are prepared as a requirement of statutes or regulations [105] should be viewed as advertisements under the proposed rule.[106] However, if an adviser includes in such a communication information that is neither required under applicable law nor required by the proposed rule, and such additional information ''offers or promotes'' the adviser's services, then that information would be considered an ''advertisement'' for purposes of the proposed rule.[107] We request comment on this proposed exclusion.

• Is the description of the information eligible for this exclusion clear?

• Should any information required to be contained in a statutory or regulatory notice, filing, or other communication be advertisements under the rule? Should any such documents or other communications be considered to ''offer or promote'' advisory services?

• Would this proposed exclusion create any compliance difficulties for investment advisers? What types of difficulties and how should we address them? Are there specific notices, filings, or other communications that are required of investment advisers by statute or regulation and that would be affected by this proposed exclusion?

• Considering that there may be additional legal duties or liability that attach to documents filed with regulatory bodies, should we exclude from the definition of ''advertisement'' all legally required filings regardless of content?

We also request comment on all aspects of the proposed exclusions from the definition of ''advertisement.''

• Do the proposed exclusions sufficiently describe the types of communications that should not be

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[101] Proposed rule 206(4)–1(e)(1)(iii). For example, to the extent that a RIC's statutory and summary prospectus, annual and semi-annual report, and statement of additional information are within the scope of rule 156 under the Securities Act, they would not be advertisements under the proposed definition.

[102] *See* Request for Comment on Fund Retail Investor Experience and Disclosure, Release No. 33–10503 (June 5, 2018) [83 FR 26904 (June 11, 2018)]. We recently sought public comment from individual investors and other interested parties on enhancing investment company disclosures to improve the investor experience and to help investor make more informed investment decisions. *Id.* In that request for comment, we specifically sought comments with respect to rule 482 under the Securities Act.

[103] *See* proposed rule 206(4)–1(e)(1)(iv).

[104] To the extent information is required by regulation to be provided in a non-public filing with a regulatory agency, then this exclusion may not apply. At the same time, such information would not be an ''advertisement'' under the proposed rule if the information does not offer or promote the adviser's services or seek to obtain or retain investors—and so the adviser would not need to rely on the exclusion.

[105] *See, e.g.,* rule 204–3 (requiring registered investment advisers to deliver a brochure and one or more brochure supplements to each client or prospective client).

[106] However, information that is required to be provided or offered by the proposed advertising rule would not qualify for this proposed exclusion. For example, the schedule of fees and expenses required to be provided under the proposed rule would be part of the advertisement and subject to the proposed rule. *See, e.g.,* proposed rule 206(4)–1(c)(1)(i) (requiring an advertisement to provide or offer to provide promptly a schedule of certain fees and expenses as a condition of presenting gross performance).

[107] For example, Item 5.A of Part 2 of Form ADV requires investment advisers to describe how they are compensated for their advisory services. If an investment adviser completes that requirement by describing how its fee structure compares favorably to the fee structure of other investment advisers, then we would view that comparison as information ''offering or promoting'' the investment adviser's services. Such a comparison to other investment advisers is not required by the terms of Item 5.A., even though such a comparison is permitted in responding to Item 5.A. *See* Instructions for Part 2A of Form ADV, Instruction 12 (permitting the inclusion of information not required by an Item as long as the response does not include so much additional information that the required information is obscured).

subject to the requirements of the proposed rule? Are there types of communications that should not be subject to the requirements of the proposed rule but do not satisfy the conditions of any of the proposed exclusions? For example, should we provide an exclusion for all one-on-one communications made by an adviser to its clients, including communications in writing? Conversely, do the listed exclusions exclude communications that should be subject to the requirements of the proposed rule?

• Would any of the proposed rule's exclusions allow communications that are subject to the current rule's definition of ''advertisement'' to be excluded from the proposed rule's definition of ''advertisement''? Conversely, are there communications that commenters believe are not subject to the current rule's definition of ''advertisement'' that would not satisfy the conditions of any of the proposed exclusions?

3. General Prohibitions

The proposed rule contains general prohibitions of certain advertising practices as a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts.[108] To establish a violation of the proposed rule, the Commission would not need to demonstrate that an investment adviser acted with scienter; negligence is sufficient.[109]

We discuss below each of these practices, and the reasons we believe they should be prohibited.[110] We developed the proposed list of prohibited practices from our experience with the current rule, our review and consideration of investment adviser advertisements, FINRA rule 2210,[111] Securities Act rule 156, and our experience with private fund advertising practices. Rule 156 identifies certain pertinent factors that may be relevant to the question of whether a particular statement is, or might be, misleading in investment company sales literature.[112]

a. Untrue Statements and Omissions

The proposed rule prohibits advertisements that include any untrue statements of a material fact, or that omit a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading.[113] This provision of the proposed rule retains the substance of current rule 206(4)–1(a)(5), which prohibits an advertisement that contains any untrue statement of a material fact and uses similar wording as other anti-fraud provisions in the Federal securities laws.[114] As with similar anti-fraud provisions in the securities laws, whether a statement is false or misleading depends on the context in which the statement or omission is made. For example, as under the current rule, advertising that an adviser's performance was positive during the last fiscal year may be misleading if the adviser omitted that an index or benchmark consisting of a substantively comparable portfolio of securities experienced significantly higher returns during the same time period. To avoid making a misleading statement, the adviser in this example could include the relevant index or benchmark or otherwise disclose that the adviser's performance, although positive, significantly underperformed the market.

The current rule contains an explicit prohibition on advertisements that contain statements to the effect that a report, analysis, or other service will be furnished free of charge, unless the analysis or service is actually free and without condition.[115] We believe that this practice would be captured by the proposed rule's prohibition on untrue statements or omissions. As a result, the proposed rule would not contain a separate explicit prohibition of such statements.

We request comment on this proposed prohibition of untrue statements and omissions.

• As discussed above, such provisions appear in other areas of the securities laws, including rule 206(4)–8. Are there any particular aspects specific to its application to the proposed advertising rule that would need clarification?

• Do commenters agree that the proposed rule's prohibition of untrue statements or omissions captures the current rule's explicit prohibition of advertisements that contain statements to the effect that a report, analysis, or other service will be furnished free of charge, unless the analysis or service is actually free and without condition, or should such prohibition continue to be explicit? If not, why?

b. Unsubstantiated Material Claims and Statements

The proposed rule also prohibits advertisements that include any material claim or statement that is unsubstantiated.[116] This provision would prohibit as misleading, for example, statements about guaranteed returns and claims about the adviser's skills or experience that the adviser cannot substantiate. Rule 156 and FINRA rule 2210 both contain a similar provision.[117] In particular, rule 156 provides that a statement about the characteristics of an investment company could be misleading because of exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by such company, service, security of investment or fund, effects of government supervision, or other attributes.[118] We believe that prohibiting advisers from making any material claim that is unsubstantiated when promoting their services is appropriate and not overly broad or burdensome.

Today an adviser's use of graphs, charts, or formulas is explicitly

[108] Proposed rule 206(4)–1(a).

[109] *See SEC* v. *Steadman,* 967 F.2d 636, 647 (D.C. Cir. 1992). As we noted when we adopted rule 206(4)–8, the court in *Steadman* analogized section 206(4) of the Advisers Act to section 17(a)(3) of the Securities Act, which the Supreme Court had held did not require a finding of scienter (*citing Aaron* v. *SEC,* 446 U.S. 680 (1980)). *See also Steadman* at 643, n.5. In discussing section 17(a)(3) and its lack of a scienter requirement, the *Steadman* court observed that, similarly, a violation of section 206(2) of the Advisers Act could rest on a finding of simple negligence. *See also* Standard of Conduct Release, *supra* footnote 23, at n.20.

[110] We believe these practices, which are each discussed in detail below, are associated with a significant risk of being false or misleading. We therefore believe it is in the public interest to prohibit these practices, rather than permit them subject to specified conditions.

[111] FINRA rule 2210 contains content standards that prohibit misleading claims or statements in certain communications.

[112] Rule 156 describes statements, representations, illustrations, and other information found in fund sales literature that could be considered false or misleading in violation of the anti-fraud provisions in the securities laws applicable to sales of funds. 17 CFR 230.156. In the proposing and adopting releases for rule 156, the Commission explained that rule 156 is not a ''legislative rule designed to prescribe law or policy.'' The releases emphasize that the rule's general prohibition against the use of misleading sales literature ''merely reiterated pertinent statutory provisions of the federal securities laws applicable to sales literature'' and that the factors found in rule 156 are ''particular factors which could be among those considered'' when determining whether a statement is false or misleading. Mutual Fund Sales Literature Interpretive Rule, Release Nos. 33–6140 and 34–16299 (Nov. 6. 1979).

[113] *See* proposed rule 206(4)–1(a)(1).

[114] *See, e.g.,* 17 CFR 240.10b–5; 15 U.S.C. 77q(a)(2); 17 CFR 230.156(a); rule 206(4)–8.

[115] *See* current rule 206(4)–1(a)(4); *see also* Dow Theory Forecasts, Inc., SEC Staff No-Action Letter (May 21, 1986) (''Dow Theory Letter'') (staff declined to provide no-action recommendation where an offer for ''free'' subscription was subject to conditions).

[116] Proposed rule 206(4)–1(a)(2).

[117] Rule 156(b)(3)(ii). FINRA rule 2210(d)(1)(A) (stating that no member may make any false, exaggerated, unwarranted, promissory, or misleading statement or claim in any communication).

[118] Rule 156(b)(3)(ii).

prohibited in the current rule absent certain disclosures.[119] Under the proposed rule's prohibition against unsubstantiated material claims and statements, it may be false or misleading to imply or state in an advertisement that any graph, chart, or formula can by itself be used to determine which securities to buy or sell, depending on the disclosures provided and the extent to which an adviser in fact does provide investment advice solely based on such materials.[120]

We request comment on this application of the general prohibition.

• Should we take a similar approach to rule 156 and specify the particular attributes to which the standard would apply (*e.g.,* claims about an investment adviser's management skills or techniques, services, or other attributes)? If so, why? To which particular characteristics or attributes should the provision apply and how?

• Do commenters believe that statements about the characteristics of an investment adviser are useful in advertisements? How difficult is it to substantiate these types of statements?

• Is the prohibition on unsubstantiated claims necessary?

• We believe exaggerated claims or statements of material fact would be prohibited under the proposed rule.[121] However, should we explicitly prohibit exaggerated claims or statements, consistent with rule 156 and FINRA rule 2210?

• Should we retain the current rule's explicit prohibition on advertisements that represent that any graph, chart, or formula can by itself be used to determine which securities to buy or sell, or when to buy or sell them? If so, should we modify it? Are there practices that are prohibited under the current provision that would not be covered by the proposed prohibition or other prohibitions in the proposed rule?

• Should we modify this application of the general prohibition in any way for advisers with algorithms or other methodologies that may be considered formulas?

c. Untrue or Misleading Implications or Inferences

We are also proposing to prohibit any advertisement that includes an untrue or misleading implication about, or is reasonably likely to cause an untrue or misleading inference to be drawn concerning, a material fact relating to an investment adviser.[122] For example, this provision would prohibit an adviser from making a series of statements in an advertisement that are literally true when read individually, but whose overall effect creates an untrue or misleading implication about the investment adviser.[123] Another example of an untrue or misleading inference would be an advertisement that includes a single investor testimonial stating that investor's account was profitable, which is factually true for that particular investor but nonetheless atypical among all the adviser's investors. If the communication did not disclose the extent to which most other investor accounts were not profitable, this testimonial would create an untrue or misleading impression about the adviser's performance history.[124] Additionally, an advertisement that states an adviser was rated ''the top investment adviser'' by a publication would create a misleading inference if the adviser omitted the fact that this was a group rating, and several other investment advisers rated by the publication achieved the same rating. As discussed in further detail in section II.A.3.e. below, we believe this provision (along with other provisions discussed below) would prohibit ''cherry picking'' of past investments or investment strategies of the adviser—that is, including favorable results while omitting unfavorable ones in a manner that is not fair and balanced.

We request comment on this provision.

• Do commenters agree with including this provision? Is this provision necessary, or do the other provisions of section 206(4)–1(a) of the proposed rule effectively prohibit conduct such as cherry picking?

• Should we consider limiting this provision? For example, should the prohibition be limited to untrue statements or misleading inferences concerning the adviser's competence or skills or the experience of investors?

• Do commenters agree that this proposed prohibition would help limit cherry picking in advertisements? If not, how should the proposed prohibition be modified to limit cherry picking in advertisements?

d. Failure To Disclose Material Risks or Other Limitations

The proposed rule prohibits advertisements that discuss or imply any potential benefits connected with or resulting from the investment adviser's services or methods of operation without clearly and prominently[125] discussing associated material risks or other limitations associated with the potential benefits.[126] Rule 156 and FINRA rule 2210 contain similar provisions.[127] We believe that in advertising their services, advisers might be incentivized to make, and investors might be misled by, statements that highlight financial upside and gain, without discussing the attendant risks or other limitations. Accordingly, we believe it is appropriate to prohibit the practice under the proposed rule.

The proposed requirement to ''clearly and prominently'' disclose material risks would necessitate formatting and tailoring based on the form of the communication. For example, an advertisement intended to be viewed on a mobile device may meet the standard in a different way than one intended to be seen as a print advertisement. For instance, a person viewing a mobile device could be automatically redirected to the required disclosure before viewing the substance of an advertisement. However, it would not be consistent with the clear and prominent standard to merely include a hyperlink to disclosures available elsewhere.[128] For example, a post on

[119] *See* current rule 206(4)–1(a)(3) (requiring that the investment adviser also disclose in any such advertisements the limitations and difficulties with regard to such use).

[120] *Id.*

[121] *See* proposed rule 206(4)–1(a)(1) and (3).

[122] Proposed rule 206(4)–1(a)(3). Staff has previously provided its views regarding when an advertisement would be otherwise false or misleading under section (a)(5) of the current rule. *See, e.g.,* Clover Capital Mgmt., Inc., SEC Staff No-Action Letter (Oct. 28, 1986) (stating the use of performance results in an advertisement in the staff's view would be false or misleading if it implies, or a reader would infer from it, something about the adviser's competence or about future investment results that would not be true had the advertisement included all material facts) (''Clover Letter''); Stalker Advisory Services, SEC Staff No-Action Letter (Jan. 18, 1994) (stating that copies of articles printed in independent publications that contain performance information of an adviser would be prohibited if they implied false or misleading information absent additional facts) (''Stalker Letter''); F. Eberstadt & Co., Inc., SEC Staff No-Action Letter (Jul. 2, 1978) (stating that advertisements could be misleading if they imply positive facts about the adviser when additional facts, if also provided, would cause the implication not to arise) (''Eberstadt Letter'').

[123] *See* Spear, *supra* footnote 61 (the Commission brought an enforcement action against an investment adviser, asserting, in part, that the adviser's advertisements, which recounted a number of factually accurate stories highlighting the outstanding investment success of certain selected clients collectively created ''illusory hopes of immediate and substantial profit'').

[124] *See infra* section II.A.4.b.

[125] The Commission has used a similar ''prominent'' standard in other rules and forms. For example, Form N–1A requires that open-end management companies disclose certain information on their websites in a ''clear and prominent format.'' *See* Form N–1A Item 12(a)(5).

[126] *See* proposed rule 206(4)–1(a)(4).

[127] *See* rule 156(b)(3)(i); FINRA rule 2210 (d)(1).

[128] However, it may be consistent with the clear and prominent standard if the adviser has reasonable assurance that the investor will access

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social media advertising the benefits of an adviser's investment methods, but which only included relevant disclosures about the material risks in a hyperlinked ''additional information available here'' or similar web link, would not meet this standard. Such hyperlinked disclosures may not be seen or read by investors, as they may not click through to the additional information necessary to make an informed decision.

We request comment on this aspect of the proposed prohibitions.

• Should the proposed rule contain additional specifications regarding the required disclosure (*e.g.,* requiring the disclosure to be of equal prominence in size and location to discussion of potential benefits)?

• The proposed rule would require that investment advisers disclose ''associated material risks or other limitations associated with the potential benefits.'' Is the proposed approach too narrow? For example, should the provision require advisers to disclose all material risks, and not just those associated with potential benefits?

• Should the rule identify specific risks that any advertisement must address to be considered not misleading? For example, should it require disclosure that provides balanced treatment of risks and potential benefits, consistent with the risks related to fluctuating prices and the uncertainty of dividends, rates of return and yield, as is required by FINRA rule 2210(d)(1)(D)?

• Should the rule provide additional details on how an advertisement could meet the clear and prominent standard?

• Should the rule permit hyperlinked disclosures in cases where the adviser can be assured that the investor has accessed the information? How should an adviser be able to do so?

• Should the rule permit hyperlinked disclosures subject to other conditions? If so, what types of conditions could ensure that the disclosure meets the clear and prominent standard? How do advisers believe they could meet the clear and prominent standard in mobile communications, social media posts, or other space-limited media? The FTC provides guidance on how to make effective disclosures through hyperlinks, which provide that if a hyperlink: (i) Is obvious; (ii) is labeled to appropriately convey the importance, nature, and relevance of the disclosures it leads to; (iii) is placed as close as possible to the relevant information it qualifies; and (iv) takes investors directly to the relevant disclosures on the click-through page, that such hyperlinked disclosures may be effective.[129] Should we consider imposing similar requirements on an adviser's use of hyperlinked disclosures?

or otherwise view the disclosures, such as by providing them before the relevant content and requiring the investor to acknowledge their review before accessing the substance of the advertisement.

e. Anti-Cherry Picking Provisions: References to Specific Investment Advice and Presentation of Performance Results

The proposed rule contains two other provisions designed to address concerns about investment advisers' potentially cherry-picking information that is presented to investors in advertisements.

i. References to Specific Investment Advice

The proposed rule would prohibit a reference to specific investment advice where such investment advice is not presented in a manner that is fair and balanced.[130] The factors relevant to when a presentation of specific investment advice is fair and balanced, as well as certain examples, are discussed below.

Consistent with the current rule, this prohibition is intended to address concerns of advisers presenting ''cherry-picked'' advice that they have provided on specific investments. When the Commission adopted the current rule's general prohibition of past specific recommendations, it expressed concern about the ''inherently misleading'' nature of advertisements that include references to past specific profitable recommendations, while omitting other recommendations that were not profitable.[131] The Commission believed that cherry picking profitable recommendations implied that the selected recommendations were representative of the experiences of all of the investment adviser's clients.[132] For this reason, the rule prohibited investment advisers from distributing advertisements that refer directly or indirectly to past specific recommendations which were, or would have been, profitable to anyone unless the advertisement sets out or offers to furnish information about all recommendations made by the adviser during the preceding period of not less than one year.

Over the years since the advertising rule was adopted, however, our experience has led us to believe that some information about an adviser's past advice could be presented without misleading investors. For instance, we understand that some investment advisers may produce communications such as ''thought pieces,'' which are intended to illustrate the investment adviser's philosophy and process to investors and prospective investors and often contain references to specific investments, such as their largest holdings within a given strategy or recommendations during a certain time period, as well as general views about the market. These advisers may hesitate to share such thought pieces with investors in light of the current rule's prohibition on past specific recommendations. Out of the same concerns, an adviser may also hesitate to illustrate in an advertisement the investment adviser's specific investment advice in response to a major market event or crisis, such as a natural disaster in a region where the adviser made or suggested investments for its investors.

The proposed rule would replace the current prohibition with a principles-based restriction on the presentation of specific investment advice. In particular, the proposed rule would require advertisements that include specific investment advice to be presented by the investment adviser in a manner that is fair and balanced. The factors that are relevant to whether a reference to specific investment advice is presented in a fair and balanced manner for purposes of paragraph (a)(5) of the proposed rule will vary based on the facts and circumstances. The proposed rule would not include specific requirements regarding disclosure about specific recommendations. We believe the proposed approach would allow investment advisers to better tailor the information that they include in advertisements that contain references to specific investment advice in a manner that does not mislead investors. While we are not prescribing any particular presentation or specific disclosure, which we believe would be unduly limiting on advisers, we believe several factors, discussed below, may be relevant to whether an adviser should

[129] *See* Federal Trade Commission, ''.com Disclosures: How to Make Effective Disclosures in Digital Advertising,'' press release (March 2013), *available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcom disclosures.pdf.*

[130] *See* proposed rule 206(4)–1(a)(5). The wording ''fair and balanced ''is also used in FINRA rule 2210, which requires, among other things, that broker-dealer communications ''must be fair and balanced and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service.'' See FINRA rule 2210(d)(1)(A).

[131] *See* Advertising Rule Adopting Release, *supra* footnote 5.

[132] *See id.*

be considered to have presented specific investment advice in a fair and balanced manner.[133] A reference to specific investment advice may also be prohibited under other provisions of the general prohibition of false or misleading advertisements.

We believe an advertisement that references favorable or profitable specific investment advice without providing sufficient information and context to evaluate the merits of that advice would not be fair and balanced. The current rule identifies particular information that must be disclosed when furnishing a list of all past specific recommendations made by the adviser within the immediately preceding period of not less than one year: (i) The name of each such security recommended, the date and nature of each such recommendation (*e.g.,* whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date, and (ii) a specific cautionary legend on the first page of the advertisement.[134] An adviser may find this list to be helpful guidance; however, the proposed rule would not require these disclosures, and the inclusion of such disclosures would not be the only way of satisfying paragraph (a)(5).

We believe that instead of including a requirement for a particular presentation, advisers, when determining how to present this information in a fair and balanced manner, should consider the facts and circumstances of the advertisement, including the nature and sophistication of the audience. For example, our staff has stated that it would not recommend enforcement action under the current rule with respect to charts in an advertisement containing an adviser's best and worst performers if: (i) The adviser's calculation takes into account consistently the weighting of every holding in the relevant account that contributed to the account's performance during the measurement period, and the charts reflect consistently the results of the calculation; (ii) the charts' presentation of information and number of holdings is consistent from measurement period to measurement period; and (iii) the charts include the holdings that contributed most positively and negatively to the relevant account's performance during the measurement period.[135] We are not prescribing these factors under the proposed rule. Although we believe that an advertisement that includes this information would likely meet the proposed fair and balanced standard, we do not believe this is the only way to present specific investment advice in a manner that would comply with this provision of the proposed rule.

Under the proposed rule, unlike under the current rule, the adviser may be able to describe the specific investment advice it provided to an investor in response to a previous major market event, provided the investment recommendations included in the advertisement were fair and balanced illustrations of the adviser's ability to respond to major market events and accompanying disclosures provided investors with appropriate contextual information to evaluate those recommendations (*e.g.,* the circumstances of the market event, such as its nature and timing, and any relevant investment constraints, such as liquidity constraints, during that time). However, we believe that an advertisement that contains this specific investment advice without disclosing contextual information would not be consistent with the proposed rule's fair and balanced standard.

We recognize that an investment adviser might provide a list of certain investments it recommended based upon certain selection criteria, such as the top holdings by value in a given strategy at a given point in time. The criteria investment advisers use to determine such lists in an advertisement, as well as how the criteria are applied, should produce fair and balanced results. We believe that consistent application of the same selection criteria across measurement periods limits an investment adviser's ability to reference specific investment advice in a manner that unfairly reflects only positive or favorable results.

Our staff has stated that under current rule 206(4)–1 it would not recommend enforcement action relating to an advertisement that includes performance-based past specific recommendations if: (i) The adviser uses objective, non-performance based criteria to select the specific securities that it lists and discusses in the advertisement; (ii) the adviser uses the same selection criteria for each quarter for each particular investment category; (iii) the advertisements do not discuss, directly or indirectly, the amount of the profits or losses, realized or unrealized, of any of the specific securities; and (iv) the adviser maintains appropriate records, which would be available for inspection by Commission staff.[136] An adviser may find these criteria helpful guidance in complying with the proposed rule, but the proposal would not require them.

The current rule prohibits references to past specific recommendations in an advertisement that do not set out or offer to furnish a list of all recommendations made by such investment adviser in the last year.[137] We considered, but are not proposing, to maintain this requirement from the current rule. We believe that it may not be practical for many investment advisers to disclose all purchases, sales, or recommendations made during the preceding one-year period (*e.g.,* including in such a list potentially thousands of investments). For example, we understand that the current requirement of offering to provide all investments has a chilling effect on adviser communications with pooled investment vehicle investors because providing such information would reveal proprietary strategies. Therefore, we believe that requiring presentations of references to specific investment advice in an advertisement to be fair and balanced could provide more useful information to investors than the current requirement of a comprehensive list of investments.[138] However, if an adviser chooses to provide a list of all specific investment advice made in a period of no shorter than the preceding year, we believe that such a list would meet the proposed rule's ''fair and balanced'' standard.

Finally, the proposed rule uses the phrase ''reference to specific investment advice'' rather than the current rule's reference to ''past specific recommendations . . . which were or would have been profitable . . . .''[139] This change substantively broadens the scope of the provision and eliminates confusion that we understand may exist in interpreting the current rule.[140] The

[133] For selecting and presenting performance information, these factors are in addition to the requirements and restrictions on presentation of performance, which are discussed in Section II.A.5. *See* proposed rule 206(4)–1(c).

[134] *See* rule 206(4)–1(a)(2).

[135] *See* the TCW Group, SEC Staff No-Action Letter (Nov. 7, 2008) (''TCW Letter'').

[136] *See* Franklin Management, Inc., SEC Staff No-Action Letter (Dec. 10, 1998) (''Franklin Letter'').

[137] *See* current rule 206(4)–1(a)(2).

[138] In some instances, however, an investment adviser should consider listing some, or all, of the specific investment advice of the same type, kind, grade, or classification as those specific investments presented in the advertisement in order for a presentation to be fair and balanced.

[139] *Compare* proposed rule 206(4)–1(a)(5) *with* current rule 206(4)–1(a)(2).

[140] *See, e.g.,* Comment letter of Investment Counsel Association of America (Aug. 2001). We understand that industry participants have raised

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proposed provision applies to any reference to specific investment advice given by the investment adviser, regardless of whether the investment advice remains current or occurred in the past. This provision applies regardless of whether the advice was acted upon, or reflected actual portfolio holdings, or was profitable. Finally, the modified provision includes investments in discretionary portfolios, even if an adviser is not making a non-discretionary ''recommendation'' to the investor. We believe that including current or past references to specific investment advice in the scope of the proposed rule is appropriate because it avoids questions about when a current recommendation becomes past. In addition, we believe that selective references to current investment recommendations could mislead investors in the same manner as selective references to past recommendations.

ii. Presentation of Performance Results

The proposed rule would prohibit any investment adviser from including or excluding performance results, or presenting time periods for performance, in a manner that is not fair and balanced.[141] This prohibition responds to concerns similar to the Commission's concerns discussed above regarding ''cherry-picking'' of investments for inclusion in advertisements.[142] Similarly, the potential exists for an adviser to ''cherry-pick'' the time periods used to generate performance results in advertisements. In addition, an advertisement that includes only favorable performance results or excludes only unfavorable performance results would be ''misleading'' to the extent that such an advertisement implies something about or is likely to cause an inference to be drawn concerning the investment adviser that would not be implied or inferred were certain additional facts—*i.e.,* any performance results excluded from the advertisement—disclosed.[143]

As with specific investment advice, the factors that are relevant to whether a reference to performance information is presented in a fair and balanced manner for purposes of the rule's general prohibition will vary based on the facts and circumstances. For example, presenting performance results over a very short period of time, or over inconsistent periods of time, may result in performance portrayals that are not reflective of the adviser's general results and thus generally would not be fair and balanced.[144] Portrayals of performance results that do not include sufficient information for an investor to assess how the results were determined, or which do not provide sufficient context for the investor to evaluate the utility of the results, would not be consistent with the fair and balanced standard we are proposing here.

In section II.A.4 below we discuss further specific requirements and conditions for portrayals of certain types of performance to different audiences that we are also proposing here. In those cases, however, the fair and balanced standard for performance that we are proposing here would also apply.

We request comment on the proposed rule's provision regarding references to specific investment advice and presentation of performance:

• Do commenters agree with the proposed treatment of references to specific investment advice in advertisements? Is fair and balanced an appropriate standard? Can advisers apply this standard? Are there other standards we should use? Are there alternative or additional requirements that would reduce the risk of cherry picking or other misleading or deceitful practices while providing advisers the ability to appropriately include such information?

• Should the proposed rule include specific presentation requirements, such as requiring advertisements with references to specific investment advice to include an equal number of best- and worst-performing holdings, or use an objective, non-performance based criterion, such as the largest dollar amount of purchases or sales? Are there additional presentation requirements we should consider? Should the presentation requirements be the same for advertisements for which an adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisements are disseminated solely to ''qualified purchasers'' and certain ''knowledgeable employees'' (defined as ''Non-Retail Advertisements'' in paragraph (e)(7) of the proposed rule) and all other advertisements (defined as ''Retail Advertisements'' in paragraph (e)(13) of the proposed rule)?

• Should advertisements including a reference to specific investment advice be required to disclose or offer to provide a complete list of specific investments? If so, should the list be limited to investments of the same type, kind, grade, or classification as those specific investments presented in the advertisements? If not, how else should this list be limited?

• Should we require investment advisers that include a reference to specific investment advice to disclose the criteria used to select the specific investment?

• While the proposed rule does not contain a list of prescriptive requirements, to provide additional guidance the proposal discusses several factors that advisers should consider when determining whether a presentation is fair and balanced. Should we include any or all of these factors in the rule text itself? Do any of these factors need further clarification? Are the factors we discussed relevant? Are there any additional or alternative factors we should discuss?

• Does using the term ''reference to specific investment advice'' instead of ''past specific recommendations'' clarify the scope of the provision? If not, is there another term that should be used?

• Should the rule have separate requirements for references to specific investment advice in Retail Advertisements and Non-Retail Advertisements?

• Should the rule have separate general provisions for advisers advertising to different types of investors (*e.g.,* separate provisions for advertisements to Retail Persons and Non-Retail Persons)? Why or why not? If so, what different requirements should apply to what types of investors? Should the requirements for Retail Advertisements include additional restrictions and/or prescribed disclosures? If so, what should they be? Would additional restrictions and prescribed disclosures be meaningful to

concerns regarding what qualifies as a *past* recommendation versus a *current* recommendation and whether there is a meaningful distinction. We also understand that industry participants have questioned the meaning of *recommendation* in the current rule and whether this phrasing includes portfolio holdings more generally. Finally, we do not believe it is necessary to limit the provision to ''profitable'' recommendations. We believe that there may be instances where an investment adviser seeks to reference investments for reasons other than to demonstrate its ability to generate profits (*e.g.,* ability to select low volatility investments).

[141] Proposed rule 206(4)–1(a)(6).

[142] *See* Advertising Rule Adopting Release, *supra* footnote 5 (stating that ''material of this nature, which may refer only to recommendations which were or would have been profitable and ignore those which were or would have been unprofitable, is inherently misleading and deceptive''); *see also* Clover Letter (stating that, in the staff's view, an advertisement containing performance results would be false or misleading if it failed to disclose prominently, if applicable, that the results portrayed relate only to a select group of the adviser's clients, the basis on which the selection was made, and the effect of this practice on the results portrayed, if material).

[143] *See* proposed rule 206(4)–1(a)(3).

[144] However, such information may be presented in response to specific requests from Non-Retail Persons under the proposed exclusion for responses to unsolicited requests. *See supra* section II.A.2.c.ii.

Retail Persons but not Non-Retail Persons? Would additional restrictions and prescribed disclosures be meaningful to only a subset of Non-Retail Persons? Why or why not?

• Should the proposed requirement for fair and balanced presentation for references to specific investment advice vary based on the type of communications?

• Should we specify in some way what ''favorable'' or ''unfavorable'' mean? Why or why not?

f. Otherwise Materially Misleading

Finally, we are proposing to prohibit any advertisement that is otherwise materially misleading.[145] Rule 206(4)–1 currently has a broad catch-all provision prohibiting advertisements that are ''otherwise false or misleading.''[146] We are generally proposing to retain a catch-all provision like this aspect of the current rule. We believe this catch-all would ensure that certain materially misleading practices that are not specifically covered by the other prohibitions would be addressed. For example, if an adviser provided accurate disclosures, but presented them in an unreadable font, such an advertisement would be materially misleading and prohibited under this catch-all.

However, because we are also prohibiting a variety of specific types of advertisement practices within the general prohibitions, most of which include an element of materiality, as discussed above, we are proposing to focus the catch-all provision on only those advertisements that are otherwise *materially* misleading. We believe that limiting the catch-all to materially misleading advertisements would be more appropriate within the overall structure of the proposed prohibitions while still achieving our goal of prohibiting misleading conduct that may affect an investor's decision-making process. We also believe that, in light of the proposed rule's prohibitions on making untrue statements and omissions of material fact, including ''false'' is unnecessary in the catch-all provision as it is already covered by the previous prohibition.[147] We request comment on this provision of the proposed rule.

• Should we include this catch-all provision? If not, why not? Would the other general prohibitions capture all types of conduct that would otherwise result in an advertisement being materially misleading? If not, should we instead seek to specifically identify all potentially misleading conduct that an adviser might seek to engage in within the rule rather than include such a catch-all?

• Should the provision prohibit all false and misleading advertisements as under the current rule, not just materially misleading ones, as proposed? Are there situations where an advertisement would be immaterially false or misleading?

• Does the proposed rule's prohibitions on making untrue statements and omissions of material fact make the term ''false'' unnecessary in the catch-all? Should the proposed provision also apply to materially false advertisements?

g. General Request for Comment and Alternate Approaches

We request comment on the proposed prohibitions discussed above.

• The proposed rule prohibits certain advertising practices as a means reasonably designed to prevent fraud within the meaning of section 206(4) of the Act. Is this approach effective? Would the list of practices in the proposed rule be helpful for investment advisers in evaluating whether their advertisements are or might be misleading?

• Are there other practices that we should include, such as any additional factors listed in rule 156? Or should we extend all of the anti-fraud guidance in rule 156 to investment adviser advertisements?

• Should any of the practices that we are proposing to prohibit instead be reframed as factors to consider similar to the approach in rule 156? Should we modify the rule to incorporate any of these factors to consider in lieu of the prohibitions under the proposed rule?

• Should we include any specific prohibitions related to the presentation of information in advertisements? For example, should we prohibit including disclosures in too small of a font? Should we specifically require that information be presented in Plain English?

• Do commenters agree with the proposed prohibitions? Should we modify the language or scope of any of the prohibitions? Is each of the practices described in this provision sufficiently likely to be misleading that it should be prohibited, or is it possible that any of these provisions could encompass statements or presentations that are not misleading and provide investors with valuable information?

• Should these provisions apply to all advertisements, regardless of whether the advertisement is directed to Retail Persons or Non-Retail Persons? Should any of them apply only to Retail Advertisements or vice versa?

We also request comment on other approaches to the regulation of advertising by advisers. For example, we are proposing an approach where, as a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, and courses of business, we would amend rule 206(4)–1 generally to prohibit certain conduct, as discussed above, *and* restrict certain specific identified advertising practices, as discussed below. Instead, we could not identify any specific restricted practices and rely on the general prohibitions against fraud or deceit in section 206 of the Advisers Act and certain rules thereunder.[148] Under such an approach, a rule specifically targeting adviser advertising practices might be unnecessary.

• Should we repeal the current rule 206(4)–1 and rely instead solely on section 206 of the Act and such rules thereunder to regulate adviser advertising practices?

• Alternatively, should we identify general prohibited conduct, such as discussed above?

• Should we only restrict certain specific practices, or include a narrower set of restricted practices? If so, which practices should still be covered in an advertising rule? For example, should the rule target the presentation of performance or certain other specific practices such as the use of testimonials?

• Would such approaches provide advisers with sufficient clarity and guidance on whether certain advertising practices would likely be fraudulent or deceptive?

• Would such approaches provide sufficient clarity for an adviser of its legal obligations and potential liabilities in crafting advertisements?

4. Testimonials, Endorsements, and Third Party Ratings

The proposed rule specifically addresses the use of testimonials, endorsements, and third-party ratings in advertisements. The proposed rule would define ''testimonial,'' ''endorsement,'' and ''third-party rating,'' and would permit advisers to use them in advertisements, subject to the rule's general prohibitions of certain advertising practices and additional conditions. The current advertising rule outright prohibits the use of

[145] Proposed rule 206(4)–1(a)(7).

[146] Rule 206(4)–1(a)(5).

[147] Rule 156 under the Securities Act similarly prohibits investment company sales literature which is ''materially misleading.''

[148] For example, rule 206(4)–8 would continue to apply to advertisements directed to investors in private funds under such an approach.

''testimonials,'' and does not expressly address endorsements and third-party ratings.[149] When the Commission adopted the advertising rule in 1961, it stated that testimonials ''. . . by their very nature emphasize the comments and activities favorable to the investment adviser and ignore those that are unfavorable. This is true even when the testimonials are unsolicited and printed in full.'' [150] We are proposing a provision that would address testimonials, endorsements, and third-party ratings in a nuanced manner.[151] Unlike the current rule's broad restrictions on the use of testimonials, the proposed provision would permit testimonials, endorsements, and third-party ratings, subject to disclosures and other tailored conditions. Our proposal would recognize that while consumers and businesses often look to the experiences and recommendations of others in making informed decisions, there may be times when these tools are less credible or less valuable than they appear to be.

Testimonials, endorsements, and third-party ratings are widely used and accepted in today's marketplace for various consumer goods and services outside of the securities and investment industry. Technological advances, including the development of the internet and social media platforms, have made the use and dissemination of testimonials easier and more widespread, and they continue to be an important resource for consumers and businesses. In addition, those selling goods and services also seek endorsements about their product or service from trade and consumer groups or particular individuals. Like testimonials and endorsements, third-party ratings often provide information to consumers to help them evaluate a business relative to its peers or based on certain factors that may be important to the consumer. People continue to seek out and consider the views of others when making a multitude of transactions or decisions—from purchasing a coffee maker to finding the right medical expert to consult. Consumers that make purchases in online marketplaces may be experienced in reading reviews and evaluating any accompanying qualifications, such as reviews marked as ''verified purchaser'' or ''verified review.''

We believe that testimonials, endorsements, and third-party ratings can be useful and important for investors when evaluating investment advisers. Yet, we recognize that there are circumstances in which this type of information might mislead investors by, for example, failing to provide important context in which the statement or rating was made. With tailored disclosures and other safeguards discussed below, we believe that advisers could use testimonials, endorsements, and third-party ratings in advertisements to promote their accomplishments with less risk of misleading retail investors.

a. Definition of Testimonial, Endorsement, and Third-Party Rating

The proposed rule defines ''testimonial'' as ''any statement of a client's or investor's experience with the investment adviser or its advisory affiliates, as defined in the Form ADV Glossary of Terms.'' [152] It defines ''endorsement'' as ''any statement by a person other than a client or investor indicating approval, support, or recommendation of the investment adviser or its advisory affiliates, as defined in the Form ADV Glossary of Terms.'' [153]

The proposed definitions of testimonial and endorsement would broadly cover an investor's experience with the adviser or its advisory affiliates (testimonial), and a non-investor's approval, support, or recommendation of the adviser or its advisory affiliates (endorsement). Testimonials and endorsements would both include, for example, opinions or statements by persons about the investment advisory expertise or capabilities of the adviser or its advisory affiliates. To the extent that a statement does not cover an investor's experience with the adviser or its advisory affiliates, or a non-investor's approval, support or recommendation of the adviser or its advisory affiliates, it would not be treated as a testimonial or endorsement. For example, complete or partial client lists that do no more than identify certain of the adviser's investors would not be treated as a testimonial.[154] Testimonials and endorsements could include character-based or other statements that more indirectly implicate the expertise or capabilities of the adviser or its advisory affiliates, such as their trustworthiness, diligence, or judgment.[155] We believe that these types of statements typically should be treated as testimonials and endorsements, depending on the specific facts and circumstances, because an investor would likely

[149] *See* rule 206(4)–1(a)(1) for the prohibition on testimonials.

[150] *See* Advertising Rule Adopting Release, *supra* footnote 5.

[151] Our proposed approach is somewhat informed by the approach taken by FINRA, which permits testimonials about broker-dealers, subject to limitations, though we recognize that advisers and brokers have different business models, and are subject to different regulation. FINRA requires a testimonial about a technical aspect of investing that appears in any communication (regardless of investor sophistication) be offered by a person that has the ''knowledge and experience to form a valid opinion.'' *See* FINRA rule 2210(d)(6)(A). FINRA's rule does not define the term ''testimonial.'' With regard to any testimonial in retail communications (or correspondence as defined in the FINRA rule), the communication must make certain prominent disclosures, including, for example, if more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial. *See* FINRA rule 2210(d)(6)(B); *see also* FINRA's Regulatory Notice 17–18: Social Media and Digital Communications: Guidance on Social Networking websites and Business Communications, April 2017 (stating that for broker-dealers, among other things, ''third-party posts on a firm or associated person's business website may constitute communications with the public by the firm or an associated person under Rule 2210 if the firm or an associated person has (1) paid for or been involved in the preparation of the content (which FINRA would deem to be 'entanglement') or (2) explicitly or implicitly endorsed or approved the content (which FINRA would deem to be 'adoption').'').

[152] *See* proposed rule 206(4)–1(e)(15). An adviser's ''advisory affiliate'' is defined in Form ADV's Glossary of Terms as ''(1) all of your officers, partners, or directors (or any *person* performing similar functions); (2) all *persons* directly or indirectly *controlling* or *controlled* by you; and (3) all of your current *employees* (other than *employees* performing only clerical, administrative, support or similar functions).'' Form ADV Glossary of Terms. In addition, if an adviser is a ''separately identifiable department or division'' (SID) of a bank, the term ''advisory affiliate'' is defined in Form ADV Glossary of Terms as: ''(1) all of your bank's *employees* who perform your investment advisory activities (other than clerical or administrative *employees*); (2) all *persons* designated by your bank's board of directors as responsible for the day-to-day conduct of your investment advisory activities (including supervising the *employees* who perform investment advisory activities); (3) all *persons* who directly or indirectly *control* your bank, and all *persons* whom you *control* in connection with your investment advisory activities; and (4) all other *persons* who directly manage any of your investment advisory activities (including directing, supervising or performing your advisory activities), all *persons* who directly or indirectly *control* those management functions, and all *persons* whom you *control* in connection with those management functions.'' *Id.* The terms ''person,'' ''employee,'' and ''control'' are also defined in Form ADV's Glossary of Terms, and would be incorporated in the proposed rule to the extent they are used in the rule's definition of ''testimonial'' and ''endorsement.'' *Id.*

[153] *See* proposed rule 206(4)–1(e)(2). Even though the current rule prohibits testimonials, it does not define the term, and it does not address endorsements.

[154] Similarly, in the context of stating it would not recommend enforcement action when the adviser proposed to use partial client lists that do no more than identify certain clients of the adviser, the Commission staff stated its view that partial client lists would not be testimonials because they do not include statements of a client's experience with, or endorsement of, an investment adviser. *See* Cambiar Investors, Inc., SEC Staff No-Action Letter (Aug. 28, 1997).

[155] Even though the proposed rule treats testimonials and endorsements similarly, we are providing a distinct definition for each so that we can tailor the disclosure requirements for each and request comment on whether the rule should treat them differently, as discussed below.

perceive them as relevant to the adviser's investment advisory services. In the infrequent event that such statements are not relevant to an investment adviser or its advisory affiliates' investment advisory services, however, such statements would not be treated as testimonials or endorsements.

We considered, but are not proposing that the definitions of testimonial and endorsement include certain types of statements about an adviser's *related persons,* which are an adviser's advisory affiliates and any person that is under common control with the adviser.[156] We believe that applying the testimonial and endorsement provision to persons under common control with the adviser would be overly broad, because statements about such persons would not be relevant to an investor's assessment of an investment adviser. For similar reasons, we are not proposing to use the term ''affiliated person,'' as defined in the Investment Company Act and incorporated into the Act, as that term also would apply, among other things, to persons under common control with the adviser.[157]

Our proposed rule defines ''third-party rating'' as a ''rating or ranking of an investment adviser provided by a person who is not a related person, as defined in the Form ADV Glossary of Terms, and such person provides such ratings or rankings in the ordinary course of its business.'' [158] The proposed definition is intended to permit advisers to use third-party ratings, subject to conditions, when the ratings are conducted in the ordinary course of business. We believe that the ordinary course of business requirement would largely correspond to persons with the experience to develop and promote ratings based on relevant criteria. It would also distinguish third-party ratings from testimonials and endorsements that may include statements that resemble third-party ratings, but that are not made by persons who are in the business of providing ratings or rankings. The requirement that the provider not be an adviser's related person would avoid the risk that certain affiliations could result in a biased rating.[159] However, we request comment below on whether the proposed definition of ''third-party rating'' should include affiliated parties under certain circumstances, such as when the rating is at arm's length and not designed to favor the affiliate. Under our proposal, we believe that a rating by an affiliated person might otherwise be prohibited under the proposed rule's general prohibitions of certain advertising practices, depending on the facts and circumstances, such as if it includes an untrue or misleading implication about, or is reasonably likely to cause an untrue or misleading inference to be drawn concerning, a material fact relating to the investment adviser.[160]

Testimonials, endorsements, and third-party ratings would only be subject to the proposed rule to the extent they themselves are ''advertisements'' or they appear within an advertisement. Whether they are themselves advertisements requires a facts and circumstances analysis of whether a communication is ''by or on behalf of'' an investment adviser.[161] While some third-party statements or ratings that appear in a third-party hosted platform may meet the proposed rule's definition of ''advertisement,'' we generally believe that many of these statements or ratings would fall outside of the scope of the proposed rule.[162] For example, as discussed above, statements regarding the investment adviser on a third-party hosted platform, such as a social media site other than the adviser's site, that solicits users to post information, including positive and negative reviews of the adviser, would not fall within the scope of the proposed rule's definition of ''advertisement'' unless the adviser took some steps to influence such reviews or posts, and thus the statement was made by or on the adviser's behalf. For example, if the adviser paid the third party website to promote certain statements or reviews or to hide or ''downrank'' others, the adviser would be taking steps to influence the content of the reviews or posts.[163] Likewise, a third-party statement or rating may meet the definition of ''testimonial,'' ''endorsement,'' or ''third-party rating,'' but could fall outside of the rule's scope because it does not fall under the proposed rule's definition of ''advertisement.'' For example, as discussed above, the fact that an adviser permits all third parties to post public commentary to the adviser's website or social media page generally would not, by itself, render such commentary attributable to the investment adviser, unless the adviser took some steps to influence the content of the commentary.[164]

Compensated testimonials and endorsements would generally be ''by or on behalf of'' an adviser and would make the statements subject to the rule.[165] In these cases, and in all instances where a testimonial, endorsement, or third-party rating would be an advertisement or would be part of an adviser's advertisement, the adviser would be required to comply with both the tailored conditions of the proposed rule with respect to testimonials, endorsements, and third-party ratings, and the proposed rule's general prohibitions on certain advertising practices (*e.g.,* that the advertisement not imply something untrue or misleading about, or that is reasonably likely to cause an untrue or misleading inference to be drawn

[156] An adviser's ''related person'' is defined in Form ADV's Glossary of Terms as ''[a]ny *advisory affiliate* and any *person* that is under common *control* with your firm.'' Italicized terms are defined in the Form ADV Glossary.

[157] As defined in the Investment Company Act, ''[a]ffiliated person'' of another person means: (A) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof. Section 2(a)(3) of the Investment Company Act. Such term is incorporated into section 202(a)(12) of the Act.

[158] Proposed rule 206(4)–1(e)(16). *See supra* footnote 156 for the definition of ''related person.''

[159] In the third-party rating provision, we are proposing to use the term ''related person,'' as opposed to ''advisory affiliate,'' which we are proposing to use in the definition of ''testimonial'' and ''endorsement.'' As discussed above, the term ''related person'' includes persons under common control with the adviser, and we believe that a rating by a person under common control with the adviser could present the same bias towards the adviser as a rating by an adviser's other advisory affiliates.

[160] *See* proposed rule 206(4)–1(a).

[161] *See* proposed rule 206(4)–1(e)(1) (defining advertisement, in part, as any communication. . . ''by or on behalf of an investment adviser''. . .). As discussed in detail *supra* section II.A.2.b.ii, content created by or attributed to third parties, such as investors, could be considered by or on behalf of an investment adviser, depending on the investment adviser's involvement. *See supra* section II.A.2 (discussing the proposed definition of ''advertisement'').

[162] *See supra* section II.A.2.b.ii.

[163] *Id.* However, merely letting an investor know about the availability of a third party review site without suggesting that the investor leave a positive review or not leave a negative review may not qualify as taking steps to influence the third party content.

[164] *See supra* footnotes 50–52 and accompanying text.

[165] *See supra* section II.A.2.b. (discussing when a statement is ''by or on behalf of'' an adviser, and stating that compensation includes any cash or non-cash compensation such as rewards or other incentives for a third-party to provide content). In many cases, a person providing a compensated testimonial or endorsement under the proposed advertising rule (a ''promoter'') will also be a solicitor, and both the proposed advertising and solicitation rules would apply. *See infra* section II.B.1.

concerning, a material fact relating to the investment adviser).

Statements made by an adviser that would be prohibited under the proposed rule's general prohibitions of certain advertising practices would also be prohibited in an adviser's advertisement if made by a third-party in a covered testimonial, endorsement, or third-party rating.[166] An adviser therefore would be prohibited from using any such statement or rating in an advertisement if, for example, the content, presentation or any other aspect of the statement or rating would be materially misleading if the adviser communicated it itself. For example, some advisers may wish to include in their advertisements testimonials about an adviser's performance results (including performance achieved by a particular investor —*e.g.,* ''XYZ Adviser's investment strategy has returned over 10% per year for my account in each of the last five years'' or ''ABC Adviser invested all of my assets in the health care sector and made me a fortune''). Such statements without additional disclosure would not overcome the proposed rule's general prohibitions, to the extent that they are not typical of the adviser's investors' experiences.[167] In such cases, they would give rise to a fraudulent or deceptive implication, or mistaken inference, that the experience of the person giving the testimonial is typical of the experience of the adviser's clients.[168] Such statement may also implicate the provisions related to performance and specific investment advice, respectively, discussed below as they may not meet the requirements to be fair and balanced.[169]

Under our proposed rule, in all instances where a testimonial, endorsement, or third-party rating would be an advertisement, the adviser would be required to comply with both the tailored conditions of the proposed rule that are discussed below as well as the proposed rule's general prohibitions on certain advertising practices. Therefore, for example, an adviser could not include an endorsement in an advertisement that makes a material claim or statement that is unsubstantiated or that is likely to create a misleading implication about a material fact.[170] Further, we believe that cherry picking testimonials, or otherwise selectively only using the most positive testimonials available about an adviser, would not be consistent with the general prohibition in the proposed rule. For example, if an adviser were to select a single positive testimonial to highlight in an advertisement, while excluding all negative testimonials, it is likely to create a misleading inference that the adviser has only received positive testimonials.

Similarly, statements about performance or specific investment advice made in the context of an endorsement or third-party rating would be subject to the proposed rule's general prohibitions. In all cases, we believe performance information or specific investment advice stated by persons other than the adviser or its representatives may be particularly compelling to an investor. For this reason, we would generally view an advertisement as unlikely to be presented in a manner that is fair and balanced under the proposed rule if the testimonial, endorsement, or third-party rating references performance information or specific investment advice provided by the investment adviser that was profitable that is not representative of the experience of the adviser's investors.

We request comment on this aspect of the proposed rule:

- Are our proposed definitions of ''testimonial,'' ''endorsement,'' and ''third-party ratings'' clear? Are there ways in which the proposed definitions are over- or under-inclusive?
- Do commenters agree that the provision regarding ''testimonials'' and ''endorsements'' should apply to statements about an adviser's advisory affiliates? Why or why not? If not, which persons associated with an adviser, if any, should be included in the provision? Should we instead use the term ''related persons,'' which would pick up persons under common control with the adviser? Why or why not?
- Do commenters agree with the scope of opinions or statements about the adviser and its advisory affiliates that would be included in the proposed definitions of testimonial and endorsement? Do commenters favor a broader or narrower scope, and why? For example, the scope of the proposed definitions of testimonial and endorsement would include statements about an adviser's or its advisory affiliates' trustworthiness, diligence, or judgment to the extent that they are statements of an investor's experience with the investment adviser, or are statements by others that indicate approval, support, or recommendation of the investment adviser. Should we more narrowly capture only the opinions or statements that are explicitly about the investment advisory expertise or capabilities of the adviser? Why or why not, and if so, how should we narrow the scope? Alternatively, how should we broaden the scope?
- A rating provided by a related person of the investment adviser would be evaluated under the proposed rule's general prohibitions of certain advertising practices, and might be prohibited thereunder, depending on the facts and circumstances. Do commenters agree with this approach? Should the proposed definition use a term other than ''related person'' to capture persons who are affiliated with the adviser and would be likely to produce a biased rating? If so, what term should we use, and what universe of persons should the term capture? For example, should the term include or exclude ratings provided by an adviser's investors, because of the potential for an investor to provide a more favorable rating of the adviser in order to receive preferential treatment by the adviser? Should the proposed definition of ''third-party rating'' exclude related persons in certain instances, such as when a related person's rating would be at arm's length and not designed to favor the adviser? Should it include or exclude any other persons based on the nature of the relationship between the adviser and the person providing the rating or ranking? Why or why not?
- Do commenters believe that the proposed definition of ''third-party rating,'' including the requirement that the rating be provided by a person who ''does so in the ordinary course of its business,'' distinguishes adequately between testimonials or endorsements that may include statements that resemble third-party ratings, from the types of ratings or rankings that we intend to capture within the scope of the definition (*i.e.,* they are made by persons who are in the business of providing ratings or rankings)? If not, how should we draw this distinction? Or, do commenters believe that such a distinction is unnecessary? Why?
- Do commenters agree or disagree that investors afford additional weight to statements about performance and

[166] As discussed above, the proposed rule contains general prohibitions of certain advertising practices. *See* proposed rule 206–4(1)(a). Therefore, an adviser may not use in an advertisement any endorsement or testimonial if it would be a prohibited statement if made directly by the adviser.

[167] General disclaimer language (*e.g.,* ''these results may not be typical of all investors'') would not be sufficient to overcome the proposed rule's general prohibitions. *See generally infra* footnote 180. However, disclosure could be sufficient if, for example, the advertisement states that the performance advertised is representative of a subset of clients who follow the particular strategy (if applicable).

[168] Proposed rule 206(4)–1(a).

[169] *Id.*

[170] *See* proposed rule 206(4)–1(a).

specific investment advice when presented in the context of a testimonial, endorsement, or third-party rating? Should the rule specifically address any of these practices, or other practices, in the testimonial, endorsement, and third-party rating provisions? If so, why, and how? Are there disclosures that would cure any misleading inferences about an adviser's performance or return of an investor's account or profitable investment advice of the adviser when made in the testimonial, endorsement, or third-party rating context? If so, what are they, and should we incorporate them as a condition for testimonials, endorsements, and third-party ratings? If so, should we incorporate them into conditions for Retail Advertisements or Non-Retail Advertisements (each as defined and discussed below), or both, and why?

• Do commenters agree that if an adviser links to a third-party website that contains a testimonial or endorsement, only the testimonial or endorsement on such third-party website should be viewed as the adviser's advertisement subject to proposed rule 206(4)–1? For an adviser linking to a third-party website that contains only educational information about investing, or a third-party tool such as an investing calculator, how would advisers signal to investors that, if applicable, the third-party content does not relate to the adviser's services or otherwise meet the definition of ''testimonial'' or ''endorsement''?

• As discussed below, testimonials and endorsements under the proposed rule could also be deemed to be solicitations under the proposed solicitation rule. Should the rule define ''testimonials'' and ''endorsements'' to distinguish them from solicitations?

b. Conditions on Testimonials, Endorsements, and Third-Party Ratings

The proposed rule would require that an investment adviser clearly and prominently disclose, or the investment adviser reasonably believe that the *testimonial* or *endorsement* clearly and prominently discloses, that the testimonial was given by a client or investor, and the endorsement was given by a non-client or non-investor, as applicable.[171] Disclosure about the status of the person making the testimonial or endorsement (*e.g.,* investor or non-investor) would provide investors with important context for weighing the relevance of the statement. For example, an investor might give more weight to a statement made about an adviser by another investor than a non-investor. An endorsement that is not clearly attributed to a non-investor could mislead investors who may assume the endorsement reflects the endorser's experience as an investor.

The proposed rule would also require that the investment adviser clearly and prominently disclose, or the investment adviser reasonably believe that the *testimonial, endorsement, or third-party rating* clearly and prominently discloses, that cash or non-cash compensation has been provided by or on behalf of the adviser in connection with the testimonial, endorsement, or third-party rating, if applicable.[172] In order to be clear and prominent, the disclosure must be at least as prominent as the testimonial, endorsement or third-party rating. For third-party ratings, this provision would apply to cash or non-cash compensation provided by or on behalf of the adviser to the party providing the rating (*e.g.,* the rating agency). Importantly, it also would apply to cash or non-cash compensation provided by or on behalf of the adviser to any person participating in the rating (*e.g.,* any investor that completes a questionnaire about the adviser in connection with the rating). The disclosure requirements would apply to third-party statements or ratings that appear in a third-party hosted platform that meet the proposed rule's definition of ''advertisement'' as well as to advertisements that the adviser publishes on its own platform. In the case of an advertisement on a third-party hosted platform to which investors' access is only through the adviser, the adviser could provide a pop-up web page including the required clear and prominent disclosures for third-party statements and ratings when the client or investor links to the third-party site. In other cases where investors may access through other channels an adviser's advertisement on a third-party hosted platform, and the adviser itself cannot provide the required disclosures, the adviser must form a reasonable belief that the third-party statement or rating includes the required clear and prominent disclosures.

These proposed requirements to disclose that cash or non-cash compensation has been provided would provide important context for weighing the relevance of the statement. Consumers understand that compensation provided by or on behalf of a company in connection with reviews, testimonials, and ratings can incentivize the reviewer or the party providing the rating to provide a positive statement about, or positive rating of, the adviser. Cash or non-cash compensation provided in connection with a testimonial, endorsement, or third-party rating can include, for example, an adviser paying for the review or rating with cash, or providing the third-party with non-cash benefits or rewards that would incentivize it to make a positive statement about, or provide a positive rating of, the adviser or its advisory affiliates or related persons. Non-cash benefits or rewards could include, for example, reduced-fee or no-fee advisory services and cross-referrals (*e.g.,* the adviser refers its investors to the third-party's business platform). Without clear and prominent disclosure that cash or non-cash compensation or is provided, the conflict of interest may be hidden. A testimonial, endorsement, or third-party rating that is not clearly labeled as compensated could mislead investors, who may assume that the person making the statement or rating is not receiving compensation. Our proposed disclosure would permit investors to decide, based on relevant information, how much weight to give a compensated testimonial, endorsement, or third-party rating.

We considered, but are not proposing, prohibiting in Retail Advertisements compensated testimonials, endorsements, and third-party ratings (*i.e.,* testimonials, endorsements, and third-party ratings in connection with which cash or non-cash compensation has been provided by or on behalf of the adviser). However, we believe that we can more narrowly tailor our approach with disclosures and other conditions (that are discussed below) to reduce the risk that such statements and ratings mislead retail investors. In addition, our proposal would apply certain requirements to testimonials, endorsements, and third-party ratings in both Retail and Non-Retail Advertisements—rather than only Retail Advertisements—because we believe that the proposed provisions would reduce the risk of such advertisements misleading investors regardless of the analytical and other resources or financial sophistication of the investor. With respect to compensated testimonials, endorsements, and third-party ratings, we believe that Retail Persons and Non-Retail Persons are similarly positioned to evaluate the proposed disclosures in a way that would make a third-party statement or rating less likely to be misleading.

Our proposal is consistent with other regulatory regimes that permit paid testimonials and endorsements if the

[171] *See* proposed rule 206(4)–1(b)(1).

[172] *See* proposed rule 206(4)–1(b)(1)(ii) and (b)(2)(iii).

payment is clearly and prominently disclosed. For example, FINRA permits paid testimonials in the retail context for certain broker-dealer communications, subject to certain conditions, including that the broker-dealer discloses the fact that the testimonial is paid for if the payment is more than $100 in value.[173] In addition, the Federal Trade Commission's guidelines for endorsements promote full disclosure of connections between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement, including disclosure of compensation arrangements between sellers and many endorsers.[174]

Unlike FINRA, we are not proposing a *de minimis* exception for the proposed disclosure because we believe that investors should be made aware when advisers provide even a small amount of compensation in connection with testimonials, endorsements, and third-party ratings in advertisements. We believe that smaller amounts can also influence a third party to make a favorable statement or a positive rating. We are not prohibiting an adviser from indicating the amount of compensation provided if it prefers to make that additional disclosure. We request comment on a *de minimis* exception below.

Our proposal for third-party ratings in advertisements would be subject to two additional disclosure requirements to provide context for evaluating the merits of the third-party rating. Specifically, it would require that the investment adviser clearly and prominently disclose, or the investment adviser must form a reasonable belief, that the *third-party rating* clearly and prominently discloses: (i) The date on which the rating was given and the period of time upon which the rating was based; and (ii) the identity of the third party that created and tabulated the rating.[175] An adviser that uses third-party ratings in advertisements should develop policies and procedures to implement this ''reasonable belief'' provision as part of its compliance program. They could, for example, require the adviser to maintain records of the third-party rating containing the required disclosures. As with testimonials and endorsements, we believe that the proposed disclosures for third-party ratings would provide context for evaluating the information provided and reduce the risk of it misleading investors. The first proposed disclosure—the date on which the rating was given and the period of time upon which the rating was based—would assist investors in evaluating the relevance of the rating. Ratings from an earlier date, or that are based on information from an earlier time period, may not reflect the current state of an investment adviser's business. An advertisement that includes an older rating would be misleading without clear and prominent disclosure of the rating's date.[176] The second proposed disclosure—the identity of the third party that created the rating—is important because it would provide investors with the opportunity to assess the qualifications and credibility of the rating provider. Investors can look up a third-party by name and find relevant information, if available, about the third-party's qualifications and can form their own opinions about credibility. While these disclosures are explicitly required under the proposed rule, they would not cure a rating that could otherwise be false or misleading under the proposed rule's general prohibitions of certain advertising practices or under the general anti-fraud provisions of the Federal securities laws. For example, where an adviser's advertisement references a recent rating and discloses the date, but its advisory business has sharply declined shortly thereafter, the advertisement would be misleading. Likewise, an adviser's advertisement would be misleading if it indicates that the adviser is rated highly without disclosing that the rating is based solely on a criterion, such as assets under management that may not relate to the quality of the investment advice.

Finally, we are proposing additional requirements for third-party ratings in advertisements that we believe would increase the integrity of the rating and reduce the risk that it misleads investors. In many cases, third-party ratings are developed by relying significantly on questionnaires or client surveys. Our proposed rule would require that the investment adviser reasonably believe that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result. Third-party ratings not designed in this manner may be misleading. Our proposed approach would update the current rule by permitting advisers to promote their accomplishments by referencing third-party ratings, while prohibiting certain misleading or fraudulent practices.[177] For an adviser to satisfy the proposed reasonable belief requirement, it would likely need to have access to the questionnaire or survey that was used in the preparation of the rating. We request comment on this aspect of the proposed rule:

- Would our proposed required disclosures for testimonials, endorsements, and third-party ratings provide useful information to investors? If not, why? Would our proposed disclosures provide useful information to both Retail Persons and Non-Retail Persons? Are Non-Retail Persons and Retail Persons similarly positioned to use the information that would be provided in the disclosures to obtain important contextual information about the third-party statements? If not, what approach do commenters advocate and why?
- Should the current rule's flat prohibition on testimonials of any kind be retained in an amended rule? If so, should it apply to testimonials, endorsements, and third-party ratings in Retail Advertisements or Non-Retail Advertisements, or both?
- Should testimonials, endorsements, and third-party ratings be treated differently from each other under the rule? If so, how? For example, should compensation be permitted (with disclosure) for one type of third-party statement but prohibited for another? Should we add different conditions to each type of advertisement depending upon, for example, the person making

[173] *See* FINRA rule 2210(d)(6)(B)(iii). The FINRA rule also requires that the person making the testimonial must have the ''knowledge and experience to form a valid opinion'' if the testimonial in a communication concerns a technical aspect of investing. FINRA rule 2210(d)(6)(A).

[174] *See, e.g.,* Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR part 255, at n.1 *available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf* (''FTC Guides'') (the FTC Guides, as revised in October, 2009) (discussing circumstances in which disclosure of compensation should be made). The FTC Guides provide, among other things, that (i) the advertiser must possess and rely upon adequate substantiation including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.,* without using endorsements, and (ii) advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. *Id.*

[175] *See* proposed rule 206(4)–1(b)(2)(i) and (ii).

[176] In addition, an adviser would be required to provide contextual disclosures of subsequent, less-favorable performance in the rating, if applicable. *See* proposed rule 206(4)–1(a) (the proposed rule's general prohibitions).

[177] The current rule does not specifically address third-party ratings.

the statement or the content of the statement?

• For testimonials that the adviser includes in Retail Advertisements, should the rule text expressly prohibit the adviser from selectively including positive testimonials without providing an equal number of negative testimonials (if applicable)? If so, what would be the benefits of such a prohibition, in light of the proposed rule's general prohibition and tailored conditions that would also apply to testimonials in advertisements (*e.g.,* the prohibition from including any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading)? If we included such an express prohibition, should we apply a carve-out for testimonials that appear on an adviser's website, or a third-party site, over which the adviser does not have any influence or control (*e.g.,* the adviser cannot delete, rank or affect the display or presentation of any particular testimonial)? Why or why not? Is there any other method we should specifically prescribe in the rule for testimonials in Retail Advertisements (and/or advertisements, generally) other than the proposed rule's general prohibitions, to prevent an adviser from selectively presenting certain favorable testimonials in a way that is not misleading? If so, what method should we prescribe, and why?

• Should we prohibit testimonials, endorsements, or third-party ratings for which an adviser pays more than a *de minimis* amount in value in return for the statement or rating? If so, what should an appropriate value be? Should a prohibition be limited to Retail Advertisements?

• Do commenters believe we should also adopt a ''knowledge and experience'' requirement for testimonials, endorsements and third-party ratings, like FINRA's requirement for certain testimonials concerning a technical aspect of investing? Should we adopt such requirement instead of, or in addition to, our proposed disclosures and conditions?

• FINRA's filing and regulatory review process of broker-dealer communications provides an additional assurance that a testimonial in a broker-dealer communication is used in a manner that complies with the rule's standards.[178] Given that we do not have a review process like FINRA's, and that the adviser is promoting its own services, should we allow advisers to use testimonials, endorsements, and third-party ratings in Retail and Non-Retail Advertisements, subject to the rule's anti-fraud provision and the additional conditions?

• FINRA rule 2210 also requires additional disclosures when testimonials are included in retail communications.[179] The additional disclosures include disclosing prominently that the testimonial may not be representative of the experience of other customers and that the testimonial is no guarantee of future performance or success.[180] Should we require such disclosures? Do commenters believe that such disclosures provide meaningful information to investors? Would other disclosures or requirements for presentation to investors reduce the risk that a testimonial or endorsement might lead investors to make inferences about an adviser that are inappropriate or inaccurate?

• As noted above, statements that would be prohibited by the adviser under the proposed rule's general prohibitions of certain advertising practices would also be prohibited if made by a third party in a testimonial, endorsement, or third-party rating that an adviser uses in its advertisement. Should we also explicitly state in the rule text, similar to the FTC's Guides for endorsements, that (i) advisers are subject to liability for false or unsubstantiated statements made through endorsements, testimonials, and third-party ratings, and (ii) the adviser must possess and rely upon adequate substantiation to support the claims made through endorsements, testimonials and third-party ratings in the same manner the adviser would be required to do if it had made the representation directly? Given that the proposed general anti-fraud principles would apply to testimonials, endorsements, or third-party ratings in advertisements, are such explicit requirements necessary? Why or why not?

• Do commenters believe that our proposed disclosures appropriately reduce the risk that compensated testimonials, endorsements, and third-party ratings could mislead investors, and that any remaining risk is justified by the potential benefits of such statements? If not, should we instead prohibit compensated testimonials, endorsements, and third-party ratings in Retail or Non-Retail Advertisements? Why or why not? Alternately, should we require disclosure of the amount of compensation provided by or on behalf of the adviser for a testimonial, endorsement, or third-party rating? Why or why not?

• In circumstances where advisers themselves cannot provide the disclosures required for testimonials, endorsements, and third-party ratings in advertisements, should we require that the advisers form a reasonable belief that the advertisements contain the required clear and prominent disclosures, as proposed? Why or why not? In what types of situations should advisers be required to form such a reasonable belief?

• Should we establish a *de minimis* exception to disclosing that compensation was paid for a testimonial, endorsement, or third-party rating, if compensation is under a certain amount, similar to the ''more than $100 in value'' threshold imposed by FINRA? What would be the threshold and why is that threshold appropriate? Should such a *de minimis* be adjusted for inflation over time? How would firms value any non-cash compensation? Should any such exception be limited to Non-Retail Advertisements? Please explain your answer.

• Do commenters believe it would or would not be difficult for investment advisers to form a reasonable belief of whether a questionnaire or survey used to create a third-party rating is structured in a way that makes it easy for participants to provide favorable and unfavorable responses and is not designed to produce any predetermined result? Why or why not? Would an adviser more easily have access to, and editorial control over, questionnaires or surveys used in a rating when the adviser (or someone on its behalf) solicits a third-party to conduct the rating, as opposed to when an adviser is approached by a third-party to participate in its rating? If so, should our rule address this difference?

• Should our rule prescribe how the adviser should seek to form a reasonable belief that the questionnaire or survey used to create a third-party rating is structured in a way that makes it easy

[178] *See* FINRA rule 2210(b) and (c).

[179] *See generally* FINRA rule 2210(d)(6).

[180] *See also* FTC Guides, *supra* footnote 174 and accompanying text (discussing the FTC Guides' adequate substantiation provision). However, the FTC Guides state that the FTC tested the communication of advertisements containing testimonials that clearly and prominently disclosed either ''Results not typical'' or ''These testimonials are based on the experiences of a few people and you are not likely to have similar results,'' and concluded that neither disclosure adequately reduced the communication that the experiences depicted are generally representative. The FTC Guides further noted that based upon this research, the FTC believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

for participants to provide favorable and unfavorable responses and is not designed to produce any predetermined result? For example, should an adviser be required to conduct due inquiry (*e.g.,* obtaining a representation from the third-party about the structure of the questionnaire, or obtaining copies of the questionnaires and maintaining them in their books and records)? Why or why not?

- Are there additional disclosures that might provide investors with useful context to evaluate the merits of a third-party rating? For example, would it be useful for investors to know the number of survey participants or the percentage of participating advisers who received each designation or rating? Should investment advisers be required to disclose the criteria upon which the rating was based, including, for example: (i) Assets under management; (ii) performance (both realized and unrealized); (iii) number of years in operation; or (iv) size of the adviser based on other metrics such as number of employees or number of offices?
- Are the proposed disclosure requirements for third-party ratings sufficiently broad to capture references to independent third-party ratings, regardless of whether such ratings are based entirely, or in part, on investor surveys or questionnaires, rather than other analysis (*e.g.,* performance)?

5. Performance Advertising

Advertisements containing performance results (''performance advertising'') can be a useful source of information for investors when such advertisements are presented in a manner that is neither false nor misleading. An investment adviser advertising performance results typically does so to demonstrate its competence and experience and to provide evidence of how the adviser's strategies and methods have worked in the past. A prospective investor may reasonably wish to see performance results attributable to an adviser that the prospective investor may consider hiring.

Performance advertising would be subject to the proposed rule's general prohibitions. These prohibitions would address the risk of performance advertising containing any untrue statements of material fact or being otherwise materially misleading. Performance advertising raises special concerns, however, that warrant additional requirements and restrictions under the proposed rule. In particular, the presentation of performance could lead reasonable investors to unwarranted assumptions and thus would result in a misleading advertisement. For example, a prospective investor could reasonably believe that the advertised performance results are similar to those that the investor could achieve under the adviser's management. We believe that prospective investors may rely particularly heavily on advertised performance results in choosing whether to hire or retain an investment adviser.[181] This reliance may be misplaced to the extent that an investor considers past performance achieved by an investment adviser to be predictive of the results that the investment adviser will achieve for the investor.[182] Similarly, we believe that investors may be influenced heavily by the manner in which past performance is presented. For example, recent research indicates that a change in the presentation of Israeli retirement funds' past performance could have significantly affected households' investment decisions.[183] As a result, we believe there is a heightened risk that the presentation of performance results may be made in a manner that may mislead prospective investors, including by creating in those prospective investors unrealistic expectations.[184]

Further, we believe that certain types of performance advertising raise special concerns because of many prospective investors' limited ability to analyze and verify the advertised performance due to a lack of access to analytical and other resources.[185] In the absence of specific standards for computation and presentation such as those we have promulgated for RICs and BDCs,[186] performance advertising allows investment advisers to take advantage of their access to the results and the underlying data and make specific choices over how to select and portray them. Investors without sufficient access to analytical resources may not be in a position to question or challenge how relevant or useful the advertised results are in light of the underlying assumptions and limitations. Other, and potentially much greater, concerns are raised when advisers present hypothetical performance—that is, performance results that were not actually achieved by any portfolio of any client of the investment adviser—which typically reflects assumptions made by the adviser. The more assumptions the adviser uses in preparing the presentation, the more opportunities the adviser has to select assumptions to improve the result, and the better the investor must understand the assumptions and their effect on the result. Reflecting our concerns about the advertising of performance results, we have separately imposed particular requirements on such advertising by RICs and BDCs.[187] Likewise, we are

[181] *See also* Proposed Amendments to Investment Company Advertising Rules, Release No. IC–25575 (May 17, 2002) [67 FR 36712 (May 24, 2002)] (''Proposed Investment Company Advertising Release'') (noting studies finding retail investors in mutual funds rely heavily on performance results in advertisements).

[182] For example, research has indicated that, with respect to mutual funds, there is ''weak and controversial evidence that past performance has much, if any, predictive ability for future returns.'' *See* Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?,* 46 Ga. L. Rev. 289, 300 (2012) (quoting Ronald T. Wilcox, *Bargain Hunting or Star Gazing? Investors' Preferences for Stock Mutual Funds,* 76 J. Bus. 645, 651 (2003)).

[183] *See* Shaton, Maya (2017). ''The Display of Information and Household Investment Behavior,'' Finance and Economics Discussion Series 2017–043. Washington: Board of Governors of the Federal Reserve System, *available at https://www.federalreserve.gov/econres/feds/files/2017043pap.pdf.* This paper examined the effects on Israeli households' trade volume and risk-portfolio allocation following a regulatory change in the presentation of retirement funds' past performance. Specifically, starting in 2010, Israel's retirement funds were prohibited from displaying returns for any period shorter than 12 months. The ''default performance measure'' of retirement funds changed from 1-month returns to 12-month returns, although investors were still able to view 1-month returns. This paper found that fund flow sensitivity to past 1-month returns significantly decreased after the regulatory change, which suggests the ''default performance measure'' could have been a significant factor in their investment decisions.

[184] *See* Proposed Investment Company Advertising Release, *supra* footnote 181 (proposing amendments to rule 482 and citing concerns that that some funds, when advertising their performance, may resort to techniques that create unrealistic investor expectations or may mislead potential investors); *see also* Anametrics Investment Management, SEC Staff No-Action Letter (Apr. 5, 1977) (indicating the staff's view that ''[i]nformation concerning performance is misleading if it implies something about, or is likely to cause an inference to be drawn concerning, the experience of advisory clients, the possibilities of a prospective client having an investment experience similar to that which the performance data suggests was enjoyed by the adviser's clients, or the advisor's [*sic*] competence when there are additional facts known to the provider of the information, or which he ought to know, which if also provided would cause the implication not to arise or prevent the inference being drawn.'').

[185] For example, some investors may hire or otherwise have access to investment personnel that analyze and conduct due diligence of investments and investment opportunities based on extensive information collected from a variety of sources.

[186] *See* Advertising by Investment Companies, Release No. IC–16245 (Feb. 2, 1988) [53 FR 3868 (Feb. 10, 1988)] (adopting specific rules regarding the advertising of performance because of Commission concerns that investors could not compare performance claims because no prescribed methods of calculating fund performance existed (except for money market funds), and because funds were being advertised on the basis of different types of performance data).

[187] *See* 17 CFR 230.482; *see also* Final Investment Company Advertising Release, *supra* footnote 57, at 57760 (''Like most issuers of securities, when an investment company ('fund') offers its shares to the

proposing particularized requirements in the proposed rule, as discussed below.

a. Application of the General Prohibitions to Performance Advertising

Paragraph (a) of the proposed rule contains a list of advertising practices that we believe should be prohibited, rather than permitted subject to specified conditions, and these prohibitions would also apply to performance advertising. In particular, the proposed rule would prohibit an advertisement if it ''omits to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading.'' [188] The proposed rule would also prohibit an advertisement if it ''include[s] an untrue or misleading implication about, or [would] reasonably be likely to cause an untrue or misleading inference to be drawn concerning, a material fact relating to the investment adviser.'' [189] We believe that investment advisers generally would include in their performance advertising certain disclosures to avoid these types of omissions, implications, and inferences. Such disclosures could provide important information and prompt the audience to seek additional information, resulting in improved investment decisions.

We recognize that the Commission staff, in stating it would not recommend enforcement action regarding presentation of performance under the current rule, has discussed a number of disclosures that advisers may consider including in such a presentation.[190] Accordingly, many investment advisers may already include such disclosures in their performance advertising or consider such disclosures to be useful in preparing performance advertising that is neither false nor misleading. These include disclosure of: (1) The material conditions, objectives, and investment strategies used to obtain the results portrayed; [191] (2) whether and to what extent the results portrayed reflect the reinvestment of dividends and other earnings; [192] (3) the effect of material market or economic conditions on the results portrayed; [193] (4) the possibility of loss; [194] and (5) the material facts relevant to any comparison made to the results of an index or other benchmark.[195] We are not proposing to require these specific disclosures or a legend containing specified disclosures in advertisements presenting performance results.[196] Instead, as discussed above, the proposed rule reflects a principles-based approach.[197] In addition, we understand that requiring standard disclosures in all performance advertising prepared by investment advisers may be of limited utility to investors, given their diversity and the diversity of the advisory services they seek. That is, a set of standard disclosures, such as those we require in certain advertisements for RICs,[198] may be either over-inclusive or under-inclusive for purposes of advertisements disseminated with respect to investment advisory services. In addition, we believe that requiring a list of disclosures that may not be properly tailored to the relevant services being offered or the performance being presented could result in a prospective investor receiving irrelevant information or being unable to determine which information is most relevant. We believe that advisers generally should evaluate the particular facts and circumstances of the advertised performance, including the assumptions, factors, and conditions that contributed to the performance, and include appropriate disclosures or other information such that the advertisement does not violate the prohibitions in paragraph (a) of the proposed rule or other applicable law.[199]

We request comment on the approach we are taking to disclosures in performance advertising.

- The proposed rule addresses some disclosures by reference to the prohibitions in paragraph (a) of the proposed rule. As an alternative, should we require in rule text any specific disclosures or other information to be included in performance advertising? [200]

public, its promotional efforts become subject to the advertising restrictions of the Securities Act. . . . The advertising restrictions of the Securities Act cause special problems for many investment companies. . . . In recognition of these problems, the Commission has adopted special advertising rules for investment companies. The most important of these is rule 482 under the Securities Act . . .''); Securities Offering Reform for Closed-End Investment Companies, Release No. IC–33427 (Mar. 20, 2019) [84 FR 14448 (Apr. 10, 2019)].

[188] Proposed rule 206(4)–1(a)(1).

[189] Proposed rule 206(4)–1(a)(3).

[190] In some letters, our staff has stated that a failure to disclose certain information could be considered misleading. That information includes how material market conditions, advisory fee expenses, brokerage commissions, and the reinvestment of dividends affect the advertised performance results. *See, e.g.,* Clover Letter.

[191] For example, an advertisement presenting performance results of a composite of portfolios targeting growth in international biotechnology companies might disclose whether those results were attributable to strong performance of a few large holdings or strong performance in the industry overall.

[192] Such disclosure could inform the audience that amounts other than those originally invested contributed (positively or negatively) to the overall performance. The reinvestment of dividends and other earnings may have a powerful compounding effect on investment performance, and the audience might infer something about the adviser's abilities that is not true without such reinvestment.

[193] For example, such disclosure could include the effect of an increase in interest rates on the results or the fact that the broader market increased by a certain amount during the same period as used in the results. Advisers might also consider whether the audience has sufficient information to understand that absence of those particular market or economic conditions in the future could cause future performance to differ significantly.

[194] Such disclosure might alert the audience to the limitations of relying on performance data for investment decisions, as well as the relationship between rewards and risk. *See also* 17 CFR 230.482(b)(3)(i); Final Investment Company Advertising Release, *supra* footnote 57 (requiring certain RIC advertisements presenting performance figures to include a legend stating that past performance does not guarantee future results and that current performance may be lower or higher than the performance data quoted).

[195] Such disclosure might explain that the index has a different level of volatility, represents a fixed group of securities, is not managed, and involves no shorting activity. These material facts could provide a context for the audience to evaluate the significance of the comparison to the index. A favorable comparison to an index would not provide the audience with a clear assessment of the adviser's value if the favorable comparison is a result of factors related to the index and having nothing to do with the adviser. Similarly, a favorable comparison to an index may not be useful if the results presented reflect the adviser having taken on more risk of loss than by investing in the index.

[196] *See, e.g.,* 17 CFR 230.482(b)(3)(i) (requiring legends containing specific disclosures in certain RIC advertisements including performance figures, including a disclosure that ''past performance does not guarantee future results''); *see also* 17 CFR 230.482(b)(1) (requiring specific statements about availability of additional information); 17 CFR 230.482(b)(2) (requiring specific legend); 17 CFR 230.482(b)(4) (requiring specific statement in advertisements for certain money market funds).

[197] *See supra* section I.A.

[198] Some research has called into question the utility of these standard disclaimers. *See, e.g.,* Molly Mercer, Alan R. Palmiter, and Ahmed E. Taha, *Worthless Warnings? Testing the Effectiveness of Disclaimers in Mutual Fund Advertisements,* 7 J. Empirical Legal Stud. 429 (2010) (presenting the results of a controlled experiment that indicated that disclaimers required by rule 482 regarding the importance of advertised performance data did not reduce reliance on advertised past returns by participants in the experiment).

[199] We believe that investment advisers might include these disclosures in any performance advertising because in their absence the advertisement otherwise might violate the provisions of paragraph (a) of the proposed rule or the general anti-fraud provisions of the Federal securities laws. For example, the absence of disclosures such as those discussed above could result in an untrue or misleading implication about, or could reasonably be likely to cause an untrue or misleading inference to be drawn concerning, a material fact relating to the investment adviser, in violation of the proposed rule. *See* proposed rule 206(4)–1(a)(3). Similarly, the absence of these disclosures could constitute omissions of material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. *See* proposed rule 206(4)–1(a)(1); *see also supra* footnote 79 and accompanying text.

[200] *See* Clover Letter.

Why or why not? Should we require any of the disclosures described above? For example, should we require disclosure of the material conditions, objectives, and investment strategies used to obtain the results portrayed; whether and to what extent the results portrayed reflect the reinvestment of dividends and other earnings; the effect of material market or economic conditions on the results portrayed; the possibility of loss; or the material facts relevant to any comparison made to the results of an index or other benchmark? Why or why not? Should our disclosure requirements differ based on the intended audience for the performance advertising?

• Are there specific disclosures that we should require to prevent performance advertising from being misleading—*e.g.,* how material market conditions, advisory fee expenses, brokerage commissions, and the reinvestment of dividends affect the advertised performance results? If so, should we identify those and specifically require their disclosure?

• Are there specific disclosures that we should require to prevent prospective investors from placing too much importance on performance advertising? Should we require disclosures similar to or different from those required in RIC advertisements, such as a disclosure that past performance neither guarantees nor predicts future results, or a disclosure that past performance may not be an accurate indication of the investment adviser's competence or experience?

• If we adopt a rule that requires specific disclosures, should we specify how those disclosures are presented? For example, should we specify the proximity of the disclosure to the claim it qualifies or other relevant information? Should we specify how prominent such disclosure should be—*e.g.,* with respect to size, color, or use of graphics—in order to increase the likelihood that a prospective investor reviews the disclosure? Would specifying such characteristics impede investment advisers from using non-paper media for advertising? Are there other elements of presentation that we should consider if we adopt a rule requiring specific disclosures?

• Are there specific disclosures that investment advisers include in their advertisements in order to comply with the current rule that they believe would be unnecessary in order to comply with the proposed rule?

• Have investment advisers experienced any specific compliance challenges in preparing and presenting appropriate disclosures for performance advertising? What types of compliance challenges and how might we address them in the proposed rule?

• Are there specific disclosures that should be required in presenting the performance results of separate accounts but not pooled investment vehicles? Or in presenting the performance results of pooled investment vehicles but not separate accounts? What sorts of issues do investment advisers face in advertising performance results of pooled investment vehicles that they do not face in advertising performance results of separate accounts? Should the proposed rule address those issues? And if so, how? Are there similar or other issues that would apply to presenting the performance results of other investment structures, for example side pockets of illiquid investments?

b. Requirements for Gross and Net Performance

We recognize that the audiences viewing an advertisement may have differing levels of access to analytical and other resources to analyze information in performance advertising. Based on our experience and outreach, we believe that some advertising practices that are likely to be misleading with respect to retail investors may not be misleading for investors with the resources to consider and analyze the performance information. We are therefore proposing certain requirements that are designed specifically to empower Retail Persons, as defined below, to understand better the presentation of performance results and the limitations inherent in such presentations. In particular, we are proposing to require advisers to include net performance results in any Retail Advertisements, as defined in the proposed rule, that include gross performance results. We are also proposing to require the performance results in Retail Advertisements to cover certain prescribed time periods. We believe these requirements will prevent investment advisers from presenting performance results in a way that is likely to mislead Retail Persons, including by creating unrealistic expectations or undue implications that the advertised performance will likely be achieved or is guaranteed to be achieved.

i. Proposed Definition of ''Retail Advertisement''

Rather than establish a new qualification for investment advisers to use in determining whether a person has access to analytical and other resources for independent analysis of performance results, the proposed rule would rely on existing statutory and regulatory definitions. Specifically, the proposed rule distinguishes between advertisements for which an adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisements are disseminated solely to qualified purchasers and certain knowledgeable employees (defined as ''Non-Retail Advertisements'' in the proposed rule) and all other advertisements (defined as ''Retail Advertisements'' in the proposed rule).[201]

The proposed rule would treat each investor in a pooled investment vehicle, including in a private fund, as a Retail Person or Non-Retail Person, depending on whether the investor is a qualified purchaser or knowledgeable employee. An investment adviser to a pooled investment vehicle would be required to ''look through'' the vehicle to its investors in order to comply with the proposed rule. If a pooled investment vehicle has as investors both Non-Retail Persons and Retail Persons, then the investment adviser could choose to disseminate a Retail Advertisement to the Retail Persons and a Non-Retail Advertisement to the Non-Retail Persons in the same pooled investment vehicle. Alternatively, to ensure that all investors receive the same information, the investment adviser could choose to disseminate only a Retail Advertisement to all investors in the pooled investment vehicle. We believe this approach is appropriate to address the difference in access to analytical and other resources among types of investors. That is, we seek to differentiate between types of investors, and not types of advisory services or investment opportunities.

The proposed rule would require certain additional disclosures for Retail Advertisements. Specifically, an adviser would be required to include net performance in certain Retail Advertisements and to present performance results using 1-, 5-, and 10-year period presentations. As discussed below, an adviser would also be subject to certain additional conditions when providing hypothetical performance.[202]

ii. Proposed Definition of ''Non-Retail Advertisement.''

The proposed rule would define a ''Non-Retail Advertisement'' to mean

[201] FINRA's communications rule similarly distinguishes types of communications on the basis of audience, with more prescriptive content requirements applying to ''correspondence'' and ''retail communications'' than to ''institutional communications.'' *See, e.g.,* FINRA rule 2210(d)(2); FINRA rule 2210(d)(3); and FINRA rule 2210(d)(4)(A).

[202] *See infra* section II.A.5.c.iv.

any advertisement for which an adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisement is disseminated solely to non-retail persons.'' [203] ''Non-Retail Person'' would be defined as two types of investors: ''qualified purchasers,'' [204] and ''knowledgeable employees.'' [205]

Qualified purchasers are investors that are eligible to invest in private funds such as hedge funds and private equity funds that rely on section 3(c)(7) of the Investment Company Act. The statute presumes them to have the financial sophistication to invest in these types of investment vehicles, which, because they are not registered, do not provide the protections of the Investment Company Act.[206] The ''qualified purchaser'' definition generally captures entities with $25 million in ''investments'' and natural persons with $5 million in ''investments,'' as defined by rule 2a51–1 under the Investment Company Act.[207] As we have stated previously, the ''qualified purchaser'' definition articulates the types of investors that ''are likely to be able to evaluate on their own behalf matters such as the level of a fund's management fees, governance provisions, transactions with affiliates, investment risk, leverage and redemption or withdrawal rights.'' [208]

We believe that treating a qualified purchaser as a Non-Retail Person would provide an appropriate standard for purposes of determining whether the person has sufficient resources to consider and analyze certain types of performance information without additional disclosures and conditions. We understand also that qualified purchasers are regularly in a position to negotiate the terms of their arrangements with investment advisers, whether as separate account clients or as fund investors. Their access to analytical and other resources generally provides them with the opportunity to ask questions of, and receive information from, the appropriate advisory personnel, and enables them to assess that information before making investment decisions. Accordingly, if an adviser has policies and procedures reasonably designed to ensure that certain advertisements are disseminated solely to qualified purchasers, we believe it would be appropriate to apply fewer requirements regarding the presentation of performance in such advertisements.[209]

In treating as Non-Retail Persons any qualified purchaser, the proposed rule would take into account the provisions of rule 2a51–1 under the Investment Company Act, which clarifies when certain investors may be deemed ''qualified purchasers.'' For example, rule 2a51–1(g)(1) clarifies the circumstances under which certain qualified institutional buyers (QIB) under rule 144A under the Securities Act may be deemed ''qualified purchasers.'' [210] The proposed rule would adopt this approach and treat any such QIB as a Non-Retail Person to which Non-Retail Advertisements could be disseminated.[211]

Rule 2a51–1(h) also defines ''qualified purchaser'' to include any person that the issuer or a person acting on its behalf ''reasonably believes'' meets such definition.[212] The proposed rule would adopt this approach as well and allow an investment adviser to provide a Non-Retail Advertisement to an investor that the investment adviser reasonably believes is a qualified purchaser. Rule 2a51–1 has existed for twenty years, and we believe that many investment advisers have developed policies and procedures to implement this ''reasonable belief'' provision. Accordingly, we believe that advisers would utilize or modify those same policies and procedures as necessary to comply with the proposed rule. We recognize, however, that the application of this ''reasonable belief'' provision might differ for evaluating the audience for advertisements, where often the adviser has not yet had an opportunity

[203] Proposed rule 206(4)–1(e)(7).

[204] *See* proposed rule 206(4)–1(e)(8)(i). *See* 15 U.S.C. 80a–2(a)(51).

[205] *See* proposed rule 206(4)–1(e)(8)(ii). *See* rule 3c–5 under the Investment Company Act. For purposes of the proposed rule, a knowledgeable employee would be treated as a Non-Retail Person with respect to a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Investment Company Act, if the ''knowledgeable employee'' otherwise satisfied the terms of that definition. *See infra* footnotes 214–216 and accompanying text.

[206] *See generally* 15 U.S.C. 80a–3(c)(7). Section 3(c)(7) excludes from the definition of ''investment company'' an issuer that is not making a public offering of its securities and is owned exclusively by qualified purchasers. *See* Privately Offered Investment Companies, Release No. IC–22597 (Apr. 3, 1997) [62 FR 17512 (Apr. 9, 1997)] (''Qualified Purchaser Adopting Release'') (indicating that qualified purchasers are the types of investors that Congress determined do not need the protections of the Investment Company Act); *see also* 2019 Concept Release, *supra* footnote 19.

[207] *See* 15 U.S.C. 80a–2(a)(51). ''Investments'' is defined in rule 2a51–1 under the Investment Company Act and generally includes securities and other assets held for investment purposes. 17 CFR 270.2a51–1. *See* Qualified Purchaser Adopting Release, *supra* footnote 206, at 17515 (noting the Commission's belief that the legislative history of the ''qualified purchaser'' standard suggested that Congress intended ''investments'' for these purposes to be assets held for investment purposes and having a nature that ''indicate[s] that [the assets'] holder has the investment experience and sophistication necessary to evaluate the risks of investing in unregulated investment pools,'' such as 3(c)(7) funds).

[208] *See* Private Investment Companies, Release No. IC–22405 (Dec. 18, 1996) [61 FR 68102 (Dec. 26, 1996)] (referring to legislative history indicating that funds relying on the exclusion under section 3(c)(7) of the Investment Company Act ''are to be limited to investors with a high degree of financial sophistication who are in a position to appreciate the risks associated with investment pools that do not have the protections afforded by the Investment Company Act''). Issuers relying on the exclusion under section 3(c)(7) of the Investment Company Act cannot make or propose to make a public offering of securities, a limitation that the Commission stated ''appears to reflect Congress's concerns that unsophisticated individuals not be inadvertently drawn into'' such a vehicle. Qualified Purchaser Adopting Release, *supra* footnote 206, at n. 5.

[209] Proposed rule 206(4)–1(c)(2)(i) (prohibiting a Retail Advertisement from presenting gross performance unless it also presents net performance with at least equal prominence and in a format designed to facilitate comparison).

[210] *See* Qualified Purchaser Adopting Release, *supra* footnote 206, at 17514 (''The Commission believes that it is generally appropriate to treat [QIBs] as qualified purchasers for section 3(c)(7) in light of the high threshold of securities ownership that these institutions must meet under rule 144A, a threshold much higher than the investment ownership threshold required for qualified purchasers under section 2(a)(51)(A) of the [Investment Company Act].'') A QIB generally includes certain institutions that, in the aggregate, own and invest on a discretionary basis at least $100 million in securities of issuers that are not affiliated with such institutions. *See generally* 17 CFR 230.144A(a)(1). Banks and other specified financial institutions must also have a net worth of at least $25 million. A QIB is a person to whom persons other than the issuer may sell securities that are not registered under the Securities Act pursuant to a safe harbor exemption contained in rule 144A.

[211] Although a QIB is generally a qualified purchaser, there are two exceptions. One exception requires a dealer (other than a dealer acting for a QIB in a riskless principal transaction) to own and invest on a discretionary basis a greater amount of securities of unaffiliated issuers to be a qualified purchaser than to be a QIB. 17 CFR 270.2a51–1(g)(1)(i). The Commission established this greater amount for qualified purchasers in order to coordinate the QIB definition with the statutory definition of ''qualified purchaser.'' *See* Qualified Purchaser Adopting Release, *supra* footnote 206, at 17514. The other exception excludes self-directed employee benefit plans or trust funds holding the assets of employee benefit plans from the qualified purchaser definition unless the beneficiaries making the investment decisions are themselves qualified purchasers. 17 CFR 270.2a51–1(g)(1)(ii). The Commission established this ''look through'' requirement citing legislative history indicating that the relevant factor was the amount of investments owned by the person making the investment decision. *See* Qualified Purchaser Adopting Release, *supra* footnote 206, at 17519.

[212] 17 CFR 270.2a51–1(h). In adopting this ''reasonable belief'' prong of rule 2a51–1, the Commission noted that it was reflecting the approach of other rules establishing ''certain categories of sophisticated investors'' for engaging in transactions and allowed those categories to focus on whether an issuer ''reasonably believes'' that a prospective investor satisfies certain criteria. Qualified Purchaser Adopting Release, *supra* footnote 206, at 17519.

to perform the due diligence that might be common for evaluating whether an investor is qualified to invest. Accordingly, we request comment below on any additional procedures or standards we should require in the rule text for evaluating whether such advertisements are directed only to Non-Retail Persons.

The proposed rule also would treat as a Non-Retail Person any ''knowledgeable employee,'' as defined in rule 3c–5 under the Investment Company Act, with respect to a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Investment Company Act (a ''Section 3(c)(7) Company'') that is advised by the investment adviser.[213] The ''knowledgeable employee'' standard was adopted in order to allow certain employees of a Section 3(c)(7) Company and certain of its affiliates to acquire securities issued by the fund even though they do not meet the definition of ''qualified purchaser.'' [214] The ''knowledgeable employee'' definition requires an employee to have a significant amount of investment experience in order to qualify—whether the employee has oversight or management responsibility with respect to the Section 3(c)(7) Company or its affiliate,[215] or participates in the investment activities of the Section 3(c)(7) Company in connection with their regular functions or duties.[216] We believe that a ''knowledgeable employee'' has the relevant investment experience to enable him or her to evaluate a Non-Retail Advertisement with respect to the Section 3(c)(7) Company for which he or she satisfies the definition of ''knowledgeable employee''. We believe that, as employees actively participating in the investment activities of the Section 3(c)(7) Company or its affiliates, knowledgeable employees will be in a position to bargain for and obtain additional information or ask questions of advisory personnel to help them consider and analyze the type of performance information available in a Non-Retail Advertisement. In addition, because many Section 3(c)(7) Companies already include knowledgeable employees as investors, and investment advisers to Section 3(c)(7) Companies may seek to provide these investment opportunities to their knowledgeable employees, we believe that it is appropriate to permit those employees to be treated as Non-Retail Persons to whom Non-Retail Advertisements with respect to the relevant Section 3(c)(7) Companies could be disseminated under the proposed rule.

We considered treating as Non-Retail Persons other categories of investors meeting other standards existing in the Federal securities laws, but are not proposing to include those categories. Three such standards are: (a) ''Accredited investor,'' as defined in rule 501(a) of Regulation D under the Securities Act; (b) ''qualified client,'' as defined in rule 205–3(d)(1) under the Advisers Act; and (c) investors that do not meet the definition of ''retail investor'' for purposes of the Form CRS relationship summary required by rule 204–5 under the Advisers Act. These definitions were adopted by the Commission for particular purposes and including these categories as Non-Retail Persons may not achieve the goals of the proposed rule.[217]

The definition of ''accredited investor'' generally includes entities with at least $5 million in total assets and natural persons with at least $1 million in net worth [218] or income in excess of $200,000 (or $300,000 jointly with a spouse) in each of the two most recent years with a reasonable expectation of reaching the same income level in the current year.[219] Accredited investors are ''persons who can bear the economic risk of an investment in unregistered securities, including the ability to hold unregistered (and therefore less liquid) securities for an indefinite period and, if necessary to afford a complete loss of such investment.'' [220] The accredited investor standard serves as a proxy for being ''capable of evaluating the merits and risks of the prospective investment'' without the specific protections afforded by the Securities Act with respect to public offerings of securities.[221]

The ''accredited investor'' standard therefore seeks to identify which investors are able to make certain types of investments in unregistered offerings and balances the considerations of investor choice in investment opportunities and investor ability to bear risks. In contrast, the standard for Non-Retail Person under the proposed rule seeks to provide a proxy for an investor's ability to access the kinds of resources and analyze information that would allow the investor to subject the

[213] As long as a person satisfies the definition of ''knowledgeable employee'' with respect to the relevant Section 3(c)(7) Company, that person could be treated as a Non-Retail Person to whom a Non-Retail Advertisement with respect to that Section 3(c)(7) Company could be disseminated under the proposed rule.

[214] *See* Qualified Purchaser Adopting Release, *supra* footnote 206, at 17524.

[215] The first prong of the ''knowledgeable employee'' definition applies to any Executive Officer (as defined in 17 CFR 270.3c–5(a)(3)), director, trustee, general partner, advisory board member, or person serving in a similar capacity. 17 CFR 270.3c–5(a)(4)(i).

[216] The second prong of the ''knowledgeable employee'' definition applies to employees and Affiliated Management Persons (as defined in 17 CFR 270.3c–5(a)(1)). *See* 17 CFR 270.3c–5(a)(4)(ii). Employees who do not perform ''solely clerical, secretarial or administrative functions'' with regard to the Section 3(c)(7) Company or its investments may qualify under this prong of the definition if they have participated in the investment activities of the Section 3(c)(7) Company or its investments and have been performing their functions or duties ''or substantially similar'' functions or duties for at least 12 months. 17 CFR 270.3c–5(a)(4)(ii).

[217] In general, investors who meet the ''accredited investor'' definition are eligible to invest in private funds, such as hedge funds and private equity funds, that are excluded from the definition of ''investment company'' in reliance on section 3(c)(1) of the Investment Company Act, and investors who meet the ''qualified client'' definition are eligible to be charged a performance-based fee by their investment advisers. Section 3(c)(1) excludes from the definition of ''investment company'' an issuer that is not making (and does not presently propose to make) a public offering of its securities and whose outstanding securities are beneficially owned by not more than one hundred persons. *See* 2019 Concept Release, *supra* footnote 19.

[218] 17 CFR 230.501(a)(5). *See also* 15 U.S.C. 77b(a)(15(ii) (defining certain institutions as ''accredited investors'' and directing the Commission to establish additional definitions ''on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management'').

[219] 17 CFR 230.501(a)(6). The accredited investor standards are measured ''at the time of the sale of the securities.'' 17 CFR 230.501(a). Natural persons serving as directors, executive officers, or general partners of an issuer, or of a general partner of an issuer, also qualify as ''accredited investors.'' 17 CFR 230.501(a)(4).

[220] Net Worth Standard for Accredited Investors, Release No. IA–3341 (Dec. 21, 2011) [76 FR 81793, 81794 (Dec. 29, 2011)]. When adopting the definition, the Commission agreed that ''accredited investors can fend for themselves without the protections afforded by registration'' of securities offerings. Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Release No. 33–6339 (Aug. 7, 1981) [46 FR 41791 (Aug. 18, 1981)], at 41802. *See also* 2019 Concept Release, *supra* footnote 19; Accredited Investor Staff Report, *supra* footnote 17, at 88 (''The accredited investor concept in Regulation D was designed to identify, with bright-line standards, a category of investors whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of registration unnecessary.'').

[221] 17 CFR 230.506(b)(2)(ii) (requiring that any purchaser in a rule 506 offering who is not an accredited investor must possess, or be reasonably believed by the issuer to possess, these characteristics, whereas such a verification is not required for any purchaser who is an accredited investor). If securities are sold to any non-accredited investors, specified information requirements apply; in contrast, accredited investors may purchase such securities without receiving specific information. *See* 17 CFR 230.502(b). A purchaser may rely on his or her purchaser representative(s) to demonstrate these characteristics. 17 CFR 230.506(b)(ii).

information presented in Non-Retail Advertisements to independent scrutiny without the aid of additional disclosures or conditions.[222] We believe that analyzing certain performance information requires access to more specialized and extensive analytical and other resources than would be required to evaluate the merits and risks of an investment in an unregistered offering. In our view, accredited investors are less likely to have the kind of access to these resources and information.

We also considered treating as a Non-Retail Person any person meeting the definition of ''qualified client.'' The definition of ''qualified client'' generally includes entities and natural persons having at least $1 million under the management of an investment adviser or a net worth (jointly with a spouse in the case of a natural person) of more than $2.1 million.[223] A qualified client is a person with whom a registered investment adviser may enter into an advisory contract that provides for compensation based on a share of capital gains on, or capital appreciation of, the funds of a client (also known as performance compensation or performance fees).[224] Congress generally prohibited these compensation arrangements in 1940 to protect advisory clients from arrangements that Congress believed might encourage advisers to take undue risks with client funds to increase advisory fees.[225] However, clients having the ''financial experience and ability to bear the risks of performance fee arrangements,'' including the ''risks of loss that are inherent'' in those arrangements,[226] may enter into them. In our view, this status does not necessarily mean that qualified clients generally have the kind of access to more specialized and extensive analytical resources necessary to obtain and analyze information sufficient to evaluate the types of performance information that would be permitted only in a Non-Retail Advertisement without additional requirements.

While we recognize that some qualified clients and accredited investors may have the necessary access to resources, we believe that the qualified purchaser and knowledgeable employee standards are the most appropriate standards to distinguish the persons having sufficient access to analytical and other resources to evaluate the complex and nuanced performance information that would be permitted only in Non-Retail Advertisements under the proposed rule without additional requirements. In balancing access to analytical and other resources needed to evaluate this type of information effectively, with its utility to financially sophisticated investors, we have determined, in our judgment, to propose the qualified purchaser and knowledgeable employee standards as our dividing line for Non-Retail Persons.

Finally, we also considered treating as a Non-Retail Person any person that falls outside the definition of ''retail investor'' under Form CRS.[227] We believe that this definition of ''retail investor'' is inappropriate for purposes of the proposed rule as it does not take into account whether an investor has the analytical or other resources to consider and analyze the type of performance information that the proposed rule would permit in Non-Retail Advertisements. The definition of ''retail investor'' for purposes of Form CRS generally includes all natural persons who seek to receive or receive services primarily for personal, family, or household purposes.[228] This definition imposes no other requirements and does not distinguish between natural persons other than the purposes for which advisory services are sought.[229] Form CRS is designed to provide ''clear and succinct disclosure regarding key aspects of available brokerage and advisory relationships'' that would benefit ''all individual investors.'' [230] In contrast, the proposed rule is designed to provide additional disclosures for investors where there is a heightened risk of performance results being misused or misleading if the results are not subject to scrutiny and further analysis. We believe that natural persons who are qualified purchasers or knowledgeable employees are likely to have the analytical or other resources to consider and analyze these presentations of performance. Accordingly, we do not believe that falling outside the Form CRS definition would serve as a proxy for the access to analytical or other resources that we believe are necessary for persons receiving Non-Retail Advertisements.

iii. Reasonably Designed Policies and Procedures

The proposed rule would define ''Non-Retail Advertisement'' to mean any advertisement for which an adviser ''has adopted and implemented policies and procedures reasonably designed'' to ensure that the advertisement is disseminated solely to qualified purchasers or knowledgeable employees.[231] Such policies and procedures would be reasonably designed to ensure that Non-Retail Advertisements are disseminated by or on behalf of the investment adviser solely to qualified purchasers and knowledgeable employees. We would not prescribe the ways in which an investment adviser may seek to satisfy the ''Non-Retail Advertisement'' definition, including how the investment adviser will establish a reasonable belief that persons receiving the advertisement are qualified purchasers or knowledgeable employees. The proposed rule's use of policies and procedures to establish a defined audience is an approach we have used previously.[232] We believe

[222] The ''accredited investor'' definition at one time included a proxy for bargaining power—an amount of securities being purchased in an offering—on the premise that ''individuals capable of investing large amounts of capital in an offering should be considered accredited investors because of their bargaining power.'' Accredited Investor Staff Report, *supra* footnote17, at 17. We rescinded that provision in part out of a concern that it ''[did] not assure sophistication *or access to information.*'' Regulation D Revisions, Release No. 33–6758 (Mar. 3, 1988) [53 FR 7866 (Mar. 10, 1988)] (emphasis added).

[223] *See generally* rule 205–3(d)(1).

[224] A qualified client is also a person who is eligible to invest in a pooled investment vehicle that is managed by a registered investment adviser and that compensates the adviser based on a share of capital gains on, or capital appreciation of, the funds of the pooled investment vehicle.

[225] Investment Adviser Performance Compensation, Release No. IA–3372 (Feb. 15, 2012) [77 FR 10361 (Feb. 22, 2012)].

[226] *Id.*

[227] Form CRS is a relationship summary that provides succinct information about the relationships and services offered to retail investors (as defined in rule 204–5(d)(2)), fees and costs that retail investors will pay, specified conflicts of interest and standards of conduct, and disciplinary history, among other things. *See* Form CRS Relationship Summary; Amendments to Form ADV, Release No. IA–5247 (June 5, 2019) [84 FR 33492 (Jul. 12, 2019)] (''Form CRS Release''). Form CRS must be delivered by registered investment advisers to each retail investor at specified times. *See* rule 204–5.

[228] Rule 204–5(d)(2). ''Retail investor'' for this purpose also includes the ''legal representative'' of such natural persons. *Id.* We have established definitions by reference to ''natural persons'' in other contexts as well. For example, we have defined ''retail money market funds'' to mean, in part, funds the beneficial owners of which are only natural persons. *See* 17 CFR 270.2a–7(a)(21).

[229] *See* Form CRS Release, *supra* footnote 227 (''We continue to believe that the retail investor definition should not distinguish based on a net worth or other asset threshold test.''). In addition, the definition of ''retail client'' in Form CRS reflected the definition used in the statute that authorized adoption of that form. *See id.* (''[S]ection 913 of the Dodd-Frank Act defines 'retail customer' to include natural persons and legal representatives of natural persons without distinction based on assets or net worth.'').

[230] *See* Form CRS Release, *supra* footnote 227.

[231] *See* proposed rule 206(4)–1(e)(7).

[232] We have defined ''retail money market fund'' to mean ''a money market fund that has policies and procedures reasonably designed to limit all beneficial owners of the fund to natural persons.'' *See* 17 CFR 270.2a–7(a)(21); *see also Money Market Fund Reform; Amendments to Form PF,* Release No. IA–3879 (Jul. 23, 2014) [79 FR 47736 (Aug. 14,

Continued

that this approach would provide investment advisers with the flexibility to develop policies and procedures that best suit its investor base and its operations, including any use of intermediaries to disseminate advertisements.

Such policies and procedures might include disseminating Non-Retail Advertisements to persons that the investment adviser knows are qualified purchasers on the basis of the amount of ''investments'' held by that person in an account managed by the investment adviser. Policies and procedures for purposes of the proposed rule might take into account any policies and procedures that an adviser may have adopted as a result of rule 2a51–1(h) under the Investment Company Act, which defines ''qualified purchaser'' to include any person that the issuer or a person acting on its behalf reasonably believes meets such definition. Similarly, these policies and procedures might reflect the ability of an investment adviser to a particular Section 3(c)(7) Company to determine which employees satisfy the definition of ''knowledgeable employee'' with respect to that Section 3(c)(7) Company.[233]

Regardless of the specific policies and procedures followed by an investment adviser in reasonably concluding that persons receiving Non-Retail Advertisements are qualified purchasers and knowledgeable employees, an adviser must periodically review the adequacy of such policies and procedures and the effectiveness of their implementation.[234] Accordingly, such periodic reviews would assist investment advisers in detecting and correcting any gaps in their policies and procedures, including an adviser's ability to reasonably conclude that its Non-Retail Advertisements are being disseminated solely to qualified purchasers and knowledgeable employees.

iv. Presentation of Gross and Net Performance

The proposed rule would prohibit in any Retail Advertisement any presentation of gross performance unless the advertisement also presents net performance with at least equal prominence and in a format designed to facilitate comparison with gross performance.[235] Gross performance does not indicate all fees and expenses that the adviser's existing investors have borne or that prospective investors would bear, which can be relevant to an evaluation of the investment experience of the adviser's advisory clients and investors in pooled investment vehicles advised by the investment adviser.

We believe the proposed requirement is reasonably designed to prevent Retail Persons from being misled by the presentation of gross performance. Presenting gross performance alone may imply that investors received the full amount of the presented returns, when in fact the fees and expenses paid to the investment adviser and other service providers would reduce the returns to investors. Presenting gross performance alone may be misleading as well to the extent that amounts paid in fees and expenses are not deducted and thus not compounded in calculating the returns.

We believe that requiring Retail Advertisements that show performance results to present net performance would help illustrate for Retail Persons the effect of fees and expenses on the advertised performance results.[236] In particular, we believe that the burden of demonstrating the compounding effect of fees and expenses belongs properly on the investment advisers, rather than requiring Retail Persons to make that determination on their own. Advertisements presenting both gross performance and net performance would remain subject to the proposed rule's other requirements as well, including the prohibition on including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced.[237]

We believe that Non-Retail Persons do not need this requirement because they have access to analytical and other resources, and therefore the capacity to evaluate gross performance as advertised. Based on staff outreach, we also believe that Non-Retail Persons often do not find advisers' presentation of net performance useful and prefer to apply to gross performance their own assumptions and calculations of fees and expenses on performance presentations. Non-Retail Persons have access to analytical and other resources that allow them to calculate a net performance figure that is relevant to them.[238] Access to analytical and other resources may enable these persons to scrutinize and to assess independently the information provided in advisers' advertisements and allow these persons to decide whether to obtain or retain the offered or promoted services. In addition, we believe Non-Retail Persons are regularly in a position to bargain for and obtain additional information when considering performance information in an advertisement and to negotiate the terms of their agreements with investment advisers, including the amount of fees and expenses that they may reasonably expect to incur.[239] To the extent that those negotiated fees and expenses are different from those that the investment adviser would otherwise reflect in its presentation of net performance, we believe that Non-Retail Persons would be able to calculate the effect on performance of those negotiated fees and expenses. As discussed below, however, we are proposing to require advisers to provide or offer to provide promptly a schedule of fees and expenses to ensure that Non-Retail Persons receiving gross performance calculations will receive such information and may calculate net performance if they desire it.[240]

The proposed rule would require advisers to calculate both gross performance and net performance over the same time period and using the same type of return and methodology.[241] This proposed

2014)] (''SEC Money Market Fund Reform Release''), at nn. 715–716 and accompanying text.

[233] For example, such policies and procedures might reflect the methods by which the investment adviser, as the adviser to the Section 3(c)(7) Company, identifies all directors and trustees of the Section 3(c)(7) Company, who would be ''knowledgeable employees'' by the terms of rule 3c–5 under the Investment Company Act. *See* 17 CFR 270.3c–5(a)(4)(i).

[234] *See* rule 206(4)–7(b); *see also* Compliance Program Adopting Release, *supra* footnote 33 (''Annual reviews are integral to detecting and correcting any gaps in the [compliance] program before irrevocable or widespread harm is inflicted upon investors.'').

[235] Proposed rule 206(4)–1(c)(2)(i)(A).

[236] *See* proposed rule 206(4)–1(e)(6) (defining ''net performance'').

[237] Proposed rule 206(4)–1(a)(6).

[238] Investment advisers may be particularly willing to spend time and resources in responding to requests for information from prospective investors when those prospective investors have investment portfolios that are large enough to justify the advisers' efforts or when those prospective investors have investment or finance experience that enables them to analyze information efficiently. Our staff has indicated that it would not recommend enforcement action under the current rule where an investment adviser would present gross performance and not net performance in one-on-one presentations to ''certain prospective clients, *e.g.*, wealthy individuals, pension funds, universities and other institutions, who have sufficient assets to justify the cost of the presentations.'' ICI Letter. The proposed rule similarly would assume that the access to resources of an advertisement's audience can play a role in determining the extent to which an advertisement may be misleading.

[239] For example, investors in new private funds may negotiate with the private fund's investment adviser regarding which private fund expenses will be borne by the private fund and its investors and which private fund expenses will be borne by the adviser.

[240] Proposed rule 206(4)–1(c)(1)(i).

[241] *See* proposed rule 206(4)–1(c)(2)(i)(B).

requirement is designed to help ensure that net performance effectively conveys to the audience information about the effect of fees and expenses on the relevant performance. A calculation of net performance over a different time period or using a different type of return or methodology would not necessarily provide information about the effect of fees and expenses. That is, if differences in calculation were permitted, then any contrast between gross performance and net performance could be attributed simply to those differences and not demonstrate the effect of the deducted fees or expenses.

At the same time, the proposed rule does not prescribe any particular calculation of gross performance or net performance. Because of the variation among types of advisers and investments about which they provide advice, we believe prescribing the calculation could unduly limit the ability of advisers to present performance information that they believe would be most relevant and useful to an advertisement's audience.[242] We understand, however, that an absence of prescribed standards may increase the risk of different advisers presenting different performance figures that are not comparable. Accordingly, we request comment below on any additional guidance we should provide or requirements we should specify in rule text regarding such calculations.

Under the prohibitions in paragraph (a) of the proposed rule, it would be misleading to present certain performance information without providing appropriate disclosure or other information about gross performance or net performance, taking into account the particular facts and circumstances of the advertised performance.[243] For example, to avoid misleading portrayals of performance, advisers generally should describe the type of performance return being presented. Depending on the facts and circumstances, this disclosure may be necessary to avoid misleading the audience as to the elements comprising the presented performance. For example, an advertisement may present the performance of a portfolio using a return that accounts for the cash flows into and out of the portfolio, or instead a return that does not account for such cash flows. In either case, an adviser generally should disclose what elements are included in the return presented so that the audience can understand, for example, how it reflects cash flow and other relevant factors, including the method of calculation and weighting of portfolios and returns in a composite.

The proposed rule would define ''gross performance'' as ''the performance results of a portfolio before the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio.'' The proposed rule would define ''net performance'' to mean ''the performance results of a portfolio after the deduction of all fees and expenses, that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio'' and includes a non-exhaustive list of the types of fees and expenses to be considered in preparing net performance. This list includes, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the adviser, and is meant to illustrate fees and expenses that clients or investors bear in connection with the services they receive. Under the proposed definitions, ''net performance'' would be calculated after deducting ''all fees and expenses,'' while ''gross performance'' might be calculated after deducting some (but not all) fees or expenses.[244]

The fees and expenses to be deducted in calculating net performance are those that an investor ''has paid or would have paid'' in connection with the services provided. That is, where hypothetical performance is permissibly advertised under the proposed rule, net performance should reflect the fees and expenses that ''would have been paid'' if the hypothetical performance had been actually achieved by an actual portfolio.[245]

Both ''gross performance'' and ''net performance'' would be defined by reference to a ''portfolio,'' which would be defined as ''an individually managed group of investments'' and can include ''an account or pooled investment vehicle.'' [246] Once an adviser establishes the ''portfolio'' for which performance results are presented, the adviser would determine the fees and expenses borne by the owner of the portfolio and then deduct those to establish the ''net performance.''

The ''net performance'' definition allows an adviser to apply three possible modifications when it deducts the relevant fees and expenses. First, ''net performance'' may reflect the deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted.[247] In this case, the adviser may deduct the highest fee charged in respect of the portfolio giving rise to the performance and, accordingly, present performance that is lower than it would be if the actual fees had been deducted. We understand that advisers may choose this modification for the ease of calculating net performance. When an adviser advertises net performance that is no higher than that reflecting the deduction of actual fees, there appears to be little chance of the audience being misled.[248]

Second, ''net performance'' may reflect the deduction of a model fee that is equal to the highest fee charged to the relevant audience of the advertisement.[249] For example, an adviser presenting performance information in a Retail Advertisement may choose to present net performance using a model fee that is equal to the highest fee charged to a Retail Person. This modification could also allow the adviser to calculate net performance easily, while using a fee that is relevant to the target audience. We believe this presentation of performance results

[242] In contrast, in Form N–1A, we prescribe the calculation of performance for open-end management investment companies because the performance relates to a single type of investment product.

[243] *See supra* footnote 199 and accompanying text.

[244] For example, if an investment adviser calculates the performance of a portfolio in part by deducting the fees and expenses charged when buying, selling, or exchanging investments (including, if applicable, brokerage commissions and exchange fees), but deducts no other fees or expenses, then such performance would be ''gross performance'' under the proposed rule. In order to present that gross performance in a Retail Advertisement, the advertisement must also present ''net performance.'' Because the proposed definition of ''net performance'' includes the deduction of ''all fees and expenses'' (subject to the proposed modifications described in the definition), the calculation of net performance would necessarily require the deduction of those types of trading expenses.

[245] *See infra* section II.A.5.c.ii (discussing the presentation of net performance with respect to representative performance).

[246] This proposed definition is identical to the definition used in the Global Investment Performance Standards adopted by the CFA Institute. *See* Global Investment Performance Standards (GIPS), 2010, *available at: https://www.gipsstandards.org/standards/pages/currentedition.aspx*. The 2020 GIPS standards will be effective on January 1, 2020.

[247] Proposed rule 206(4)–1(e)(6)(i).

[248] That is, the audience would not be misled into believing that investors received better returns than they actually did, because the advertised net performance would be lower than or equal to the net performance calculated using actual fees and expenses.

[249] Proposed rule 206(4)–1(e)(6)(ii).

would not cause investors to mistakenly believe that similar investors received returns higher than those investors actually did. Net performance that reflects a model fee that is not available to the audience—*e.g.,* because the model fee is offered only to persons having a certain amount of assets under management by the adviser—may imply that the audience can expect future performance to be reduced by that same fee and would not be permitted under this modification. We understand that this proposed modification may be useful for advisers who manage a particular strategy for different types of investors.[250]

Third, ''net performance'' may exclude custodian fees paid to a bank or other third-party organization for safekeeping funds and securities.[251] We understand that custodians are commonly selected and frequently paid directly by advisory clients, and in such cases advisers may not have knowledge of the amount of such custodian fees to deduct for purposes of establishing net performance.[252] To the extent that net performance can demonstrate the kind of investment experience that advisory clients might have experienced with an adviser, the amount of custodian fees paid directly by an advisory client to a custodian that was selected by the advisory client may not be relevant. We believe that this approach is appropriate even where advisers know the amount of custodian fees—*e.g.,* where the adviser recommended the custodian. However, to the extent the adviser provides custodial services with respect to funds or securities for which the performance is presented and charges a separate fee for those services, or when custodial fees are included in a single fee paid to the adviser, such as in wrap programs, then the adviser must deduct the custodial fee in calculating net performance.[253]

We are not including a definition of ''equal prominence.'' We believe, however, that this ''equal prominence'' principle is consistent with investment advisers' current practice.[254] In addition, investment advisers may have experience interpreting ''equal prominence'' in other rules governing the use of communications by financial professionals.[255]

Finally, the proposed rule would prohibit in any advertisement any presentation of gross performance, unless the advertisement provides or offers to provide promptly a schedule of the specific fees and expenses deducted to calculate net performance.[256] Such a schedule must itemize the specific fees and expenses that were incurred in generating the performance of the specific portfolio being advertised.[257] Where an adviser presents net performance, whether because net performance is required under the proposed rule or because the adviser otherwise chooses to present it, the schedule should show the fees and expenses actually applied in calculating the net performance that is presented. Where an adviser does not otherwise present or calculate net performance, the schedule should show the fees and expenses that the adviser would apply in calculating net performance as though such adviser were presenting net performance.[258] The proposed rule would require investment advisers to show each fee and expense ''presented in percentage terms''—that is, as a percentage of the assets under management. The proposed rule otherwise would impose no specific restrictions on how those fees and expenses are categorized or determined, as different investment advisers may classify the same fee or type of fee differently.[259]

We believe that Non-Retail Persons routinely request breakdowns of fees and expenses in order to assess advertised performance results, but even with their increased bargaining power, they may struggle at times to negotiate for and receive transparent information.[260] This provision would require advisers to provide such information, to the extent that the adviser wants to advertise performance information. We recognize that, as a result, this fee and expense schedule may be utilized primarily by institutional investors because all Retail Advertisements that include gross performance results must also include performance results net of fees and expenses. However, we believe that the schedule should be available to all investors if they choose to request it as part of their analysis of an investment adviser.

The Commission has emphasized the importance of providing clear and meaningful disclosure to mutual fund investors about fees and expenses.[261] We believe advisory clients and investors in private pooled investment vehicles should similarly have access to this type of important information to alert them to the types of fees and expenses that they may reasonably expect to incur in connection with

[250] For example, an adviser managing several accounts, each using the same investment strategy, could present in a Retail Advertisement the gross performance and net performance of all such accounts. To calculate net performance, the adviser may elect to deduct a model fee that is equal to the highest fee charged to Retail Persons (that is, the audience of the Retail Advertisement), even if that model fee is different from the actual fee charged to any of the accounts.

[251] Proposed rule 206(4)–1(e)(6)(iii).

[252] *See, e.g.,* Investment Company Institute, SEC Staff No-Action Letter (Aug. 24, 1987) (indicating the staff's view that ''the costs charged by custodians, which ordinarily are selected by clients and frequently are paid directly by the clients'' need not be deducted in calculating net performance).

[253] The proposed rule would permit the exclusion of only custodian fees that are ''paid to a bank or other third-party organization.''

[254] *See, e.g.,* Global Investment Performance Standards, GIPS Advertising Guidelines, *available at* (indicating that advertisements may include information beyond what is required under the GIPS Advertising Guidelines, provided the information is shown ''with equal or lesser prominence'' relative to the required information).

[255] *See, e.g.,* 17 CFR 230.482(d)(3)(iii); 17 CFR 230.482(d)(4)(v); 17 CFR 230.482(e)(1)(ii); *see also* Final Investment Company Advertising Release, *supra* footnote 57 (explaining that prominence requirements in rule 482 advertisements ''are designed to prevent advertisements from marginalizing or minimizing the presentation of [ ] required disclosure'' and ''to encourage fair and balanced advertisements'').

[256] *See* proposed rule 206(4)–1(c)(1)(i). We would consider any such schedule provided upon request to be a part of the advertisement and therefore subject to the books and records rule. *See infra* section II.C. We would not consider such a schedule to be within the scope of the proposed rule's exclusion for information required to be contained in a statutory or regulatory notice, filing, or other communication, *see supra* section II.2.c.iv, as the schedule would be providing contextual information to understand the substance of the advertisement. *See supra* footnote 106 and accompanying text.

[257] *See* proposed rule 206(4)–1(e)(6).

[258] In these circumstances, we would interpret the proposed rule's phrase ''deducted to calculate net performance'' to include ''if such calculation were otherwise required.''

[259] Because any such schedule would be a part of the advertisement, *see supra* footnote 256, the provisions of paragraph (a) of the proposed rule would apply to the schedule.

[260] *See, e.g.,* Letter of the Institutional Limited Partners Association (ILPA) to Jay Clayton, Chairman, Securities and Exchange Commission (May 24, 2017) (''The ILPA's members are sophisticated investors and supporters of free market principles. However, there are proven limits to what any investor can achieve through negotiation, particularly without strong oversight by the [Commission] to ensure that the rules of the market are followed and that contractual obligations are being met.'').

[261] *See* Item 3 of Form N–1A; Final Investment Company Advertising Release, *supra* footnote 57, at 57765 (agreeing with a commenter that ''investors should consider a fund's objectives and risks, *and its charges and expenses,* before investing because these factors will directly affect future returns'') (emphasis added); Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33–8998 (Jan. 13, 2009) [74 FR 4546, 4554 (Jan. 26, 2009)] (noting recent Commission steps to address ''concerns that investors do not understand that they pay costs every year when they invest in mutual funds''). *See also* Bradford Hall, SEC Staff No-Action Letter (Jul. 19, 1991) (noting the staff's view that ''the presentation of performance results on a gross basis may cause the average investor to infer something about the adviser's competence or about future results that may not be true had the performance results been presented net of advisory fees'').

receiving the adviser's services, and provide a basis for additional questions from advisory clients to the extent that the adviser seeks to charge additional or different fees and expenses in the future.[262]

v. Prescribed Time Periods

The proposed rule would prohibit any performance results in a Retail Advertisement, unless the advertisement includes performance results of the same portfolio for 1-, 5-, and 10-year periods, each presented with equal prominence and ending on the most recent practicable date, with an exception for portfolios not in existence during a particular prescribed period.[263] This time period requirement would apply to performance results of any composite aggregation of related portfolios as well.[264] Requiring performance results over these periods of time would provide the audience with insight into the experience of the investment adviser over set periods that are likely to reflect how the advertised portfolio(s) performed during different market or economic conditions.[265] For portfolios in existence for at least ten years, performance for that period of time could be useful to Retail Persons to provide more complete information than only performance over the most recent year. That performance may prompt Retail Persons to seek additional information from advisers regarding the causes of significant changes in performance over longer periods of time.

This time period requirement would prevent investment advisers from including in Retail Advertisements only recent performance results or presenting only results or time periods with strong performance in the market generally, which could lead to Retail Persons being misled. An investment adviser would remain free to include in Retail Advertisements performance results for other periods of time as long as the advertisement presents results for the three prescribed periods (subject to the proposed exception). The advertised performance results for the other periods of time also must meet the other requirements of the proposed rule, including the prohibitions in paragraph (a).[266]

The proposed rule provides an exception from this time period requirement: If the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that particular period. For example, if a portfolio has been in existence for seven years, then any performance results of that portfolio must be shown for 1- and 5-year periods, as well as for the 7-year period—that is, the life of the portfolio.

The time period requirement would require that the 1-, 5-, and 10-year periods each end on the most recent practicable date.[267] We believe that this requirement will provide insight into an investment adviser's management of the same portfolio over certain periods of time to reflect how the portfolio performed during different market or economic conditions. Allowing the 1-, 5-, and 10-year periods to end on different dates would undermine that goal, as an adviser could select the periods that show only the most favorable performance—*e.g.,* presenting a 5-year period ending on a particular date because that 5-year period showed growth while presenting a 10-year period ending on a different date because that 10-year period showed growth. In addition, requiring that each period end on ''the most recent practicable date'' is designed to help ensure that those receiving Retail Advertisements generally receive performance advertising from different advisers that shows performance over the same periods of time. Together with the other proposed requirements of this time period provision, this requirement would provide investors with a more complete basis for comparison between investment advisers and reduce any investment adviser's ability to cherry-pick performance periods.

The time period requirement would also require that the three prescribed time periods are presented with equal prominence. This ''equal prominence'' principle would help ensure that all three time periods are presented in such a manner that an investor can observe the history of the adviser's performance on a short-term and long-term basis. If these periods were not required to be presented with equal prominence, an adviser might seek to highlight the single 1-, 5-, or 10-year period that shows the best performance, instead of showing them in relation to each other.

The prohibitions in paragraph (a) of the proposed rule, including the prohibition on presenting performance time periods in a manner that is not fair and balanced,[268] would apply to presentations of performance across the required time periods. For example, it would be misleading to present certain performance information without appropriate disclosure or other information about the performance presented. That is, an advertisement presenting performance results should disclose whether more recent performance results for the same portfolio are available. Otherwise, the advertisement may reasonably be likely to cause an untrue or misleading inference to be drawn concerning the adviser's performance.[269]

We request comment on the proposed performance presentation requirements applicable to Retail Advertisements and Non-Retail Advertisements.

• Is our belief accurate that analyzing certain performance information requires access to more specialized and extensive analytical and other resources than would be required to evaluate the merits and risks of an investment? Are our beliefs correct that accredited investors and qualified clients generally do not have the access to resources for independent analysis in order to consider and analyze performance information without additional information that the proposed rule would require be provided to Retail Persons? Are there certain categories of accredited investors or qualified clients that, by definition, would have such access? Are there disclosures or conditions that we could require in performance advertising that could address our concerns? What are those disclosures or conditions and how would they address our concerns?

• Should we require additional disclosures based on the type of audience to which performance advertising is disseminated as proposed? Would such an approach place Retail Persons at an informational disadvantage? Should we instead impose on all advertisements the same

[262] Similarly, investors in pooled investment vehicles would have a basis for additional questions if the pooled investment vehicle seeks to charge or agrees to bear additional or different fees and expenses in the future.

[263] *See* proposed rule 206(4)–1(c)(2)(ii). This time period requirement would be imposed on all performance results, including gross performance and net performance. Accordingly, a Retail Advertisement presenting gross performance must include performance results of the same portfolio for the prescribed time periods, on both a gross and net basis.

[264] *See id.*

[265] We require average annual total return for 1-, 5-, and 10-year periods for advertisements with respect to securities of certain RICs and BDCs. *See* 17 CFR 230.482(d)(3). We believe a similar requirement for Retail Advertisements would provide useful reference points for Retail Persons, particularly when comparing two or more sets of performance results.

[266] *See, e.g.,* proposed rule 206(4)–1(a)(6).

[267] Proposed rule 206(4)–1(c)(2)(ii).

[268] *See* proposed rule 206(4)–1(a)(6).

[269] *See* proposed rule 206(4)–1(a)(3); *see also* Proposed Investment Company Advertising Release, *supra* footnote 181 (''Outdated fund performance that is relied on by an investor when, for example, the markets have generally entered a period of lower performance, may cause the investor to have an overly optimistic view of the fund's ability to outperform the markets.'').

requirements for presenting performance results that the proposed rule would impose only on Retail Advertisements? Would such an approach create difficulties where different audiences may need different amounts and types of disclosures to ensure that the performance information is not false or misleading? For instance, would the amount or type of disclosure necessary to make a Retail Advertisement not misleading overwhelm the disclosure and render it ineffective? Would treating all advertisements presenting performance results the same way make it harder for Non-Retail Persons to obtain information they find valuable?

• Instead of our approach to performance presentations, should we simply rely on an overarching prohibition against misleading advertisements? Would such an overarching prohibition achieve our objective in a less burdensome and more effective way than the approach we are proposing? Why or why not?

• If we do not include additional disclosure requirements for Retail Advertisements, should we require that advertisements directed to general audiences include more comprehensive disclosure than those directed to more financially sophisticated audiences? If so, should we consider providing guidance or promulgating disclosure requirements for how an adviser's disclosure may differ based on the investor's financial sophistication or scope of mandate? What guidance should we provide or disclosure should we require? Would there be any types of performance presentations whose risks or limits could not be disclosed effectively to some audiences?

• Do commenters agree that defining ''Non-Retail Person'' as ''qualified purchasers'' and certain ''knowledgeable employees'' is appropriate? Why or why not?

• Are there investors other than qualified purchasers and knowledgeable employees that should be treated as Non-Retail Persons? If so, who and why? Are there criteria that we should consider instead of those underlying the ''qualified purchaser'' or ''knowledgeable employee'' definitions? Would the accredited investor or qualified client standard be more appropriate than the qualified purchaser standard? Why or why not?

• If we treated as Non-Retail Persons either accredited investors or qualified clients, should we consider imposing restrictions or requirements on Non-Retail Advertisements that under the proposed rule apply only to Retail Advertisements? Why or why not and, if so, which restrictions or requirements?

• Should we treat as Non-Retail Persons all investors other than natural persons? If so, should we change the treatment of Non-Retail Persons with respect to institutional investors—*e.g.,* treat as a Non-Retail Person any institutional investor that is also an accredited investor or qualified client? Why or why not? If so, should we consider adding requirements to Non-Retail Advertisements that under the proposed rule apply only to Retail Advertisements? Why or why not and, if so, which requirements?

• FINRA's communications rule treats as ''institutional investors'' any natural person with total assets of at least $50 million.[270] Should we consider a similar approach for defining ''Non-Retail Person''? Why or why not? If we were to consider a similar approach, should we index the prescribed amount to inflation? Why or why not?

• In defining ''Non-Retail Advertisement,'' should we consider an approach other than requiring the adoption and implementation of policies and procedures? What other approach should we consider and why? Is there an alternative approach we should consider to address the dissemination of Non-Retail Advertisements to an investor that an investment adviser may not know with certainty to be a qualified purchaser or knowledgeable employee? If we retain the proposed rule's approach, should the proposed rule specify any policies and procedures that investment advisers should adopt and implement in order to disseminate Non-Retail Advertisements? If so, what should be included in such policies and procedures and why?

• Would the ''reasonable belief'' prong of rule 2a51–1(h) be useful for purposes of determining whether an investor is a Non-Retail Person under the proposed rule? Do commenters agree that investment advisers to Section 3(c)(7) Companies already have policies and procedures necessary to implement the ''reasonable belief'' prong? Are there compliance or other challenges that investment advisers or others have faced in applying this ''reasonable belief'' prong under rule 2a51–1(h)? What steps do advisers and others associated with Section 3(c)(7) Companies take to obtain a ''reasonable belief'' for purposes of rule 2a51–1(h), and would such steps be feasible in the context of ensuring that Non-Retail Advertisements are disseminated only to qualified purchasers and knowledgeable employees?

• Should the proposed rule account for the risk of Non-Retail Advertisements disseminated only to Non-Retail Persons by or on behalf of the adviser also becoming available to Retail Persons? If so, how?

• How would requiring investment advisers to pooled investment vehicles to ''look through'' the vehicles to their investors in order to comply with the proposed rule affect investment advisers' ability to present advertisements to those investors in comparison to their approach under the current rule? Would such an approach place certain investors in the pooled investment vehicle at an informational disadvantage to others? How would this approach affect the ability of existing and prospective investors in pooled investment vehicles to receive information and make informed investment decisions? Is there an alternative approach we should consider? Should the proposed rule use different criteria for prospective advisory clients than for prospective investors in pooled investment vehicles? Should the proposed rule treat any person who is eligible to invest in a private fund as a Non-Retail Person for purposes of advertisements relating to that private fund? Why or why not?

• Should we change our approach with respect to knowledgeable employees so that an investor who is a knowledgeable employee with respect to a particular Section 3(c)(7) Company would be treated as a Non-Retail Person for advertisements for investment vehicles or services other than with respect to the particular Section 3(c)(7) Company?

• Are our beliefs correct that qualified purchasers generally do have the access to resources in order to consider and analyze performance information? If a qualified purchaser's access to resources fluctuates due to particular facts and circumstances, should we take that into account in treating qualified purchasers, or other categories of investors, as Non-Retail Persons? If so, how?

• Are there compliance or other challenges that investment advisers believe they would face if the proposed rule defines a ''Retail Advertisement'' and its audience in a way that is different from the definition of ''retail investor'' for purposes of Form CRS? Should we take those challenges into account and, if so, how?

• Do investment advisers to pooled investment vehicles other than Section 3(c)(7) Companies, including private funds that rely on section 3(c)(1) of the Investment Company Act, or investment

[270] *See* FINRA rule 2210(a)(4)(A) and rule 4512(c)(3).

advisers to separate accounts currently provide the kinds of performance information in advertisements that we propose to require in Retail Advertisements? Would the proposed rule create unique compliance difficulties for investment advisers to pooled investment vehicles other than Section 3(c)(7) Companies? What types of difficulties and how should we address them?

• Will requiring Retail Advertisements that present gross performance also to present net performance be effective in demonstrating the effect that fees and expenses had on past performance and may have on future performance? Is there an alternative approach that would better demonstrate this effect?

• Are there any instances when presenting net performance in accordance with the proposed rule would not be feasible or appropriate in a Retail Advertisement? Are there any exceptions to this requirement that we should consider?

• Is there additional information that we should require advisers to disclose when presenting gross performance?

• Should we clarify any specific criteria for ''equal prominence''? Should we clarify any criteria for determining if net performance is presented ''in a format designed to facilitate comparison''?

• Should we provide further guidance or specify requirements in the proposed rule on how to calculate gross performance or net performance? If so, what guidance or requirements should we provide? Should we look to the Global Investment Performance Standards adopted by the CFA Institute (''GIPS'') or other standards? Should we require investment advisers to adopt policies and procedures prescribing specific methodologies for calculating gross performance and net performance? Why or why not?

• Are the proposed definitions of ''gross performance,'' ''net performance,'' and ''portfolio'' clear? Should we modify any of those proposed definitions? Do we need to define any other terms?

• For the proposed definition of ''portfolio,'' should we modify the term ''managed by the investment adviser''— *e.g.,* to specify how this term addresses sub-advisory relationships or other relationships? If so, how should we modify the term?

• For the proposed definition of ''net performance,'' should we add or remove any item from the non-exhaustive list of fees and expenses to be considered? If so, which item and why? Are there particular items that might not be considered a ''fee'' or an ''expense'' that should nonetheless be deducted in calculating net performance? If so, which item and why?

• Are the proposed modifications to ''net performance'' appropriate? Are there particular changes to the proposed modifications that we should make? Should we include any other permitted deductions?

• Are there instances in which we should expressly require that ''net performance'' be calculated to reflect the deduction of a custodial fee—for example, in all circumstances other than where an advisory client selects its own custodian and directly negotiates the custodial fee? Are we correct in our understanding that if advisory clients select and pay directly their custodians, investment advisers may not know the amount of custodial fees? Are there other types of fees or expenses that investment advisers would be unable to deduct in calculating net performance and that the proposed rule should treat similarly to custodial fees?

• Are there circumstances under which investment advisers might seek to calculate gross performance and net performance using different types of returns or methodologies or to use different types of returns or methodologies for different portions of a presented period? What are those circumstances? Should we take those circumstances into account? If so, why and how?

• Should the proposed rule include different or additional criteria for Retail Advertisements in order to enable Retail Persons to compare performance between investment advisers? If so, what criteria and why?

• Instead of requiring Retail Advertisements presenting gross performance to provide or offer to provide promptly a schedule of fees and expenses, should we require that Retail Advertisements include disclosure about fees and expenses (*i.e.,* without an itemized schedule)? What information about fees should the proposed rule require to be included in Retail Advertisements?

• Should the proposed requirement to provide or offer a schedule of fees and expenses apply differently to different types of fees and expenses (*e.g.,* custodial fees or other administrative fees as opposed to advisory fees)?

• Should the proposed requirement to provide or offer a schedule of fees and expenses apply differently to advertisements presenting the performance of pooled investment vehicles and advertisements presenting the performance of separate accounts? If so, why and how?

• Should we take the position that an investment adviser would ''provide'' the schedule of fees and expenses if the advertisement includes a hyperlink that enables the audience to obtain and review the schedule?

• As proposed, the schedule of fees and expenses would need to be presented in percentage terms and on the basis of assets under management in calculating net performance. Should we allow it to be presented in other formats as well? Alternatively, should we require the schedule to be presented in another format? For example, should advisers be required to present the schedule in terms of the actual dollar amount paid or borne on a portfolio of a specific size, or the actual dollar amount paid or borne on the actual portfolio being managed and advertised? Are there other formats that would work better than dollar or percentage terms? Would allowing an alternative presentation format, in addition to a format using percentage terms, be confusing or misleading? Is it clear how an adviser would calculate net performance if it does not charge asset-based fees?

• Are there any compliance challenges that investment advisers might face in preparing a schedule such as the type proposed? Under current law, have investment advisers included in their advertisements similar offers to provide schedules or other breakdowns of fees and expenses, or have investment advisers provided the fee and expense information? Have investors accepted those offers and requested those schedules or breakdowns? Are there types of fees and expenses for which providing a schedule would be particularly difficult? Do advisers expect that they would need to account for estimated, rather than actual, fees and expenses in certain cases?

• Have investors found there to be any difficulties in receiving such schedules or breakdowns, once requested? Have those schedules or breakdowns provided investors with useful information that has enabled them to make informed investment decisions? Why or why not?

• Would there be circumstances in which investment advisers might have to provide proprietary or sensitive information to comply with this proposed requirement? Should we take those circumstances into account? If so, how?

• Should we prescribe specific time periods as proposed? Are one, five, and ten years the right periods to be used? Instead, for example, should we require that performance always be presented since inception of a portfolio?

• Are there other time periods for which we should require the presentation of performance results? Are there any specific compliance issues that an investment adviser would face in generating and presenting performance results for the required time periods?

• Should we require an adviser without any performance results available for a particular period required in Retail Advertisements to disclose specifically that the adviser does not have those results? For example, should an adviser having a track record of only eight years for a portfolio be required to disclose that it does not have performance results for the required 10-year period?

• Should we impose any additional requirements for presentation of the time periods proposed? For example, beyond the proposed rule's requirement that the specified time periods end ''on the most recent practicable date,'' should we require that performance results be current as of a particular date? For example, should we require that the specified time periods end on a date no greater than 90 days prior to dissemination of the advertisement? Would some period other than 90 days be appropriate? Should we provide guidance about the term ''most recent practicable date''? If so, what guidance should we provide?

• Are there any modifications to the proposed time period requirement that commenters believe would be appropriate or useful? If so, what modifications and why? [271]

c. Additional Requirements for Presentations of Performance in All Advertisements

The proposed rule includes several additional requirements for advertisements containing performance results. The other requirements address: (i) Statements about Commission review or approval of performance results; (ii) the presentation of performance results of portfolios with substantially similar investment policies, objectives, and strategies; (iii) the presentation of performance results of an extracted subset of portfolio investments; and (iv) the presentation of performance results that were not actually achieved by a portfolio managed by an adviser.

i. Statements About Commission Approval

The proposed rule would prohibit ''any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Commission'' (the ''approval prohibition'').[272] As described above, the proposed rule would address certain elements of the appropriate presentation of performance in advertisements, which the current rule does not explicitly address.[273] This approval prohibition is intended to prevent advisers from representing that the Commission has approved or reviewed the performance results, even when the adviser is presenting performance results in accordance with the proposed rule. Such a statement might imply that the Commission has determined that the advertised performance results neither are false or misleading, nor otherwise violate the proposed rule. Such a statement would itself be misleading because the Commission does not review or approve investment advisers' advertisements. Such a statement might also be misleading to the extent it suggests that an adviser is presenting performance results in accordance with particular methodologies or calculations, which the proposed rule would not prescribe. We believe in particular that performance results may lead to a heightened risk of creating unrealistic expectations in an advertisement's audience.[274] An express or implied statement that the Commission has approved the performance results could advance such unrealistic expectations.[275] Such a statement would also be misleading to the extent it suggests that the Commission has reviewed or approved more generally of the investment adviser, its services, its personnel, its competence or experience, or its investment strategies and methods. We request comment on this proposed approval prohibition.

• Are there types of statements that would be prohibited under the proposed approval prohibition, but that commenters believe should be allowed in performance advertising? What types of statements and why should they be allowed?

• Instead of including a specific approval prohibition, should we take the view that a statement that would otherwise violate this prohibition is addressed through paragraph (a) of the proposed rule?

ii. Related Performance

The proposed rule would condition the presentation in any advertisement of ''related performance'' on the inclusion of all related portfolios. However, the proposed rule would generally allow related performance to exclude related portfolios as long as the advertised performance results are no higher than if all related portfolios had been included.[276] ''Related performance'' is defined as ''the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as one or more composite aggregations of all portfolios falling within stated criteria.'' [277] ''Related portfolio'' in turn is defined as ''a portfolio, managed by the investment adviser, with substantially similar investment policies, objectives, and strategies as those of the services being offered or promoted in the advertisement.'' [278] We understand that related performance may be a useful source of information for investors. For example, a prospective investor considering whether to hire or retain an investment adviser to manage a portfolio having a particular investment strategy may reasonably wish to see performance results of portfolios previously managed by the investment adviser that have substantially similar investment strategies. The proposed requirement would allow advertisements to include related performance, as long as such performance includes all related portfolios. This requirement is intended to prevent investment advisers from including only related portfolios having favorable performance results or otherwise ''cherry-picking.''

The proposed rule otherwise does not identify or prescribe particular requirements for determining whether portfolios are ''related'' beyond whether there are ''substantially similar'' investment policies, objectives, and strategies as those of the services being offered in the advertisement.[279] The

[271] *See* 17 CFR 230.482(g).

[272] Proposed rule 206(4)–1(c)(1)(ii).

[273] *See supra* section I.A.

[274] *See supra* footnote 184.

[275] *See, e.g.,* Fake Seals and Phony Numbers: How Fraudsters Try to Look Legit (Dec. 2, 2009), *available at https://www.sec.gov/reportspubs/investor-publications/investorpubs fakesealshtm.html* (advising the investing public to ''be skeptical of government 'approval' '' in communications regarding securities offerings and noting that the Commission ''does not evaluate the merits of any securities offering'' or ''determine whether a particular security is a 'good' investment'').

[276] Proposed rule 206(4)–1(c)(1)(iii)(A).

[277] Proposed rule 206(4)–1(e)(11).

[278] Proposed rule 206(4)–1(e)(12).

[279] The ''substantially similar'' standard has been used by our staff previously in describing its views as to whether the presentation of prior performance results of accounts managed by a predecessor entity would not, in and of itself, be misleading under the current rule. *See* Horizon Asset Management, LLC, SEC Staff No-Action Letter (Sept. 13, 1996) (''Horizon Letter'') (describing, in relevant part, the presentation of prior performance results of

requirement that advisers include portfolios having ''substantially similar'' policies, objectives, and strategies may result in an investment adviser including an account that is otherwise subject to client-specific constraints. We request comment below on this approach. We understand that many investment advisers already have criteria governing their creation and presentation of composites and that in particular many advisers take into account GIPS. We believe that the same criteria used by investment advisers to construct any composites for GIPS purposes could be used for purposes of satisfying the ''substantially similar'' requirement of the proposed rule.[280] To the extent that an investment adviser excludes portfolios from a composite that is constructed for GIPS purposes, the proposed rule would allow those portfolios to be included in a separate composite. That is, ''related performance'' could be presented through more than one composite aggregation of all portfolios falling within the stated criteria.

The proposed rule would allow investment advisers to exclude from ''related performance'' one or more related portfolios so long as the advertised performance results are no higher than if all related portfolios had been included. This exclusion would generally provide advisers some flexibility in selecting the related portfolios to advertise, without permitting exclusion on the basis of poor performance. However, this exclusion would also be subject to the proposed time period requirement for Retail Advertisements, as discussed above.[281] Related performance in a Retail Advertisement could not exclude any related portfolio if doing so would alter the presentation of the proposed rule's prescribed time periods.[282]

The proposed rule would allow the investment adviser to present the performance of all related portfolios either on a portfolio-by-portfolio basis or as one or more composites of all such portfolios. This provision is intended in part to allow an adviser to illustrate for the audience the differences in performance achieved by the investment adviser in managing portfolios having substantially similar investment policies, objectives, and strategies. We believe that advisers may find it useful to present this information on a portfolio-by-portfolio basis if they believe that such presentation will make clear the range of performance results that the relevant portfolios experienced. Advisers that manage a small number of such portfolios particularly may find a portfolio-by-portfolio presentation to be the clearest way of demonstrating related performance.[283] Presenting related performance on a portfolio-by-portfolio basis would be subject to paragraph (a) of the proposed rule, including the prohibition on omitting material facts necessary to make the presentation, in light of the circumstances under which it was made, not misleading.[284] For example, an advertisement presenting related performance on a portfolio-by-portfolio basis could be potentially misleading if it does not disclose the size of the portfolios and the basis on which the portfolios were selected.

Presenting related performance in a composite can allow the relevant information—the investment adviser's experience in managing portfolios having specified criteria—to be presented in a streamlined fashion and without requiring every portfolio to be presented individually in the same advertisement, which may be unwieldy and difficult to comprehend. Advisers may find it useful to present related performance information in a composite particularly if presenting the information on a portfolio-by-portfolio basis could implicate privacy concerns by, for example, identifying implicitly particular clients even if the portfolios themselves are anonymized. The proposed rule would not prescribe specific criteria to define the relevant portfolios but would require that once the criteria are established, all related portfolios meeting the criteria are included in one or more composites. The presentation of composite performance would be subject to paragraph (a) of the proposed rule, including the prohibition on the inclusion of favorable performance results or the exclusion of unfavorable performance results that provides a portrayal of the adviser's performance that is not fair and balanced.[285] For example, an advertisement presenting related performance in a composite would be false or misleading where the composite is represented as including all portfolios in the strategy being advertised but excludes some portfolios falling within the stated criteria or is otherwise manipulated by the adviser.[286] Presenting related performance in a composite would also be subject to the prohibition on omitting material facts necessary to make the presentation, in light of the circumstances in which it was made, not misleading.[287] We believe that omitting the criteria the adviser used in defining the related portfolios and crafting the composite could result in an advertisement presenting related performance that is misleading.

We understand that FINRA staff has not viewed rule 2210 as allowing inclusion of certain related performance information in communications used by FINRA members with retail investors in registered funds.[288] We believe that the utility of related performance in demonstrating the adviser's experience in managing portfolios having specified criteria, together with the provisions designed to prevent cherry-picking and the provisions of paragraph (a), support

accounts managed by a predecessor entity where ''all accounts that were managed in a *substantially similar* manner are advertised unless the exclusion of any such account would not result in materially higher performance'') (emphasis added).

[280] For GIPS purposes, a composite is an aggregation of portfolios managed according to a similar investment mandate, objective, or strategy. Global Investment Performance Standards, GIPS Glossary (defining a ''composite'' as ''an aggregation of one or more portfolios that are managed according to a similar investment mandate, objective, or strategy'').

[281] *See supra* section II.A.5.c.v.

[282] Proposed rule 206(4)–1(c)(1)(iii)(B). *See* proposed rule 206(4)–1(c)(2)(ii) (requiring any performance results of any portfolio or any composite aggregation of related portfolios to include performance results of the same portfolio or composite aggregation for 1-, 5-, and 10-year periods).

[283] For example, advisers to some types of private funds may find a portfolio-by-portfolio presentation to be the most efficient approach in satisfying this requirement.

[284] Proposed rule 206(4)–1(a)(1). *See also supra* footnote199 and accompanying text.

[285] *See* proposed rule 206(4)–1(a)(6); *see also supra* footnote199 and accompanying text.

[286] *See, e.g.,* In the Matter of Valicenti Advisory Services, Inc., Release No. IA–1774 (Nov. 18, 1998) (Commission opinion) (finding that, under the circumstances, when an adviser's sales literature states that the rates of return it is advertising are based on the combined performance of certain specified accounts, then ''the plain meaning of that statement is that the rates reflect the performance of all accounts falling within the stated criteria, not merely a few chosen by the adviser''); *aff'd Valicenti Advisory Services, Inc.* v. *Securities and Exchange Commission,* 198 F. 3d 62 (2d Cir. 1999).

[287] *See* proposed rule 206(4)–1(a)(1).

[288] *See* letter from Joseph P. Savage, FINRA, to Clair Pagnano, K&L Gates LLP, dated June 9, 2017 (discussing FINRA's ''longstanding position'' that a registered fund's presentation of related performance information, other than certain performance of predecessor private accounts or funds, in communications used with retail investors does not comply with FINRA rule 2210(d)). FINRA staff has provided interpretive guidance that the use of ''related performance information'' in institutional communications concerning certain registered funds is consistent with the applicable standards of FINRA rule 2210. *Id.; see also* letter from Thomas M. Selman, Senior Vice President, NASD, to Yukako Kawata, Davis Polk & Wardwell, dated Dec. 30, 2003 (stating that NASD staff would not object to inclusion of related performance information in sales material for an unregistered private fund, provided that, among other conditions, all recipients are qualified purchasers).

not prohibiting related performance in advisers' Retail Advertisements.

The definition of ''related portfolio'' also would include a portfolio managed by the investment adviser for its own account or for its advisory affiliate. This proposed definition is designed to apply so that all portfolios having substantially similar investment policies, objectives, and strategies are incorporated into the advertised performance. However, reporting the performance of accounts of the investment adviser or its advisory affiliates may present issues regarding fees and expenses in the event certain fees and expenses are waived or charged at a lower rate than those that would be applied to an unaffiliated client of the adviser. In such case, the amount of fees and expenses charged to such a portfolio would not reflect the amount actually available to the advertisement's audience of unaffiliated investors. Presenting net performance that is higher than it would be if calculated using the fees and expenses charged to unaffiliated investors would reasonably be likely to cause an untrue or misleading inference to be drawn about the adviser's competence and experience managing the portfolio generating the performance. Accordingly, to satisfy the ''net performance'' requirement in this circumstance, an adviser generally should apply the fees and expenses that an unaffiliated client would have paid in connection with the relevant portfolio whose performance is being advertised.

We request comment on the proposed requirements for presentation of related performance.

- Are the proposed definitions of ''related performance'' and ''related portfolio'' clear? Should we modify these proposed definitions? Should we provide further guidance as to what constitutes a ''related portfolio''?
- Should we modify the proposed definition of ''related portfolio'' by changing the ''substantially similar'' criterion? If so, how and why? Should we modify the proposed definition by specifying how an adviser should account for portfolios that are non-discretionary accounts?
- Should we modify the proposed definition of ''related portfolio'' to take into account how client-specific constraints may have affected the performance of portfolios that otherwise have ''substantially similar'' policies, objectives, and strategies? Would investment advisers consider portfolios having such client-specific constraints to be portfolios that have policies, objectives, and strategies that are not ''substantially similar''?
- Would the proposed rule's approach of allowing related performance to be presented on a portfolio-by-portfolio basis or as one or more composites have the intended effect of illustrating the differences in performance achieved in managing related portfolios? Are there other better approaches, including approaches that investment advisers use currently that we should consider? What approaches and why?
- Would the proposed rule's approach of allowing related performance to be presented in ''one or more composite aggregations'' be appropriate or should we require that related performance be presented in only one such composite? Why or why not?
- Rather than allowing related performance to exclude related portfolios as long as the advertised performance results are no higher than if all related portfolios had been included, should we require inclusion of all related portfolios? Why or why not? Alternatively, should we permit exclusion of related portfolios as long as the advertised results are not ''materially'' higher than if all related portfolios had been included? Why or why not? As an alternative to any of those approaches, should we allow related performance without limitation and instead rely on the prohibitions in the rest of the proposed rule to ensure that performance of related portfolios is presented in a fair and balanced manner?
- Rather than requiring that the exclusion of any related portfolio does not alter the presentation of time periods prescribed for Retail Advertisements, should we allow the exclusion to alter such presentation? Why or why not? Should we provide additional guidance regarding this requirement? If so, what additional guidance should we provide?
- Are there particular disclosures we should require when an advertisement presents related performance? Should we require that an advertisement offer to provide additional information about the related performance? For example, if the investment adviser presents related performance as a composite, should the adviser be required to offer to provide the performance of the individual portfolios used to calculate that composite?
- Should we consider adopting FINRA's approach and prohibit the presentation of related performance in Retail Advertisements? Why or why not? If we do not adopt FINRA's approach, would it cause confusion for advisers or investors?
- Would investment advisers that seek to comply with GIPS face any compliance challenges in complying with the proposed rule's related performance provision? If so, what challenges and how would such advisers seek to address them? Should we take those challenges into account and, if so, how? Are there particular provisions of GIPS that we should consider in addressing the presentation of related performance?
- Should we retain the proposed rule's inclusion in the definition of ''related portfolio'' of a portfolio managed by the investment adviser for its own account or for its advisory affiliate? Why or why not? We have indicated that to satisfy the ''net performance'' requirement when presenting performance of a portfolio that belongs to the adviser or its affiliate, the adviser generally should apply the fees and expenses that an unaffiliated client would have paid in connection with the relevant portfolio whose performance is being advertised. Do commenters agree with this approach? Do commenters believe this would be sufficient to make related performance not misleading if it includes the adviser's or its affiliate's portfolio? Why or why not?

iii. Extracted Performance

Under the proposed rule, an adviser may include extracted performance in an advertisement only if the advertisement provides or offers to provide promptly the performance results of all investments in the portfolio from which the performance was extracted.[289] ''Extracted performance'' would be defined as ''the performance results of a subset of investments extracted from a portfolio.'' [290] Similar to the proposed requirement for the presentation of related performance, the proposed rule would require that the advertisement provide (or offer to provide promptly) the performance results of the entire portfolio in these circumstances to prevent investment advisers from cherry-picking certain performance results.

We understand that investment advisers commonly use extracted performance when they have experience managing several strategies and want to advertise performance only with respect to one strategy. For example, an investment adviser seeking to manage a new portfolio of only fixed-income

[289] Proposed rule 206(4)–1(c)(1)(iv).

[290] Proposed rule 206(4)–1(e)(3).

investments may wish to advertise its performance results from managing fixed-income investments within a multi-strategy portfolio. An investment adviser seeking to advise a new client about future investments in European companies may wish to advertise its performance results from managing past investments in all non-U.S. companies.

This information could likewise be useful to prospective investors. For example, a prospective investor seeking a fixed income investment might be interested in seeing only the relevant performance (*i.e.,* the performance of fixed income assets) of an adviser that has experience in managing multi-strategy portfolios. If that prospective investor already has investments in fixed income assets, it may want to use the extracted performance to consider the effect of an additional fixed-income investment on the prospective investor's overall portfolio. That prospective investor may also use the presentation of extracted performance from several investment advisers as a means of comparing investment advisers' management capabilities in that specific strategy as well.

At the same time, extracted performance presents a risk of being misleading to investors. An adviser presenting extracted performance would necessarily have to select the relevant investments to extract and decide both the criteria defining the extracted investments and whether particular investments meet those criteria. The adviser could adjust those decisions in critical ways affecting the performance of the extract and imply something materially untrue about the adviser's experience managing those investments. An investment adviser's experience managing a subset of an entire portfolio may reasonably be expected to be different from managing the entire portfolio: The investment adviser made investment decisions with respect to that subset taking into account the entire portfolio's investments and strategy.[291] Extracted performance therefore presents the opportunity for an investment adviser to claim credit for investment decisions that have been optimized through hindsight, and the selection of the extracted investments can be made with the knowledge of factors that may have positively affected their performance.

The proposed requirement to make available the results of the entire portfolio is intended to allow investors to evaluate the investment adviser's experience within a context broader than that of the extract. This context would include any particular differences in performance results between the entire portfolio and the extract, the data and assumptions underlying the extracted performance, and the investment adviser's process for generating the extracted performance. Requiring the performance results of the entire portfolio is intended to provide investors with the information necessary to evaluate this broader context.[292] Any differences between the performance of the entire portfolio and the extracted performance might be a basis for additional discussions between the investor and the adviser, which would themselves add to the information available for the investor in making its decision about whether to hire or retain the adviser.

The provisions of paragraph (a) of the proposed rule would apply to any presentation of extracted performance, and thus advisers would be prohibited from presenting extracted performance in a misleading way.[293] For example, we would view it as misleading to present extracted performance of only one particular strategy when the entire portfolio from which such performance was extracted had multiple strategies, if the advertisement did not disclose that fact.[294] Similarly, we would view it as misleading to include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced.[295] In addition, under paragraph (a) of the proposed rule, we would view it as misleading to present extracted performance without disclosing whether the extracted performance reflects an allocation of the cash held by the entire portfolio from which the performance is extracted and the effect of such cash allocation, or of the absence of such an allocation, on the results portrayed.[296] Finally, an adviser should consider whether disclosure of the criteria defining the extracted investments is necessary to prevent the performance results from being misleading.

We request comment on the proposed rule's approach to extracted performance in all advertisements.

- Are there circumstances under which extracted performance should be prohibited in Retail Advertisements? What types of circumstances?
- Are there specific disclosures that we should require to decrease the likelihood that extracted performance would be misleading in Retail Advertisements (*e.g.,* describing the fact that the performance does not represent the entire performance of any actual portfolio of an actual client of the investment adviser)? If so, should we identify those and specifically require their disclosure?
- Is the proposed definition of "extracted performance" sufficiently clear based on our description above? Should we modify any of the elements of the proposed definition? If so, which element and why?
- Under the current rule, have investment advisers taken the same approach that we take in the proposed rule with respect to extracted performance—*i.e.,* providing or offering to provide the performance results of the entire portfolio from which the performance is extracted? Have investors accepted any such offers and requested any such additional performance results? To what extent and under what circumstances have any such investors been misled by the

[291] Similarly, an investment adviser's investment decisions with respect to managing a subset of an entire portfolio could be different from those with respect to managing a pooled investment vehicle with the same objective as the subset.

[292] We would consider the performance results of the entire portfolio provided upon request to be a part of the advertisement and therefore subject to the books and records rule. *See infra* section II.C. If an investment adviser offered to provide the performance of the entire portfolio, rather than provide the performance in the advertisement, then such performance would not qualify for the unsolicited request exclusion from the definition of "advertisement." *See also supra* footnote 106 and accompanying text.

[293] *See supra* footnote 199 and accompanying text.

[294] The absence of such disclosures could result in an untrue or misleading implication about, or could reasonably be likely to cause an untrue or misleading inference to be drawn concerning, a material fact relating to the investment adviser. *See* proposed rule 206(4)–1(a)(3). In this case, it would be material that the presented performance reflected only a single strategy of the portfolio's multiple strategies and that an investor could have invested in the single strategy only by investing through the entire portfolio.

[295] In addition, an advertisement presenting extracted performance would likely be false or misleading where the extracted performance excludes investments that fall within the criteria the adviser represents it used to select the extract.

[296] Decisions about cash allocation are common in presenting performance extracted from a subset of portfolio investments. An investment adviser's decisions with respect to the overall portfolio would necessarily consider how much of the portfolio to allocate to cash at any given time. That consideration would not necessarily be present with respect to the investments reflected in the extracted performance if those investments were managed as a standalone portfolio. At the same time, it is possible that presenting extracted performance without accounting for the allocation of cash, and in effect implying that the allocation of cash had no effect on the extracted performance, would be misleading. Similarly, it could be misleading to an audience if the presentation of extracted performance excludes an allocation to cash and implies that the adviser would not be making decisions with respect to cash allocations in managing a future portfolio focused on the strategy of the extracted performance. The proposed rule does not prescribe any particular treatment for cash allocation with respect to extracted performance; instead, such treatment would be subject to the provisions of paragraph (a).

presentation of extracted performance? Have investors who have requested additional performance results included persons other than qualified purchasers and knowledgeable employees?

- With respect to extracted performance, should we require the disclosure or offer of additional information, other than the performance results of the entire portfolio from which the performance is extracted? What additional information would be appropriate to enable an audience to analyze extracted performance more fully? For example, should we require that an advertisement presenting extracted performance disclose the selection criteria and assumptions used by the adviser in selecting the relevant performance to be extracted? Should we require disclosure of the percentage of the overall portfolio represented by the investments included in the extracted performance? Should we require disclosure of investments included in the extracted performance and a list of all investments in the portfolio from which the extracted performance was selected, to enable the audience to evaluate how the adviser made its determination? Should we require any extracted performance to include an allocation to cash? [297]
- Should we include any other requirements for Non-Retail Advertisements presenting extracted performance? What other requirements and why should we require them?
- Instead of prescribing specific rules for the presentation of extracted performance, should we instead rely on the provisions of paragraph (a) of the proposed rule as we propose to do for cash allocations?

iv. Hypothetical Performance

The proposed rule would allow an adviser to provide hypothetical performance in an advertisement, provided that the adviser takes certain steps to address the misleading nature of hypothetical performance if its underlying assumptions are not subjected to further analysis.

An investment adviser may seek to advertise hypothetical performance results as a way to reflect the adviser's strategies or methods when such strategies or methods have not been implemented on actual portfolios of actual clients. There are various types of hypothetical performance that an adviser may seek to advertise. For example, an adviser may apply strategies to fictitious portfolios that it tracks and manages over time but without investing actual money. Or, an adviser employing a quantitative investment strategy using automated systems to make investment decisions may wish to present backtested performance showing simulated performance results of that strategy. An adviser also may wish to show the returns that it is seeking to achieve over a particular time period or that it projects based on certain estimates. Hypothetical performance presentations pose a high risk of misleading investors because, in many cases, this type of performance may be readily optimized through hindsight. Moreover, the absence of an actual client or actual money underlying hypothetical performance raises the risk of misleading investors, because there are no actual losses or other real-world consequences if an adviser makes a bad investment or takes on excessive risk. However, hypothetical performance may be useful to prospective investors that have the resources to analyze the underlying assumptions and qualifications of the presentation, as well as other information that may demonstrate the adviser's investment process. When subjected to this analysis, the information may allow an investor to evaluate an adviser's investment process over a wide range of time periods and market environments or form reasonable expectations about how the investment process might perform under different conditions.

The proposed rule therefore would condition the presentation of hypothetical performance on the adviser adopting policies and procedures reasonably designed to ensure that it is disseminated only to persons for which it is relevant to their financial situation and investment objectives, and would further require the adviser to provide additional information about the hypothetical performance that is tailored to the audience receiving it, such that the recipient has sufficient information to understand the criteria, assumptions, risks, and limitations. We believe these conditions will result in the dissemination of hypothetical performance only to those investors who have access to the resources necessary to independently analyze this information, including by modifying the assumptions to test their effect on results, and who have the financial expertise to understand the risks and limitations of these types of presentations.

A. Types of Hypothetical Performance

The proposed rule would define "hypothetical performance" as "performance results that were not actually achieved by any portfolio of any client of the investment adviser" and would explicitly include, but not be limited to, backtested performance, representative performance, and targeted or projected performance returns. We discuss each type of hypothetical performance under the proposed rule in the following sections.

Backtested Performance. Backtested performance is achieved by application of an investment adviser's investment strategy to market data from prior periods when the strategy was not actually used during those periods.[298] Backtesting is intended to demonstrate how an investment strategy may have performed in the past if the strategy had existed or had been applied at that time. An investor conducting diligence on a newly launched quantitative investment strategy, for instance, may request backtested performance to further analyze the adviser's quantitative model as well as the assumptions, inputs, and quantitative parameters used by the adviser. The investor may request backtested performance to determine how the adviser adjusted its model to reflect new or changed data sources. An investor with the resources to assess the backtested performance may also gain an understanding of other aspects of the investment strategy, including exposures and risk tolerances in certain market conditions, and develop reasonable expectations of how the strategy might perform in the future under different market conditions.

Because backtested performance is calculated after the end of the relevant period, however, it presents the opportunity for an investment adviser to claim credit for investment decisions that may have been optimized through

[297] *See, e.g.,* Global Investment Performance Standards (GIPS) for Firms (2020), 3.A.15 (requiring any carve-out included in a composite to include cash and any related income, and indicating that cash may be accounted for separately or allocated synthetically to the carve-out on a timely and consistent basis), *available at https://www.cfainstitute.org/en/ethics/codes/gips-standards.*

[298] *See* proposed rule 206(4)–1(e)(5)(ii). This generally would not include educational presentations of performance that reflect an allocation of assets by type or class, which we understand investment advisers may use to inform clients and to educate them about historical trends regarding asset classes. For example, a presentation of performance that illustrates how a portfolio composed of 60% allocated to equities and 40% allocated to bonds would have performed over the past 50 years as compared to a portfolio comprised of 40% allocated to equities and 60% to bonds would not be prohibited under the proposed rule. Our approach regarding educational presentations of performance would apply even if the investment adviser used one of the allocations in managing a strategy being advertised or illustrated such allocations by reference to relevant indices or other benchmarks.

hindsight, rather than on a forward-looking application of stated investment methods or criteria and with investment decisions made in real time and with actual financial risk. For example, an investment adviser is able to modify its investment strategy or choice of parameters and assumptions until it can generate attractive results and then present those as evidence of how its strategy would have performed in the past.[299] In addition, backtested performance can be generated with the knowledge of factors that may have positively affected its performance. Also, an adviser can fail to take into account how one or more investments would have performed if the adviser had bought or sold those investments at a different time during the performance period.

Backtested performance presents a greater risk of misleading investors when an adviser uses proprietary trading models updated in light of past experiences to make investment allocation decisions. If the adviser updates the models to incorporate new market data, it could be misleading. The presentation of the performance could then suggest that the adviser's clients could have actually experienced the performance achieved through a model using updated market information, when in fact the model was changed on the basis of actual market experience that would not have been available at the time.

These risks highlight the potential for backtested performance to be misleading if additional analysis and due diligence is not performed by the target audience. We believe that investors who may consider this type of hypothetical performance to be a useful tool would need to conduct this additional analysis and due diligence. We also understand the potential value of such data to investors.

Representative Performance. Representative performance, including performance derived from representative ''model'' portfolios managed contemporaneously alongside portfolios managed by the adviser for actual clients does not reflect decisions made by the investment adviser in managing actual accounts.[300] Model performance can help an investor gain an understanding of an adviser's investment process and management style if the investor has the resources to scrutinize that performance and the underlying assumptions. For instance, model performance may present a nuanced view of how an adviser would construct a portfolio without the impact of certain factors, such as the timing of cash flows or client-specific restrictions, that may not be relevant to the particular investor. Model performance also can help an investor assess the adviser's investment style for new strategies that have not yet been widely adopted by the adviser's clients.

Advances in computer technologies have enabled an adviser to generate hundreds or thousands of potential model portfolios alongside the ones it actually offers or manages. To the extent that an adviser thus generates a large number of potential model portfolios, the use of such a representative model portfolio poses a risk of survivorship bias where an adviser is incentivized to advertise only the results of the highest performing models and ignore others. The adviser could run numerous variations of its investment strategy, select the most attractive results, and then present those results as evidence of how well the strategy would have performed under prior market conditions. In addition, even in cases where an adviser generates only a single model portfolio, the fact that there is neither client nor adviser assets at risk may allow the adviser to manage that portfolio in a significantly different manner than if such risk existed.

Targets and Projections. Targeted returns reflect an investment adviser's performance target—*i.e.,* the returns that the investment adviser is seeking to achieve over a particular period of time. Projected returns reflect an investment adviser's performance estimate—*i.e.,* the returns that the investment adviser believes can be achieved using the advertised investment services. Projected returns are commonly established through the use of mathematical modeling. The proposed rule does not define ''targeted return'' or ''projected return.'' We believe that these terms are best defined by their commonly understood meanings, and do not intend to narrow or expand inadvertently the wide variety of returns that may be considered targets or projections. We generally would consider a target or projection to be any type of performance that an advertisement presents as results that could be achieved, are likely to be achieved, or may be achieved in the future by the investment adviser with respect to an investor.

The proposed rule would apply to targeted or projected performance returns ''with respect to any portfolio or to the investment services offered or promoted in the advertisement.''[301] Accordingly, projections for general market performance or economic conditions in an advertisement would not be considered targeted or projected performance returns. Similarly, an interactive financial analysis tool that offers historical return information or investment analysis of a portfolio based on past market data but does not project such returns forward would not be deemed to be targeted or projected performance returns under the proposed rule. Interactive tools that allow an investor to select its own targeted or assumed rate of return and to project forward a portfolio using that investor's selected rate of return also would not be considered to be targeted or projected performance returns, provided that the tool does not suggest or imply a return rate. On the other hand, if the interactive tool provides anticipated returns for the investment strategy being presented, the tool would be considered to provide targeted or projected performance results and would be subject to the proposed rule's conditions regarding hypothetical performance.[302]

Targeted and projected performance returns can potentially mislead investors, particularly if they are based on assumptions that are not reasonably

[299] *See, e.g.,* David H. Bailey, Jonathan M. Borwein, Marcos López de Prado, and Qiji Jim Zhu, *Pseudo-Mathematics and Financial Charlatanism: The Effects of Backtest Overfitting on Out-of-Sample Performance,* 61(5) Notices of the Am. Mathematical Society, 458, 466 (May 2014), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308659* (describing the potential to overfit an investment strategy so that it performs well in-sample (the simulation over the sample used in the design of the strategy) but performs poorly out-of-sample (the simulation over a sample not used in the design of the strategy)).

[300] *See* proposed rule 206(4)–1(e)(5)(i). Representative performance would include, among other things, the type of ''model performance'' described in the Clover Letter: Performance results generated by a ''model'' portfolio managed with the same investment philosophy used by the adviser for actual client accounts and ''consist[ing] of the same securities'' recommended by the adviser to its clients during the same time period, ''with variances in specific client objectives being addressed via the asset allocation process (*i.e.,* the relative weighting of stocks, bonds, and cash equivalents in each account)''. *See* Clover Letter. The proposed rule would treat this as hypothetical performance because although the ''model'' consists of the same securities held by several portfolios, the asset allocation process would result in performance results that were not ''actually achieved'' by a portfolio of ''any client.''

[301] Proposed rule 206(4)–1(e)(5)(iii).

[302] FINRA permits ''investment analysis tools'' as a limited exception from FINRA's general prohibition of projections of performance, subject to certain conditions and disclosures. FINRA rule 2214(b) defines ''investment analysis tool'' as ''an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.''

achievable. For example, an advertisement may present unwarranted claims based on assumptions that are virtually impossible to occur in reality, such as an assumption that three or four specific industries will experience decades of uninterrupted growth. Targets and projections can easily be presented in such a manner to raise unrealistic expectations of an advertisement's audience.[303]

Suitable reliance on targets or projections requires an analysis and diligence of such assumptions in order for an investor to not be misled into thinking that such targets or projections are guaranteed. We recognize that some investors want to consider targeted returns and projected returns (along with these underlying assumptions) when evaluating investment products, strategies, and services. For example, based on our staff's outreach and experience, we understand that Non-Retail Persons in particular may have specific return targets that they seek to achieve, and their planning processes may necessarily include reviewing and analyzing the targets advertised by investment advisers and the information underlying those targets.[304] Specifically, an analysis of these targets or projections can inform an investor about an adviser's risk tolerances when managing a particular strategy. Information about an adviser's targets or projections also can be useful to an investor when assessing how the adviser's strategy fits within the investor's overall portfolio.

We request comment on the proposed definition of ''hypothetical performance'' and the specific types of hypothetical performance addressed in the proposed definition.

- Is the proposed definition of ''hypothetical performance'' clear? If not, how should we modify this definition? For example, should we clarify the treatment of indexes (including indexes sponsored by or created by the adviser or its affiliate) and benchmarks under the definition of hypothetical performance?
- Are there types of performance that investment advisers currently present in advertising that would meet the proposed rule's definition of ''representative model performance'' but should not be treated as hypothetical performance under the proposed rule? What types of performance and why should they not be treated as hypothetical performance?
- Do commenters agree with the proposed rule's treatment of targeted and projected returns as hypothetical performance? Should we treat targeted and projected returns differently from hypothetical performance? If so, why and how?
- Should we define ''targeted returns'' or ''projected returns''? If so, how should we define them? Do commenters agree with our discussion above about what should be considered a target or projection? Should we provide in the rule exclusions for specific kinds of presentations that would not be considered target or projected returns? Why or why not?
- Should we prohibit hypothetical performance in advertisements? Should performance results of portfolios that are managed by an investment adviser, but without investing actual money, be treated differently than other types of performance results under the proposed rule?
- Are our beliefs correct about the risks of backtested and representative performance and of targeted and projected returns? Are there circumstances under which these types of hypothetical performance do not present the risks we identified? Are there other risks that we should consider?
- Are there types of performance that would meet the proposed rule's definition of ''backtested performance'' but should not be treated as such? What types and how should we modify the definition?
- Are there types of performance that would meet the proposed rule's definition of ''representative performance'' but should not be treated as such? What types and how should we modify the definition?
- How do investment advisers currently present targeted or projected returns in advertisements? Do investment advisers ever disclose to investors when targeted or projected returns are met or are not met, and the reasons why such returns are met or not met? Should we require such disclosure? Why or why not?
- FINRA's communications rule prohibits the projection of performance in most cases. Have broker-dealers had experience in interpreting FINRA's rule with respect to the projection of performance? Is there anything that we should consider in our treatment of projected returns?
- Should we provide a specific exception for interactive financial analysis tools from the proposed rule's approach to performance of projected returns? If so, should we consider FINRA's approach or another approach? What approach and why?
- In complying with the current rule, have investment advisers addressed any of the risks of hypothetical performance we describe above, or other risks of hypothetical performance? If so, how?
- Are there any specific disclosures that we should require to prevent any type of hypothetical performance from misleading the audience? If so, which disclosures should we require and why?
- Are there additional uses for hypothetical performance generally, or any type of hypothetical performance specifically, that benefit investors?

B. Conditions on Presentation of Hypothetical Performance

Taking into account the risks and the potential utility of hypothetical performance when investors have a need for such performance and are able to subject it to sufficient independent analysis and due diligence, the proposed rule would permit the presentation of hypothetical performance in advertisements under certain conditions. Together, these conditions are intended to address the potential for hypothetical performance to be misleading. First, the adviser must adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the financial situation and investment objectives of the person to whom the advertisement is disseminated (the ''recipient''). Second, the adviser must provide sufficient information to enable the recipient to understand the criteria used and assumptions made in calculating such hypothetical performance (the ''calculation information''). Third, the adviser must provide (or, when the recipient is a Non-Retail Person, offer to provide promptly) sufficient information to enable the recipient to understand the risks and limitations of using hypothetical performance in making investment decisions (the ''risk

[303] In a reflection of the risks posed by projected returns, FINRA's communications rule prohibits the prediction or projection of performance in most cases. *See* FINRA rule 2210(d)(1)(F). FINRA's prohibition does not apply to (i) a hypothetical illustration of mathematical principles, (ii) certain investment analysis tools, and (iii) a price target contained in a research report, under certain conditions. *See id.*

[304] For example, knowing whether one type of private fund projects or targets a particular return over a particular time period may assist a pension plan in determining whether to invest in that type of private fund or to consider another type of private fund projecting a different return. *See, e.g.,* National Association of State Retirement Administrators (NASRA) Issue Brief: Public Pension Plan Investment Return Assumptions (Feb. 2019), *available at https://www.nasra.org/files/Issue%20Briefs/NASRAInvReturnAssumptBrief.pdf* (''Funding a pension benefit requires the use of projections, known as actuarial assumptions, about future events. Actuarial assumptions fall into one of two broad categories: demographics and economic.'').

information'').[305] For purposes of this discussion, we refer to the calculation information and the risk information collectively as ''underlying information.''

Policies and Procedures. The first condition for the presentation of hypothetical performance would require the adviser to adopt and implement policies and procedures ''reasonably designed to ensure that the hypothetical performance is relevant to the financial situation and investment objectives'' of the recipient.[306] This proposed condition is intended to ensure that the adviser provides hypothetical performance only where the recipient has the financial and analytical resources to assess the hypothetical performance and that the hypothetical performance would be relevant to the recipient's investment objective.

This condition would provide investment advisers with flexibility to develop policies and procedures that best suit their investor bases and operations and that target the types of hypothetical performance the adviser intends to use in its advertisements as well as the intended recipients of the hypothetical performance.[307] For example, an investment adviser that plans to advise a new private fund might develop policies and procedures that take into account its experience advising a prior fund for which it raised money from investors. That experience might indicate that the prior fund's investors valued a particular type of hypothetical performance because, for example, the investors used it to assess the adviser's strategy and investment process and had the resources to make that assessment. The adviser's policies and procedures could then reflect its determination that this type of hypothetical performance is relevant to the financial situation and investment objectives of those investors or investors of a similar type.

Reasonably designed policies and procedures need not require an adviser to inquire into the specific financial situation and investment objectives of each potential recipient. Instead, such policies and procedures could identify the characteristics of investors for which the adviser has determined that a particular type or particular presentation of hypothetical performance is relevant and a description of that determination. In many cases, that determination could be made on the basis of the adviser's past experience with investors belonging to that group. For example, an adviser could determine that certain hypothetical performance presentations are relevant to the financial situation and investment objectives of certain types of investors, based on routine requests from those types of investors in the past. An adviser's experience could similarly provide it with an understanding of the analytical resources available to investors of a particular type. The adviser could then incorporate its understanding into its policies and procedures.

We understand that Non-Retail Persons in particular routinely evaluate the types of performance that the proposed rule would treat as hypothetical performance as part of their due diligence in hiring investment advisers and that Non-Retail Persons believe that such performance is relevant to their financial situation and investment objectives.[308] With appropriate analytical and other resources, these investors may assess and conduct diligence on hypothetical performance and the underlying assumptions and methodologies in light of market conditions, investment policies, objectives and strategies, leverage, and other factors that they believe to be important. For example, these investors may routinely analyze backtested performance to assess how a quantitative strategy would have performed under market conditions that such investors expect might occur in the near future. Non-Retail Persons also generally have the resources to obtain information that can inform their assessment, and would be provided additional information from the adviser under the conditions of the proposed rule.[309] Accordingly, an adviser could consider this experience when designing policies and procedures to provide hypothetical performance where it is relevant to the investor's financial situation and investment objectives.

On the other hand, hypothetical performance may be less relevant to the financial situation and investment objectives of investors that do not have access to analytical and other resources to enable them to analyze the hypothetical performance and underlying information. For example, analysis of hypothetical performance may require tools and/or other data to assess the impact of assumptions in driving hypothetical performance, such as factor or other performance attribution, fee compounding, or the probability of various outcomes. Without being able to subject hypothetical performance to additional analysis, this information would tell an investor little about an investment adviser's process or other information relevant to a decision to hire the adviser. Instead, viewing the hypothetical performance (without analyzing and performing the necessary due diligence on the underlying information) could mislead an investor to believe something about the adviser's experience or ability that is unwarranted. We believe that advisers should give closer scrutiny as to whether hypothetical performance is relevant to those investors' financial situation and investment objectives.

An adviser could determine, based on its experience, that hypothetical performance is not relevant to the financial situation and investment objectives of Retail Persons and reflect such determination in its policies and procedures. However, we believe that in some cases an adviser may reasonably determine that hypothetical performance is relevant to a particular Retail Person. To determine whether hypothetical performance is relevant with respect to a Retail Person, reasonably designed policies and procedures should include parameters that address whether the Retail Person has the resources to analyze the underlying assumptions and qualifications of the hypothetical performance to assess the adviser's investment strategy or processes, as well as the investment objectives for which such performance would be applicable. In light of that, we believe that advisers generally would not be able to include hypothetical performance in advertisements that are directed to a mass audience or intended for general circulation because such an advertisement would be available to all investors, regardless of their financial situation or investment objectives.

Calculation Information. The second condition for the presentation of

[305] Proposed rule 206(4)–1(c)(1)(v)(C).

[306] Proposed rule 206(4)–1(c)(1)(v)(A).

[307] In this respect, this condition would mirror in part the proposed definition of ''Non-Retail Advertisement,'' which would require an adviser to adopt and implement policies and procedures reasonably designed to ensure that Non-Retail Advertisements are disseminated solely to Non-Retail Persons, as discussed above. *See supra* footnotes 231–232 and accompanying text.

[308] *See* Comment Letter of ILPA on the 2019 Concept Release (Sept. 24, 2019) (stating that, in considering investments in private funds, ''[l]arge institutional investors spend hours of due diligence in undergoing their own manager selection processes. Evaluating and considering the potential success of management and teams is critical.'').

[309] *See, e.g.,* proposed rule 206(4)–1(c)(1)(v)(B) (requiring an investment adviser to provide certain information as a condition of presenting hypothetical performance in an advertisement). The provisions of paragraph (a) of the proposed rule, including the prohibition of material claims or statements that are unsubstantiated, would apply to targets and projections, as would the general anti-fraud provisions of the Federal securities laws.

hypothetical performance would require the adviser to provide sufficient information to enable the recipient to understand the criteria used and assumptions made in calculating the hypothetical performance.[310] With respect to criteria, investment advisers should provide information that includes the methodology used in calculating and generating the hypothetical performance. With respect to assumptions, investment advisers should provide information that includes any assumptions on which the hypothetical performance rests—*e.g.,* the likelihood of a given event occurring. We propose to require advisers to provide this calculation information so that the recipient is able to determine, in part, how much value to attribute to the hypothetical performance. This calculation information also would provide the recipient with insight into the adviser's operations. For example, this information could allow the recipient to understand how the adviser identifies the criteria and assumptions supporting the hypothetical performance and accounts for them in generating that performance. In addition, any disclosed calculation information might be a basis for additional discussions between the recipient and the investment adviser, which would add to the information available to the recipient. Finally, this calculation information might enable the recipient to attempt to replicate the hypothetical performance using its own analytical tools or other resources, which might allow the recipient to evaluate further the utility of the hypothetical performance.[311]

The proposed rule would require that calculation information be provided to all investors receiving hypothetical performance, even to Non-Retail Persons. We believe Non-Retail Persons should receive this information and understand that, even with their access to resources, Non-Retail Persons may struggle at times to receive sufficient information from investment advisers explaining the methodology by which hypothetical performance was calculated and generated.[312] Without calculation information, we believe that such performance would be misleading even to an audience with the analytical or other resources necessary to evaluate it. Accordingly, the proposed rule would require an adviser presenting hypothetical performance to provide this calculation information to Non-Retail Persons.[313]

Calculation information should be tailored to the person receiving it, though such tailoring could apply to general categories of persons, such as Retail Persons or Non-Retail Persons. The amount of calculation information and level of detail provided to a Retail Person may differ significantly from the amount and level that would be sufficient to enable a Non-Retail Person to understand it. For example, a Retail Person may require additional explanations of certain key terms that may be familiar to a Non-Retail Person. To determine what calculation information to provide, an adviser would need to determine the type and amount of calculation information that could be understood by the recipient.[314]

Risk Information. Finally, the proposed rule would require the adviser to provide—or, if the recipient is a Non-Retail Person, to provide or offer to provide promptly—information to understand the risks and limitations of using the hypothetical performance in making investment decisions.[315] With respect to risks and limitations, investment advisers should provide information that would apply to both hypothetical performance generally—*e.g.,* the fact that hypothetical performance does not reflect actual investments [316]—and to the specific hypothetical performance presented—*e.g.,* if applicable, the fact that the hypothetical performance represents the application of certain assumptions but that the adviser generated dozens of other, lower performance results representing the application of different assumptions. Risk information should also include any known reasons why the hypothetical performance would have differed from actual performance of a portfolio—*e.g.,* the fact that the hypothetical performance does not reflect cash flows in to or out of the portfolio. This risk information would, in part, enable the recipient to understand how much value to attribute to the hypothetical performance in deciding whether to hire or retain the investment adviser.[317]

Just as with calculation information, risk information should be tailored to the person receiving it, although it may be tailored to general categories of persons.[318] For example, sufficient information for a Retail Person to understand the risks and limitations of the advertised hypothetical performance may require charts, graphs, or other pictorial representations, which may be unnecessary for a Non-Retail Person.

In addition, the investment adviser must provide risk information to Retail Persons in all cases, but for Non-Retail Persons an adviser could either provide it or offer to provide it promptly. We believe risk information is essential in mitigating the risk that hypothetical performance may be misleading to Retail Persons. We believe that Non-Retail Persons are more likely aware of the risks and limitations of hypothetical performance, particularly when they are provided with the calculation information that the proposed rule would require and could analyze the hypothetical performance using their own assumptions. Accordingly, the proposed rule would only require an adviser to provide this risk information to a Non-Retail Person if the Non-Retail Person accepts the offer for it.[319] A Non-Retail Person may determine that it has

[310] Proposed rule 206(4)–1(c)(1)(v)(B).

[311] We believe that an ability to replicate the hypothetical performance would be another indication of the adviser's operations and methods, assuming that the recipient of the information also has sufficient information about the risks and limitations of the performance. That is, the recipient could determine that applying the adviser's methodologies and assumptions can produce the same results reflected in the hypothetical performance, which could indicate the utility of those methodologies and assumptions and how the adviser applies them.

[312] The proposed rule does not prescribe any particular methodology or calculation for the different categories of hypothetical performance, just as it does not prescribe methodologies or calculations for actual performance. Instead, the proposed rule would require investment advisers including hypothetical performance in an advertisement to provide the calculation information so that the recipient can understand how the hypothetical performance was calculated.

[313] In addition, we would consider any calculation information provided alongside the hypothetical performance to be a part of the advertisement and therefore subject to the books and records rule. *See infra* section II.C.7; *see also supra* footnote 106 and accompanying text.

[314] This obligation would be similar to an adviser's obligation to provide full and fair disclosure to its clients of all material facts relating to the advisory relationship and of conflicts of interest. *See* Standard of Conduct Release, *supra* footnote 23, at n. 70 (stating that institutional clients ''generally have a greater capacity and more resources then retail clients to analyze and understand complex conflicts and their ramifications'').

[315] Proposed rule 206(4)–1(c)(1)(v)(C).

[316] With respect to backtested performance, one such general risk and limitation would be the fact that backtested performance represents the application of a strategy that was created after the performance period shown in the results and, accordingly, was created with the benefit of hindsight.

[317] In addition, we would consider any risk information provided in connection with the hypothetical performance to be a part of the advertisement and therefore subject to the books and records rule. *See infra* section II.C.7; *see also supra* footnote 106 and accompanying text.

[318] *See supra* footnote 314.

[319] Proposed rule 206(4)–1(c)(1)(v)(C) (permitting an adviser to ''offer to provide promptly'' such information if the recipient is a Non-Retail Person). However, this advertisement would continue to be subject to the prohibitions in proposed rule 206(4)–1(a).

no use for the risk information and may decline to accept the offer. However, once the Non-Retail Person requests the risk information, the proposed rule would require that the adviser provide it.

In addition, any advertisement including hypothetical performance would be required to comply with the provisions in proposed rule 206(4)–1(a). As a result, the proposed rule would prohibit advisers from presenting hypothetical performance in a materially misleading way.[320] For example, we would view an advertisement as including an untrue statement of material fact if the advertised hypothetical performance reflected the application of methodologies, rules, criteria, or assumptions that were materially different from those stated or applied in the underlying information of such hypothetical performance. In addition, we would view it as materially misleading for an advertisement to present hypothetical performance that implies any potential benefits resulting from the adviser's methods of operation without clearly and prominently discussing any associated material risks or other limitations associated with the potential benefits.[321] Similarly, an advertisement presenting hypothetical performance that includes an offer to provide promptly risk information to a Non-Retail Person, pursuant to proposed rule 206(4)–1(c)(1)(v)(C), would be materially false and misleading if the adviser subsequently failed to make efforts to provide such information upon the Non-Retail Person's request.[322]

We request comment on the proposed conditions to presenting hypothetical performance in advertisements.

• Should we prohibit the presentation of hypothetical performance in any advertisement? Why or why not? Instead of a complete prohibition, should we prohibit the presentation of hypothetical performance, or specific types of hypothetical performance, under specific circumstances? If so, what circumstances? Should we prohibit the presentation of hypothetical performance in Retail Advertisements but not in Non-Retail Advertisements (or vice versa)?

• Should we permit the presentation of hypothetical performance in any advertisement without condition? Why or why not?

• Should we require, as proposed, that advisers adopt and implement policies and procedures designed to ensure that hypothetical performance is relevant to a recipient's financial situation and investment objectives? Would such policies and procedures ensure that hypothetical performance is only provided to those for whom it is relevant? Would providing hypothetical performance only to those for whom it is relevant help prevent such performance from being misleading? Would advisers be able to make the determination that hypothetical performance is relevant?

• Should we consider another standard other than ''relevant'' to a recipient's ''financial situation and investment objectives'' to help protect against hypothetical performance being provided to persons who would be misled by it? For example, should we instead require that such performance be provided only to persons whom the adviser reasonably believes may use such performance in considering whether to hire or retain an adviser and that have sufficient access to analytical and other resources to evaluate or test the assumptions underlying the hypothetical performance so as to make the hypothetical performance not misleading? Alternatively, should we limit the distribution of this performance to persons whom the adviser reasonably believes would use it in evaluating whether to hire or retain the adviser? Alternatively, should we avoid limiting at all the distribution of hypothetical performance, which some investors may find useful?

• Should we instead consider categorical approaches—*e.g.,* should we instead allow hypothetical performance to be provided to Non-Retail Persons in all cases without requiring the adviser to adopt policies and procedures? Should we allow its presentation to Non-Retail Persons but prohibit its presentation to Retail Persons entirely?

• Are there specific disclosures that we should require to decrease the likelihood that hypothetical performance, or specific types of hypothetical performance, would be misleading—*e.g.,* describing the fact that the performance was not generated by actual portfolios of actual clients of the investment adviser and describing the limitations of hypothetical performance? If so, should we identify those and specifically require their disclosure?

• Are there specific disclosures that we should require to decrease the likelihood that hypothetical performance would be misleading to Retail Persons? If so, should we identify those and specifically require those disclosures? Should we require different disclosures for Retail Persons and Non-Retail Persons, or is the tailoring implicitly permitted under the proposed rule's ''sufficient information'' standard enough?

• Should we include any other requirements or conditions for advertisements presenting hypothetical performance, or any specific type of hypothetical performance? What other requirements or conditions and why should we require them?

• Is there another approach that we should consider for hypothetical performance being provided to Retail Persons? Are there any types of hypothetical performance that are sufficiently similar to actual results of a portfolio of an actual client that we should permit their presentation in a Retail Advertisement or their dissemination to Retail Persons without conditions?

• Are the proposed ''calculation information'' and ''risk information'' provisions sufficiently clear based on our description above? Should we require specifically that such information be designed to allow the audience to replicate the hypothetical performance presented? Why or why not?

• Would investment advisers face any compliance challenges in complying with the proposed ''calculation information'' or ''risk information'' provisions? Would there be circumstances in which investment advisers might have to provide proprietary or sensitive information? Should we take those challenges or circumstances into account? If so, how?

• Should we require that the risk information be provided (not just offered to be provided) to Non-Retail Persons as well as to Retail Persons? Conversely, should we allow the calculation information to be only offered to Non-Retail Persons (instead of requiring it to be provided)?

• Under the current rule, have investment advisers taken the same approach that we are proposing with respect to hypothetical performance—*i.e.,* providing or offering to provide specific information? Have investors accepted any such offers or requested any additional information? To what extent and under what circumstances have any such investors been misled by

[320] *See, e.g., supra* footnotes 188–199 and accompanying text.

[321] Proposed rule 206(4)–1(a)(4). For example, if a presentation of hypothetical performance implies that an adviser's operations are structured so that the adviser can update its investment models quickly, then the advertisement must discuss any associated material risks from that implied benefit—*e.g.,* that quickly updating the investment model may result in the adviser over-interpreting recent data and missing subsequent growth that the adviser would have achieved if the model had not been updated.

[322] Proposed rule 206(4)–1(c)(1)(v)(C).

the presentation of hypothetical performance? Have investors who have requested additional performance results included persons other than qualified purchasers and knowledgeable employees?

d. General Request for Comment on Performance Advertising

We believe that the proposed rule's requirements with respect to performance advertising are generally consistent with widely used, internationally recognized standards of performance reporting, such as GIPS. Accordingly, we believe that investment advisers will be able to comply with both the provisions of the proposed rule and the requirements of such standards, without undue burdens. We request comment below on this issue.

- Are our beliefs correct that the proposed rule's requirements are consistent with widely-used, internationally-recognized standards of performance presentation, such as GIPS? Would investment advisers find it difficult or impossible comply with both the provisions of the proposed rule and the requirements of any such standards in order to comply with the proposed rule's requirements? If so, which requirements would create such difficulty or impossibility and how? Should we address any such difficulty or impossibility? If so, how? Should we adopt a more principles-based approach to afford flexibility in the event that such private standards change?

We request general comment on the proposed rule's requirements for performance advertising.

- Are there specific concerns about performance advertising that the proposed rule does not take into account that we should consider? What specific concerns, and how should we take them into account? Conversely, are there provisions of the proposed rule's performance advertising provisions that address concerns you believe to be unfounded?
- Should we consider removing some of the proposed rule's requirements for performance advertising and instead rely on paragraph (a) of the proposed rule and the general anti-fraud provisions of the Federal securities laws to prevent the use of performance advertising that is false or misleading? Why or why not? Are there additional requirements that we should consider including in the proposed rule with respect to performance advertising in order to supplement paragraph (a)? What additional requirements and how would they supplement paragraph (a)?
- Taken as a whole, are the disclosures required by the proposed rule for performance advertising sufficient or insufficient? Are there changes to these disclosures that we should consider in order to make them more useful or meaningful for investors, whether natural persons or institutions? What changes and how would they improve the utility of the disclosures?
- Should we impose on Non-Retail Advertisements presenting performance results the same or similar requirements that the proposed rule imposes on Retail Advertisements? For example, should we require Non-Retail Advertisements to present net performance or to present performance results for certain specified periods of time? Why or why not?
- Should we specify any types of information that advisers may refrain from disclosing when responding to prospective investors seeking the information that must be offered in advertisements? Are advisers concerned that their competitors may seek to acquire such information through requests responding to those offers? Do advisers have any other concerns regarding competition that the proposed rule may cause or should address?

6. Portability of Performance, Testimonials, Third Party Ratings, and Specific Investment Advice

Among the performance results that an investment adviser may seek to advertise are those of portfolios or accounts for which the adviser, its personnel, or its predecessor investment adviser firms have provided investment advice in the past as or at a different entity. In some cases, an investment adviser may seek to advertise the performance results of portfolios managed by the investment adviser before it was spun out from another adviser. Or an adviser may seek to advertise performance achieved by its investment personnel when they were employed by another investment adviser. This may occur, for example, when a portfolio manager or team of portfolio managers leaves one advisory firm and joins another advisory firm or begins a new advisory firm. These predecessor performance results may be directly relevant to an audience when the advertisement offers services to be provided by the personnel responsible for the predecessor performance, even when the personnel did not work during the period for which performance is being advertised for the adviser disseminating the advertisement (the ''advertising adviser'').[323]

However, predecessor performance results achieved by another investment adviser, or by personnel of another investment adviser, may be presented in a false or misleading manner by the advertising adviser.[324] For example, predecessor performance may be misleading to the extent that the team that was primarily responsible for the predecessor performance is different from the team whose advisory services are being offered or promoted in the advertisement, including when an individual who played a significant part in achieving the predecessor performance is not a member of the advertising adviser's investment team.[325] Similarly, predecessor performance may be misleading if the advertisement does not disclose that the predecessor performance was achieved by different personnel, or by a different advisory entity, than the personnel or entity whose services are being offered or promoted. In some cases, the ability of an advertising adviser to present predecessor performance that is not misleading may be limited to the extent that that the advertising adviser lacks access to the books and records underlying the predecessor performance.[326]

Where an adviser selects portfolio securities by consensus or committee decision making, it may be difficult to attach relative significance to the role played by each group member, and so an advertising adviser may face difficulties in deciding how to portray performance results achieved by an adviser's committee in a manner that is not misleading. Predecessor performance results may be misleading where they were achieved by an investment committee at the predecessor adviser, and the investment committee at the advertising adviser does not have a substantial identity of personnel with the old committee.[327]

[323] For purposes of this discussion, ''predecessor performance results'' refers to all situations where an advertisement of an investment adviser presents investment performance achieved by a portfolio that was not advised at all times during the period shown by the investment adviser.

[324] *See* current rule 206(4)–1(a)(5) (prohibiting the publication, circulation, or distribution of any advertisement ''which contains any untrue statement of a material fact, or which is otherwise false or misleading''). We have addressed this concern in the presentation of performance results by RICs. *See* Instruction 4 to Item 4(b)(2) of Form N–1A; Instruction 11 to Item 27(b)(7) of Form N–1A.

[325] *See, e.g.,* Fiduciary Mgmt. Assocs., Inc., SEC Staff No-Action Letter (Feb. 2, 1984).

[326] *See* Rule 204–2(a)(16).

[327] *See, e.g.,* Horizon Letter; *see also* Great Lakes Advisers, Inc., SEC Staff No-Action Letter (Apr. 3, 1992) (stating the staff's views that it may not be misleading for a successor adviser, composed of less than 100 percent of the predecessor's committee, to use the predecessor performance results so long as there is a ''substantial identity'' of personnel) (''Great Lakes Letter'').

Some circumstances under which predecessor performance results are misleading may be addressed through specific provisions we have included in the proposed rule. For example, depending on the facts and circumstances, predecessor performance results may be misleading where they exclude any accounts that were managed in a substantially similar manner, or where they include any accounts that were not managed in a substantially similar manner, at the predecessor firm. These presentations may result in the inclusion or exclusion of performance results in a manner that is neither accurate nor fair and balanced.[328] Predecessor performance results may be misleading where the advertisement omits relevant disclosures, including that the performance results were from accounts managed at another entity. Predecessor performance results also may be misleading where, following an internal restructuring of another adviser, an advertising adviser does not operate in the same manner and under the same brand name that existed before the restructuring.[329] These predecessor performance results may include an untrue or misleading implication about a material fact relating to the advertising adviser.[330]

Accordingly, advertisements presenting predecessor performance would be subject to the requirements imposed by the proposed rule on all advertisements, including paragraph (a), and the more specific performance advertising restrictions.[331] We are requesting comment on whether it would be appropriate to include in the proposed rule additional provisions to address specifically the presentation of predecessor performance results.

Our staff has stated that it would not recommend that the Commission take any enforcement action under section 206 of the Advisers Act or the current rule if an advertising adviser presents performance results achieved at another firm under certain conditions, including on the basis of the adviser's representation that the advertising adviser will keep the books and records of the predecessor firm that are necessary to substantiate the performance results in accordance with rule 204–2.[332] We already require investment advisers to keep copies of all advertisements containing performance data and all documents necessary to form the basis of those calculations.[333] We are considering how the books and records requirements should apply to portability of performance and whether the revised rule should explicitly require advertising advisers to have and keep the books and records of a predecessor firm or consider instead other requirements with respect to the records of performance of a predecessor firm presented in an advertisement. For example, if books and records of a predecessor firm are unavailable to an advertising adviser, it may be possible for the advertising adviser to substantiate the performance of the predecessor firm using information that was publicly available contemporaneously with such performance and verified or audited by or on behalf of the advertising adviser.

We request comment on this aspect of the proposed rule. In particular, we request comment on:

- Do commenters believe that we should include specific provisions in the proposed rule to address the presentation of predecessor performance results? Or do commenters believe that the proposed rule, including the provisions of paragraph (a), will sufficiently prevent the presentation of predecessor performance results that are false or misleading? If we include specific provisions to address the presentation of predecessor performance results, what specific provisions should we include? How would those specific provisions prevent the presentation of predecessor performance results that is false or misleading?
- Should we impose conditions on an advertising adviser seeking to present predecessor performance results achieved at a prior advisory firm? Should we require that the individual or individuals who currently manage accounts at the advertising adviser to have been ''primarily responsible'' for achieving the predecessor performance results at the prior firm? If so, should we specify how ''primary responsibility'' is determined?
- Should we address circumstances in which predecessor performance results were achieved by portfolios managed by a committee (as opposed to an individual) at the prior firm? Should we require that if the portfolios at the predecessor firm were managed by a committee, the accounts at the advertising adviser must be managed by a committee comprising a substantial identity of the membership? Should we define or provide additional guidance regarding the ''substantial identity'' required, or require that the committee comprises a specific percentage or subset of members? Should we establish any specific requirements for how much of a role an individual has to play on the committee at the predecessor firm and on the committee at the advertising adviser?
- Is there any circumstance under which the membership of a committee at a predecessor firm is so different from the membership of a committee at the advertising adviser that any presentation of performance results from the predecessor firm should be prohibited? What are those circumstances?
- Should the proposed rule distinguish between predecessor performance results on the basis of strategy—for example, between fundamental and quantitative strategies? Are presentations of predecessor performance results less likely to be misleading to the extent that those results were generated by use of a proprietary, algorithmic strategy that the advertising adviser ''owns'' and expects to use going forward? Why or why not? Should the proposed rule distinguish between predecessor performance results on the basis of something other than strategy? What basis and why?
- Should we require any similarity between the accounts managed at the predecessor firm and the accounts presented by the advertising adviser—for example, having similar investment policies, objectives, and strategies? A presentation of predecessor performance results could be false or misleading if the accounts managed at the predecessor firm are not sufficiently similar to the accounts that the adviser currently manages such that the prior results would not provide relevant information to the advertising adviser's prospective clients.[334] Should the Commission take this approach and include such provision in the rule? If the Commission were to adopt this approach, should we specify how that

[328] *See* proposed rule 206(4)–1(a)(6).

[329] *See* South State Bank, SEC Staff No-Action Letter (May 8, 2018) (conditioning the staff's statement that it would not recommend enforcement action on representations including, for example, that the successor adviser would operate in the same manner and under the same brand name as the predecessor adviser). For purposes of the discussion in this section II.A.6., we do not consider a change of brand name, without more, by an investment adviser to render its past performance as ''predecessor performance.'' Likewise, a mere change in form of legal organization (*e.g.,* from corporation to limited liability company) or a change in ownership of the adviser would likely not raise the concerns described in this section.

[330] Proposed rule 206(4)–1(a)(3).

[331] Proposed rule 206(4)–1(c). *See also supra* footnote 199 and accompanying text.

[332] *See* Horizon Letter; *see also* Great Lakes Letter, at n.3 (stating that rule 204–2(a)(16) ''applies also to a successor's use of a predecessor's performance data'').

[333] Rule 204–2(a)(16).

[334] *See, e.g.,* Horizon Letter.

similarity should be determined? Should we allow advertising advisers to present any performance results from predecessor firms without requiring that the advertising adviser determine whether the accounts are similar or the results are relevant, and let investors evaluate the relevance themselves? Would this approach be appropriate in Non-Retail Advertisements and not Retail Advertisements? Why or why not?

- Should an investment adviser seeking to present predecessor performance results be required to make any specific representations or disclosures in the advertisement? Or elsewhere?
- Do commenters believe we should consider amendments to the books and records rule to address the substantiation of performance results from a predecessor firm? Do investment advisers encounter any difficulties in accessing and retaining the books and records substantiating the performance results of a predecessor firm? Are there alternative books and records or other information that we could allow advertising advisers to rely on or retain in order to satisfy their obligations under the books and records rule with respect to predecessor performance results? Are there other sources of records that advisers currently rely on to substantiate performance results of a predecessor firm?
- Do investment advisers encounter difficulties in determining who ''owns'' the relevant performance results? That is, are investment advisers able to agree who should be able to advertise the prior performance results from the predecessor firm? How do investment advisers make this determination? Should we adopt requirements to clarify under what circumstances an advertising adviser may present predecessor performance results?
- Should we clarify that an advertising adviser may continue to advertise predecessor performance even if the personnel who achieved the predecessor performance, and who are employed by the advertising adviser, subsequently leave the advertising adviser? Why or why not?

Our proposed rule would permit the use of testimonials and references to specific investment advice given by an investment adviser, unlike the blanket ban on their use under the current rule. As a consequence, similar questions to that of performance portability may arise about the use of testimonials and endorsements referring to a predecessor entity, past third-party ratings, or specific investment advice given at a previous firm. We believe that generally the same framework that advisers apply to whether predecessor performance can be carried forward, could also be applied when analyzing whether testimonials, endorsements, third-party ratings, or specific investment advice applicable to a predecessor entity could be used by an adviser in advertisements.

We request comment on issues related to the use of testimonials, endorsements, third-party ratings, and specific investment advice associated with predecessor entities.

- Should the same framework be used for these purposes as that applicable when analyzing use of predecessor performance? Why or why not? If advisers were not to use the existing performance portability framework, how should we regulate the use of testimonials, endorsements, third-party ratings, and specific investment advice from a predecessor entity?
- Would maintaining books and records to substantiate the applicability and relevance of testimonials, endorsements, third-party ratings, and specific investment advice from a predecessor entity be feasible for advisers?
- Should an adviser that seeks to use testimonials, endorsements, third-party ratings, or specific investment advice from a predecessor entity be required to make any specific disclosures or representations in the advertisement explaining their source, limitations, or relevance?
- Should we include specific requirements in the advertising (or books and records) rule regarding the use of such predecessor information? If so, what should we require?

7. Review and Approval of Advertisements

The proposed rule would require an adviser to have an advertisement reviewed and approved for consistency with the requirements of the proposed rule by a designated employee before, directly or indirectly, disseminating the advertisement, except for advertisements that are: (i) Communications that are disseminated only to a single person or household or to a single investor in a pooled investment vehicle; or (ii) live oral communications that are broadcast on radio, television, the internet, or any other similar medium.[335] We are proposing this requirement because we believe it may reduce the likelihood of advisers violating the proposed rule. We are not proposing to require that investment adviser advertisements be filed with or approved by the Commission staff or a self-regulatory organization. Nonetheless, we believe it is important that investment advisers have a process in place designed to promote compliance with the proposed rule's requirements. Requiring a written record of the review and approval of the advertisement will allow our examination staff to better review adviser compliance with the rule.

The proposed rule would exclude communications that are disseminated only to a single person or household or to a single investor in a pooled investment vehicle from the review and approval requirement. The proposed rule would exclude these one-on-one communications, which may fall within the proposed definition of ''advertisement,'' from the scope of the review and approval requirement to avoid placing a significant burden on an adviser's individual communications with its current or potential investors. For example, an employee of the adviser might otherwise submit each email to a single investor for review before dissemination, to determine whether it is an advertisement, and if so, whether it complies with the proposed rule. We believe this could have an adverse effect on the adviser's business due to the delay in communicating with investors. In addition, we believe that requiring review and approval of each communication could impose significant costs on an adviser because of the staffing requirements such a requirement would entail. However, the other provisions of the proposed rule would continue to apply. For example, an adviser could not provide hypothetical performance to a client in a one-on-one communication unless it complies with the requirements of the proposed rule.[336]

Customizing a template presentation or mass mailing by filling in the name of an individual investor or including other basic information about the investor would not fall within the scope of this exception. In such a case the communication is not sent only to a single person because it is effectively a customized mass mailing.

The proposed rule also would except live oral communications that are broadcast on radio, television, the internet, or any other similar medium from the review and approval requirement. We are excepting live oral communications that are broadcast from the requirement because they are extemporaneous, and therefore they cannot effectively be reviewed and approved in advance. Nonetheless, to the extent live oral communications that

[335] Proposed rule 206(4)–1(d).

[336] *See* proposed rule 206(4)–1(c)(1)(v).

are broadcast are also written or scripted, the scripts would be subject to the review and approval requirement. If a live oral communication that is broadcast is also recorded, and then later disseminated by or on behalf of the adviser, then the broadcast would qualify for the exception, but the recorded communication would not qualify. In addition, any prepared materials, such as slides, used in the live broadcast would not be subject to the exception and must be reviewed.

The proposed rule would allow any designated employee to conduct the review and provide approval. This provision of the proposed rule is intended to provide advisers with the flexibility to assign the responsibilities of advertising reviews to any qualified employee. The reviewer should be competent and knowledgeable regarding the proposed rule's requirements. Advisers may designate one or more employees to provide the required review and approval. We believe that designated employees generally should include legal or compliance personnel of the adviser. In general, we do not believe it would be appropriate for the person who creates the advertisement to be the same person who reviews and approves its use, as such overlap of personnel is likely to reduce the utility and effectiveness of the review requirement. Nonetheless, we recognize that certain small or single-person advisers may not have separate personnel to create an advertisement and review it. We request comment below on potential approaches to the review requirement for such cases.

Under the proposal, similar to new advertisements, updates to existing advertisements would also require review and approval. It is our understanding that the internal policies and procedures of most advisers currently require such reviews for broadly disseminated communications. In complying with the review requirement, advisers may need to expand the scope of existing reviews to account for the additional communications that may be included within the definition of ''advertisement'' under the proposed rule as discussed above.

The proposed rule does not contain separate policy and procedure requirements other than this review and approval requirement.[337] Nonetheless, existing compliance policies and procedures requirements in Advisers Act rule 206(4)–7 would apply to investment adviser advertisements made pursuant to the proposed advertising rule.[338] In adopting rule 206(4)–7, the Commission stated that investment advisers should adopt policies and procedures that address ''. . . the accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements.'' [339] Investment advisers would continue to be required to include policies and procedures designed to prevent violations of the advertising rule in their compliance programs if the proposed rule were adopted.

In considering their compliance policies and procedures, advisers should consider methods of preventing the dissemination of advertisements that might violate the rule. Advisers could document in their policies and procedures the process by which they determine that an advertisement complies with the proposed rule, as well as any significant changes to that process over time. For example, an adviser may wish to document the process by which it determines that advertisements that contain investment recommendations are fair and balanced and consistent with the rule (such as by using objective non-performance based standards) and if it changes that process, may wish to consider documenting the reasons for such changes.

We request comment on our approach to the proposed review and approval requirement.

• As proposed, should we require a designated employee of an investment adviser to review and approve advertisements? Should we require that this review be conducted by only legal or compliance personnel of the adviser? Should we require that only employees of an adviser that are senior management be eligible to be designated as reviewers? Should we permit outside third parties, such as law firms or compliance consultants, to conduct these reviews?

• Should the rule prohibit the same individual who created the advertisement from reviewing and approving it? If so, how would small advisers, which may only have one individual qualified to create and review advertisements, comply with this requirement? Should the rule except them from the approval requirement, similar to the exception under rule 204A–1(d) of the Advisers Act for small advisers with only one access person from having that person approve his or her own personal security investments, provided they keep sufficient records?

• Should we include the proposed one-on-one communications exception to the requirement to review and approve advertisements? Is this necessary for advisers to communicate freely with investors? Is there another way to reduce the burden of reviewing individual communications before dissemination while reducing the likelihood that advisers may violate the proposed rule? Should the exception apply to communications with more than one investor? If so, how many?

• Should we except live oral communications that are broadcast from the review and approval requirement as proposed? Are there any other types of advertisements that we should except from the requirement?

• Should we require any specific compliance procedures in the advertising rule itself in addition to review and approval?

• Should we require that the review and approval process differ or be more or less comprehensive based on the audience that the advertisement is directed towards? If so, how?

8. Proposed Amendments to Form ADV

We are also proposing to amend Item 5 of Part 1A of Form ADV to improve information available to us and to the general public about advisers' advertising practices.[340] Item 5 currently requires an adviser to provide

[337] *Compare* FINRA rule 2210 which requires, in part, members to establish written procedures designed to ensure that communications comply with applicable standards; retail communications (distributed or made available to 25 or fewer retail investors within any 30 calendar-day period) be approved internally, and certain communications must be filed with FINRA at least 10 days prior to their first use. Rule 2210 does not require the review and approval of correspondence. *See* rule 2210(b)–(c).

[338] Rule 206(4)–7 makes it unlawful for an investment adviser to provide investment advice unless the adviser has adopted and implemented written policies and procedures reasonably designed to prevent violation[s] of the Advisers Act and rules that the Commission has adopted under the Act, which would include revised rule 206(4)–1 and its specific requirements. *See* rule 206(4)–7(a). Rule 206(4)–7 also requires investment advisers to review, no less than annually, the adequacy of the policies and procedures and the effectiveness of their implementation, and to designate who is responsible for administering the policies and procedures adopted under the rule. *See* rule 206(4)–7(b)–(c).

[339] *See* Compliance Program Adopting Release, *supra* footnote 33, at 74716.

[340] This section discusses the Commission's proposed rule and form amendments that would affect advisers registered with the Commission. We understand that the state securities authorities intend to consider similar changes that affect advisers registered with the states, who are also required to complete Form ADV Part 1B as part of their state registrations. We will accept any comments and forward them to the North American Securities Administrators Association (''NASAA'') for consideration by the state securities authorities. We request that you clearly indicate in your comment letter which of your comments relate to these items.

information about its advisory business.[341] We propose to add a subsection L (''Advertising Activities'') to require information about an adviser's use in its advertisements of performance results, testimonials, endorsements, third-party ratings, and its previous investment advice.

Specifically, we would require an adviser to state whether any of its advertisements contain performance results, and if so, whether all of the performance results were verified or reviewed by a person who is not a related person.[342] We would also require an adviser to state whether any of its advertisements includes testimonials or endorsements, or includes a third-party rating, and if so, whether the adviser pays or otherwise provides compensation or anything of value, directly or indirectly, in connection with their use.[343] Compensation or anything of value is not limited solely to cash, but could also include non-cash compensation. Finally, we would require an adviser to state whether any of its advertisements includes a reference to specific investment advice provided by the adviser.[344]

Our staff would use this information to help prepare for examinations of investment advisers. This information would be particularly useful for staff in reviewing an adviser's compliance with the proposed amendments to the advertising rule, including the proposed restrictions and conditions on advisers' use in advertisements of performance presentations and third-party statements.

We request comment on the proposed amendments to Part 1A of Form ADV.

- Should we require more or less detailed information about advisers' advertising practices? If so, what additional information should we require, or what should we remove from the disclosure requirement, and why?
- Should we require more information about advisers' use of performance results in advertisements? For example, for advisers that use performance results in advertisements that are verified or reviewed by someone other than a related person, should we require the advisers to provide the name and contact information of such reviewer on a corresponding schedule? Why or why not?
- For advisers that have their performance results verified or reviewed by a person who is not a *related person,* does such verification or review apply to all of the advisers' performance results, or only to some of the performance results? Please explain. Should we require that advisers state if they have any of their results verified by such a third party?
- Should we require advisers to state the particular types of performance results they use in advertisements, such as related performance, hypothetical performance, or another type of performance (and if so, what type of performance)? Should we require them to state to whom they direct specific types of advertisements (for example, Retail Persons or Non-Retail Persons)? Why or why not?
- Should we require advisers to disclose that they provide hypothetical performance to investors? If so, should we require advisers to provide descriptions of such hypothetical performance or any information about how they calculate hypothetical performance?
- Should we require advisers to state whether their use of performance, testimonials, endorsements, third-party ratings, or specific investment advice includes information from predecessor or other firms? If so, should we require any additional information about the predecessor or other firm, such as a name and contact, and an affirmation that such firm permits the adviser's use of the performance results (if applicable) and affirms its accuracy?
- Should we require advisers to state how they advertise performance results (*e.g.,* on social media, through testimonials, endorsements or third-party ratings, seminars, television advertisements, private placement materials, or through periodic client updates)? Why or why not, and if so, should we require advisers to provide more detail about the methods they use to advertise performance results, such as the name of the website or social media platform, or the name of the endorser? Why or why not?
- Should we require an adviser to state any other information about the compensation it provides in connection with the adviser's use of testimonials, endorsements, and third-party ratings in advertisements, such as the amount or range of compensation? If so, what type of information about the compensation should we require, and why? Would such additional information be helpful to investors? Why or why not?
- Should we require advisers to state the approximate percentage of their testimonials, endorsements, or third-party statements in advertisements that are current (within a specific time frame) versus not current (within a specific time frame)? Why or why not, and if so, what should those time frames be?
- Should we require advisers to state how they advertise testimonials, endorsements, third-party ratings, or specific investment advice (*e.g.,* on social media, through seminars, television advertisements, or through periodic client updates)? Why or why not, and if so, should we require advisers to provide more detail about the methods they use to advertise testimonials, endorsements, third-party ratings, or specific investment advice such as the name of the website or social media platform? Why or why not? Should we require any other information, and if so, what types of information should we require?
- Is it clear what ''specific investment advice'' means in the context of the proposed amendment to Form ADV?
- Even though Part 1A of Form ADV currently requires advisers to report information about client referrals, including the existence of cash and non-cash compensation that the adviser or a related person gives to or receives from any person in exchange for a client referral, should we also require additional information about client referrals and solicitation, as discussed *infra* Section II.B? If so, what additional information should we require, and why? For example, should we require all registered investment advisers to include the names of, and other specified information about, their current solicitors on a separate schedule, similar to our requirements for advisers to private funds to provide information about their marketers (including solicitors)?[345] Should we

[341] Exempt reporting advisers (that are not also registering with any state securities authority) are not required to complete Item 5 of Part 1A. Accordingly, our proposed subsection L of Item 5 of Part 1A would not be required for such advisers. *See, e.g.,* Instruction 3 to Form ADV: General Instructions (''How is Form ADV organized'').

[342] Proposed Form ADV, Part 1A, Item 5.L(1). The term ''related person'' would have the meaning currently ascribed to it in the Form ADV Glossary (''Any *advisory affiliate* and any *person* that is under common *control* with your firm.'') Italicized terms are defined in the Form ADV Glossary.

[343] Proposed Form ADV, Part 1A, Item 5.L(2) and (3). The Glossary to proposed Form ADV would define ''testimonial'' as ''any statement of a client or investor's experience with the investment adviser;'' ''endorsement'' as ''any statement by a person other than a client or investor indicating approval, support, or recommendation of the investment adviser;'' and ''third-party rating'' as ''a rating or ranking of an investment adviser provided by a person who is not an affiliated person of the adviser and provides such ratings or rankings in the ordinary course of its business.'' These definitions would be consistent with our proposed amendments to rule 206(4)–1.

[344] Proposed Form ADV, Part 1A, Item 5.L(4).

[345] *See* Section 7.B.(1) (Private Fund Reporting) of Schedule D to Form ADV Part 1A (requiring advisers to private funds to list, among other things,

require advisers to report the amount of compensation paid for referrals (on an aggregate basis, per referral, or based on another metric)? If a firm employs several solicitors, should we only require information about the firm's top 5 (or 10, or another number) solicitors, measured by number of client referrals made in the past year or some other measure, such as assets under management the referrals generate for the adviser? Please explain. Should we require advisers to private funds to provide additional information in Section 7.B of Schedule D of Form ADV about their private fund marketing arrangements? If yes, what additional information should we require, and why?

• Should we require advisers to describe their advertising practices in their Form ADV brochure in addition to, or instead of, the proposed Part 1A subsection L (''Advertising Activities'')? Why or why not, and if so, what information should we require advisers to describe in their brochure about their advertising activities?

B. Proposed Amendments to the Solicitation Rule

We are proposing to amend the solicitation rule, rule 206(4)–3, in part to reflect regulatory changes and the evolution of industry practices since we adopted the rule in 1979. Among other changes we discuss below, we are proposing to expand the rule to cover solicitation arrangements involving all forms of compensation, rather than only cash compensation. It would also apply to the solicitation of existing and prospective clients and investors rather than only to ''clients.'' Our proposal would also eliminate certain existing requirements where the purpose of the requirements can be achieved under other rules under the Act. Specifically, it would eliminate the requirements that the solicitor deliver the adviser's brochure and that the adviser obtain client acknowledgments of the solicitor disclosure. Our proposal would revise the rule's written agreement requirement and solicitor disclosure requirement, the partial exemptions for impersonal investment advice and affiliated solicitors, and the solicitor disqualification provision. It also would provide a conditional carve-out from the provision for certain disciplinary events, and it would add two additional exemptions to the rule for *de minimis* compensation and nonprofit programs. Accordingly, we propose to revise the title of rule 206(4)–3 from ''Cash payments for client solicitations'' to ''Compensation for solicitations.''

1. Scope of the Rule: Who is a Solicitor?

We propose to retain, with certain revisions, the current rule's definition of ''solicitor,'' which is ''any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser.''[346] In a change from the current definition, the proposed definition would also include persons who solicit investors in private funds.[347] As with the current rule, a solicitor might be a firm (such as a broker-dealer or a bank), an individual at a firm who engages in solicitation activities for an adviser (such as a bank representative or an individual registered representative of a broker-dealer), or both. A solicitor may, in some circumstances, because of its solicitation activities, be acting as an investment adviser within the meaning of section 202(a)(11) of the Act, or as a broker or dealer within the meaning of section 202(a)(11) of the Act or section 3(a)(4) or 3(a)(5) of the Exchange Act, respectively. Such person may be subject to statutory or regulatory requirements under Federal law, including the requirement to register as an investment adviser or as a broker-dealer pursuant to the Act or section 15(a) of the Exchange Act, respectively, and/or state law and certain FINRA rules.[348] This is a facts and circumstances determination. Some solicitors may not be acting as investment advisers under the Act as a result of their solicitation activities. Others may be prohibited from registering with the Commission as an investment adviser, such as if they have insufficient assets under management,[349] or they may be able to rely on an exception from registration, such as for certain advisers to private funds.[350] Similarly, a solicitor also may be able to rely on an exception or exemption from broker-dealer registration, including that provided by rule 3a4–1 under the Exchange Act.

Depending on the facts and circumstances, a person providing a compensated testimonial or endorsement in a registered investment adviser's advertisement (a ''promoter'') may also be a solicitor, and both the proposed advertising rule and solicitation rule may apply to a person's promotional activities. In our view, relevant considerations might include compensation (*e.g.,* incentive-based compensation such as payment per referral would likely mean the promoter is also a solicitor); communication control (*e.g.,* the less control an adviser has over the content or dissemination of an promoter's communication, the more likely the promoter is also a solicitor); and the extent to which the referral to the adviser is directed to a particular client or private fund investor. For example, if the adviser pays a third-

the name of their marketer (including any solicitor), whether the marketer is a related person of the advisers, whether the marketer is registered with the Commission, the location of the marketer's office used principally by the private fund, whether or not the marketer markets the private fund through one or more websites, and if so, the website address(es)).

[346] Rule 206(4)–3(d)(1); proposed rule 206(4)–3(c)(4). Depending on the facts and circumstances, a person providing advice as to the selection or retention of an investment adviser may be an ''investment adviser'' within the meaning of section 202(a)(11) of the Act and may also have an obligation to register under the Act. Accordingly, we are proposing to no longer take the position, as in 1979 when the Commission adopted the rule, that ''a solicitor who engages in solicitation activities in accordance with paragraph (a)(2)(iii) of the rule . . . will be, at least with respect to those activities, an associated person of an investment adviser and therefore will not be required to register individually under the Advisers Act solely as a result of those activities.'' 1979 Adopting Release, *supra* footnote 27. We also stated in the 1979 Adopting Release that ''[t]he staff of the Commission is prepared to consider no action inquiries regarding the registration of solicitors.'' *Id.* Subsequently, our staff has indicated in staff no-action letters that it would not recommend enforcement action if a solicitor performing solicitation activities pursuant to the solicitation rule did not register as an ''investment adviser'' under the Act. *See, e.g.,* Cunningham Advisory Services, Inc., SEC Staff No-Action Letter (Apr. 27, 1987) and Koyen, Clarke and Assoc. Inc., SEC Staff No-Action Letter (Nov. 10, 1986) (in both of these staff no-action letters, the staff cited the Commission's statement quoted in the text accompanying this footnote as support for the staff's position that would not recommend enforcement action to the Commission if each solicitor proceeded as outlined in its letter without registering as an investment adviser). *See also* Charles Schwab & Co., SEC Staff No-Action Letter (Dec. 17, 1980) (solicitor's incoming letter to the staff referenced the Commission's statement quoted to in the text accompanying this footnote to support the solicitor's argument that it was not required to register as an adviser, and the Commission staff stated that it would not recommend enforcement action to the Commission if the solicitor proceeded as outlined in its letter without registering as an investment adviser). As discussed in section II.D., staff in the Division of Investment Management is reviewing staff no-action and interpretative letters to determine whether any such letters should be withdrawn in connection with any adoption of this proposal. If the rule is adopted, some of the letters may be moot, superseded, or otherwise inconsistent with the rule and, therefore, would be withdrawn.

[347] *See infra* section II.B.3.

[348] *See* Standard of Conduct Release, *supra* footnote 23 (stating that ''[a]n adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.'').

[349] *See* section 203A of the Act. These advisers may be required to register, instead, with one or more states, or they may be exempt from the prohibition, such as advisers who would be required to register in 15 or more States. *See* rule 203A–2(d).

[350] *See* sections 203(b) and (l) under the Act, as well as rules 203(l)–1 and rule 203(m)–1.

party promoter per referral to engage in a largely unscripted social media campaign to promote the adviser's services, or pays such a person to review and provide its view of the adviser's services on a blog, website, or social media page (*e.g.,* a social media ''influencer''), we would consider the promoter to be providing an endorsement and acting as a solicitor and would apply both rules, including the proposed advertising rule's general prohibitions of certain advertising practices and its additional tailored requirements for testimonials and endorsements.[351] We believe that, as a practical matter, an adviser subject to both rules in such a situation would substantially satisfy its advertising rule disclosure obligation for testimonials and endorsements by adhering to the solicitation rule disclosure requirement (*e.g.,* the requirement to disclose the solicitor's compensation).[352] The overall effect, therefore, would be to apply a heightened set of safeguards where someone providing an endorsement crosses the line into solicitation. We believe heightened safeguards would generally be appropriate for a solicitation because a solicitor's incentives to defraud an investor would be greater than a promoter's.[353] This is because a solicitor typically will receive compensation based on the referrals made, while the compensation to a promoter for an advertisement containing an endorsement or testimonial may be less likely based on such incentive compensation.

We request comment on the above, particularly:

• Should the rule generally retain the current definition of ''solicitor,'' as proposed, with some modifications to apply to persons who solicit investors in certain types of pooled investment vehicles, as discussed below? Why or why not? If not, how should the rule define ''solicitor''? Have any interpretive issues arisen regarding the current rule's definition that we could clarify? If so, what are they and how should we address them?

• What factors or considerations should apply when evaluating a promoter's (such as a social media influencer's) status as either an endorser or solicitor or both, and why? Do commenters agree that relevant considerations should include compensation and communication control? Should we also consider the extent to which a communication is targeted to a particular investor? Why or why not?

• Should we modify the definition of ''solicitor'' so that it is limited to persons whose solicitation activities are directed at specific investors (*e.g.,* through one-on-one meetings and personalized communications)? Why or why not? Should we modify the definition of ''solicitor'' so that is limited to persons to whom the adviser provides incentive-based compensation, directly or indirectly, as compensation for solicitation activities? Why or why not? Should we add both of these modifications to the rule? Do these types of solicitations present greater conflicts of interest for the solicitor than other solicitation arrangements, necessitating greater disclosure to the investor? Should we distinguish testimonials and endorsements under the proposed advertising rule from solicitations under this proposed rule? If so, how?

• For compensated solicitation arrangements that would also be subject to the proposed advertising rule, would the application of both rules together result in any conflicting obligations or otherwise create practical difficulties in compliance with the rules? Or would advisers be able to leverage their compliance with one rule to satisfy the other rule's requirements?

2. Expanding the Rule To Address All Forms of Compensation

Rule 206(4)–3 currently prohibits an adviser from paying a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless the adviser complies with the terms of the rule.[354] The proposed rule would continue to apply to cash payments to a solicitor, including a percentage of assets under management, flat fees, retainers, hourly fees and other methods of cash compensation.

The proposed rule would also apply to non-cash compensation provided to solicitors—an adviser would be prohibited from paying a solicitor *any* form of compensation, directly or indirectly, for any solicitation activities unless the adviser complies with the terms of the rule.[355] Since the adoption of the current rule, we have gained a broader understanding of the different types of compensation that advisers use in referral arrangements, including compensation for referring investors to private fund advisers.[356] For example, advisers may direct client brokerage to reward brokers that refer them investors.[357] In addition, other solicitation arrangements, such as refer-a-friend programs in which advisers compensate current investors to solicit other investors, can involve both cash and non-cash compensation.[358] The provision of non-cash compensation for referrals creates the same conflicts of interest as cash compensation for referrals—the solicitor has an economic interest in steering the investor to the adviser and may be biased by this interest. We believe that investors should be made aware of the solicitor's conflict of interest regardless of the form of compensation.[359]

[351] *See supra* section II.A.4 for a discussion of how an adviser may satisfy the disclosure requirements applicable to third-party statements and ratings in the context of a third-party promoters.

[352] The proposed solicitation would generally require that either the adviser or solicitor deliver the solicitor disclosure. *See infra* section II.B.4. If the solicitor (and not the adviser) delivers the solicitor disclosure, the adviser itself would still be required to make the disclosures required under the proposed advertising rule for testimonials and endorsements to the extent that the solicitor's referral also constitutes a testimonial or endorsement.

[353] *But see* section II.B.7.c (discussing the proposed exemption for *de minimis* compensation).

[354] Rule 206(4)–3(a).

[355] Proposed rule 206(4)–3(a) (''As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4), it is unlawful for an investment adviser that is registered or required to be registered under section 203 of the Act to compensate a solicitor, directly or indirectly, for any solicitation activities, unless the investment adviser complies with paragraphs (1) through (3) of [paragraph (a)].'').

[356] We now require advisers to report to the Commission, and to disclose to clients, the existence of any cash or non-cash compensation they provide for client referrals, including sales awards or other prizes. *See* Item 8.H of Form ADV, Part lA; Item 14 of Form ADV, Part 2A. In addition, registered investment advisers that report to the Commission on Form ADV information about their private funds, are required to report information about marketers used for such private funds (*e.g.,* placement agents, consultants, finders, introducers, municipal advisers, other solicitors, or similar persons), but this information does not include the compensation paid to such marketers. *See* Item A.28 of Section 7.B.(1) of Schedule D to Form ADV Part 1A.

[357] In 1979 when we adopted the rule, we limited the rule to cash payments, expressly reserving judgment about then-emerging arrangements under which broker-dealers might offer investment advisers certain services, including client referrals, in exchange for the adviser directing client trades to the broker-dealer. *See* 1978 Proposing Release, *supra* footnote 27, at text accompanying n.3; 1979 Adopting Release, *supra* footnote 27, at n.6 and accompanying text. Advisers are currently required to disclose to clients in the Form ADV brochure if they consider, in selecting or recommending broker-dealers, whether they or a related person receives client referrals from a broker-dealer or third party. *See* Item 12.A.2 of Form ADV Part 2A.

[358] In refer-a-friend programs, advisers often provide soliciting investors cash and non-cash compensation such as free or lower-fee investment advisory services, investment adviser subscription services, and gift cards. However, we are proposing a *de minimis* exemption, as discussed below, which would exempt qualifying refer-a-friend arrangements from the rule.

[359] Concerns underlying non-cash compensation in the context of sales activity are also reflected in other Commission rules. *See, e.g.,* Regulation Best Interest, Release No. 34–86031 (June 5, 2019)

The rule would, therefore, be applicable to non-cash compensation, including, but not limited to, directed brokerage, sales awards or other prizes, training or education meetings, outings, tours, or other forms of entertainment, and free or discounted advisory services.[360] Compensation could also include the adviser providing investment advice that directly or indirectly benefits the solicitor. For example, if the solicitor is a broker-dealer or affiliated with a broker-dealer, an adviser's payment for solicitation could be the adviser's recommendation that its investors purchase the solicitor's proprietary investment products or products that the adviser knows have revenue sharing or other pecuniary arrangements with the solicitor or its affiliate, if the adviser directly or indirectly makes these recommendations in exchange for the solicitor's solicitation activities. Broker-dealers or dual registrants that receive brokerage for solicitation of client accounts in wrap fee programs that they do not sponsor would be subject to the proposed solicitation rule if they solicit those clients to participate in the wrap fee program. Compensation provided by the adviser may occur before or after the solicitor engages in its referral activities, but regardless of when the compensation for solicitation is provided, such compensation would be within the scope of the proposed rule.

We request comment on our proposed treatment of compensation under the solicitation rule.

- Should the rule be extended to cover all forms of compensation (including non-cash), as proposed? Should some forms of non-cash compensation be excepted from the proposed rule? If so, which ones and why?
- Are there any forms of non-cash compensation paid for investor solicitations that should be specifically prohibited under the rule, or subject to additional conditions (in lieu of or in addition to the proposed rule's requirements)? If so, which forms of non-cash compensation should be prohibited under the rule, and/or what conditions should apply to their use in solicitations for investors?
- Should the rule define ''compensation,'' or include examples of direct and indirect compensation for solicitation activities? If so, what should the definition include, and what examples should we include?
- How should the rule apply to an adviser that directs client brokerage in exchange for client referrals? Should the proposed rule apply any additional conditions in these circumstances?
- Does the proposed rule clearly distinguish compensation that is for solicitation from ordinary compensation an adviser pays to a broker-dealer for *bona fide* execution services for an adviser's clients and is unrelated to a solicitation arrangement between the adviser and the broker-dealer? If not, how should the rule clarify this distinction?
- Should the rule include any cap on the amount of compensation (cash or non-cash) paid to solicitors, and if so, what should that cap be? Why or why not? If so, should such a cap vary depending on the type of investor solicited (such as a Retail Person or a Non-Retail Person), or the type of compensation arrangement? For example, should there be a cap on the percentage of assets under management an adviser may pay a solicitor for solicitation, or an absolute cap per solicitation arrangement in terms of dollar amount, or both, and if so, what should they be? Should there be a cap on the amount of compensation for the solicitation of investors in private funds that is different from a cap on the amount of compensation for advisory clients, and if so what should they be? Should the rule include a cap on, or any other parameters regarding, the length of time over which they are paid (such that, for example, solicitors do not continue to receive fees even after they are no longer in business as a solicitor, or after they become subject to disciplinary action that would result in their disqualification as a solicitor under the rule)?

3. Compensation for the Solicitation of Existing and Prospective Investors

Our proposal would expand the scope of the rule to the solicitation of existing and prospective private fund investors.[361] We believe this would increase protections to such investors primarily by making them aware of a solicitor's financial interest in the investor's investment in a private fund and prohibiting the use of disqualified solicitors under the proposed rule. While investors in private funds may often be financially sophisticated, they may not be aware that the person engaging in the solicitation activity may be compensated by the adviser, and we believe investors in such funds should be informed of that fact and the related conflicts.

Our proposal to apply the solicitation rule to investors in private funds, and not just to the adviser's clients, which are generally the private funds themselves, would be consistent with the proposed advertising rule.[362] Similar to the scope of our proposed advertising rule, the proposed amendments would not apply the solicitation rule to solicitations of existing and prospective investors in RICs and BDCs.[363] Unlike for private funds, the primary policy goal of the proposed solicitation rule is already satisfied by other regulatory requirements applicable to RICs and BDCs: Prospective investors in RICs and BDCs sold through a broker-dealer or other financial intermediary already receive disclosure about the conflicts of interest that may be created as a result of the fund or its related companies paying the intermediary for the sale of its shares and related services.[364]

(''Regulation Best Interest Release'') (adopting rule 15*l*–1 under the Exchange Act, requiring broker-dealers to establish written policies and procedures reasonably designed to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or the sale of specific types of securities within a limited period of time, noting that these compensation practices create high-pressure situations for associated persons to increase the sales of specific securities or specific types of securities within a limited period of time and thus compromise the best interests of their retail customers).

[360] We would not consider attendance at training and education meetings, including company-sponsored meetings such as annual conferences, to be non-cash compensation, provided that free attendance at these meetings or trainings is not provided in exchange for solicitation activities. For example, if free attendance at a conference is conditioned upon a solicitor referring a certain number of investors to an investment adviser, such attendance would be non-cash compensation. Advisers already are required to identify non-cash referral arrangements pursuant to rule 206(4)–7, the compliance rule, and advisers' disclosure obligations. *See, e.g.* Item 8.H (1) of Form ADV, Part 1A (requiring advisers to disclose whether they or any related person, directly or indirectly, compensates any person that is not an employee for client referrals, and instructing advisers to consider all cash and non-cash compensation that the adviser or a related person gave to or received from any person in exchange for client referrals, including any bonus that is based, at least in part, on the number or amount of client referrals).

[361] *See* proposed rule 206(4)–3(c)(2)–(4).

[362] *See supra* footnote 66 (citing *Goldstein* v. *SEC,* 451 F.3d 873 (D.C. Cir. 2006)); *see also* Mayer Brown LLP, SEC Staff No-Action Letter (Jul. 28, 2008) (Commission staff stated, in the context of stating it would not recommend enforcement action under rule 206(4)–3, the staff's view that the cash solicitation rule generally does not apply to a registered investment adviser's cash payment to a person solely to compensate that person for soliciting investors or prospective investors for, or referring investors or prospective investors to, an investment pool managed by the adviser because such an investor is not a ''client'').

[363] *See supra* footnote 63 and accompanying text. The advertising rule's proposed RIC and BDC exclusion would not apply to communications that are not subject to rule 156 or 482. *See supra* section II.A.2.c.iii.

[364] *See* Item 8 of Form N–1A; *see also* FINRA Rule 2341(l)(4) (generally prohibiting member firms from accepting any cash compensation from an

Continued

Moreover, we believe RIC and BDC investors are typically sought through advertisements or investment advice, each of which is already subject to other regulatory requirements.[365] Finally, we believe that harmonizing the scope of the solicitation rule with the advertising rule to the extent possible should ease compliance burdens.

We request comment below on whether the proposed rule should apply to the solicitation of some or all investors in pooled investment vehicles:

- Should the proposed rule apply to solicitation of investors in private funds? Why or why not? If we do not apply the solicitation rule to solicitations for investments in private funds, would section 206(4) of the Act and rule 206(4)–8, together with section 17(a) of the Securities Act and section 10(b) of the Exchange Act and rule 10b–5 thereunder, sufficiently protect investors that are solicited to invest in private funds to the extent that section 206(4) and rule 206(4)–8 may not apply to the solicitation?[366] Why or why not?
- If we include solicitation of investors in private funds in the proposed solicitation rule, in order to comply with the proposed rule, either the solicitor or the adviser would deliver the solicitor disclosure directly to current and prospective investors in private funds and the solicitation arrangement would be subject to the proposed rule's disqualification provisions. Are there other conditions that we should impose on such solicitations?
- Should we further extend the requirements of the proposed rule to apply to solicitation activities with respect to RICs and BDCs? Why or why not?
- Should the proposed rule apply to other types of pooled investment vehicles, such as funds that are excluded from the definition of ''investment company'' by reason of section 3(c)(5) of the Investment Company Act or rule 3a–7 thereunder?[367] Why or why not?

4. Solicitor Disclosure

Proposed rule 206(4)–3 would prohibit an adviser from compensating solicitors unless the adviser and solicitor have, in the written agreement, designated the solicitor or the adviser to provide to investors at the time of any solicitation activities (or in the case of a mass communication, as soon as reasonably practicable thereafter), a separate disclosure containing specified information (the ''solicitor disclosure'').[368] The proposal would require that the solicitor disclosure state: (A) The name of the investment adviser; (B) the name of the solicitor; (C) a description of the investment adviser's relationship with the solicitor; (D) the terms of any compensation arrangement, including a description of the compensation provided or to be provided to the solicitor; and (E) any potential material conflicts of interest on the part of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement.[369] It would also require disclosure of the amount of any additional cost to the investor as a result of solicitation.[370]

This proposed disclosure is derived from the current rule's required disclosure.[371] However, it would include a new requirement to disclose any potential material conflicts of interest on the part of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement. In addition, unlike the current rule, the proposed rule would permit either the solicitor or the adviser to deliver the solicitor disclosure, rather than requiring that the solicitor deliver it, provided the written agreement designates the party responsible for delivering the disclosure. We are also proposing to remove the current rule's requirement that the solicitor disclosure be ''written.'' These proposed changes are discussed below.

When we adopted the cash solicitation rule, we noted our belief that separate solicitor disclosure was necessary to ensure that the investor's attention would be directed to the fact that the adviser pays the solicitor a cash referral fee and the incentives it may create.[372] We continue to believe that separate, targeted disclosure of the salient terms of the compensated arrangement provided at the time of the solicitation, would draw the investor's attention to the solicitor's bias in recommending an adviser directly or indirectly compensating it for the referral. While advisers themselves are required to disclose to clients their compensation arrangements, including compensation for client referrals and the related conflicts of interest, we believe that the separate solicitor disclosure to investors would put investors on notice of the solicitor's conflict of interest in the compensated solicitation arrangement.[373]

We support firms wishing to use electronic and recorded media in preparing disclosure for investors, including electronic formatting and graphical, text, audio, video, and online features.[374] Under our proposal, if the solicitor disclosure states the information required by the proposed rule, it could be presented in a written format or any other electronic or

investment company, an adviser to an investment company, a fund administrator, an underwriter or any affiliated person (as defined in section 2(a)(3) of the Investment Company Act) of such entities unless such compensation is described in a current prospectus of the investment company). For RICs and BDCs not sold through an intermediary, such as funds purchased directly by investors, the purchasing investors would not be ''referred'' or ''solicited'' and thus the solicitation rule would be inapplicable.

[365] *See supra* footnote 7 (discussing rules 156 and 482); *see also* Standard of Conduct Release, *supra* footnote 23.

[366] *See supra* footnote 67and accompanying text (discussing rule 206(4)–8, which prohibits advisers from (i) making false or misleading statements to investors or prospective investors in hedge funds and other pooled investment vehicles they advise, or (ii) otherwise defrauding these investors or prospective investors).

[367] 15 U.S.C. 80a–3(c)(5)(C). Section 3(c)(5)(C) of the Investment Company Act generally excludes from the definition of ''investment company'' any person who is primarily engaged in, among other things, ''purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.'' The exclusion provided by section 3(c)(5)(C) sometimes is used by issuers of mortgage-backed securities. *See generally* Companies Engaged in the Business of Acquiring Mortgages and Mortgage-Related Instruments, Release No. IC–29778 (Aug. 31, 2011) [76 FR 55300 (Sept. 7, 2011)] (concept release and request for comment on interpretive issues under the Investment Company Act), at nn.4 and 5. Rule 3a–7 provides that certain issuers of asset-backed securities are not investment companies for purposes of the Investment Company Act.

[368] Proposed rule 206(4)–3(a)(1)(iii). This section discusses the disclosure component of the proposed rule's written agreement requirement (other than disclosure of applicable disciplinary events). *See infra* sections II.B.5 (discussing the other components of the proposed rule's written agreement requirement); and II.B.8 (discussing the proposed rule's disqualification provisions).

[369] Proposed rule 206(4)–3(a)(1)(iii).

[370] Proposed rule 206(4)–3(a)(1)(iii)(F).

[371] Rule 206(4)–3(a)(2)(iii)(A)(3) and (b).

[372] 1979 Adopting Release, *supra* footnote 27, at n.14.

[373] *See, e.g.,* Item 14 of Form ADV Part 2A (requiring advisers to disclose to advisory clients information about their referral arrangements, including a description of the arrangement and the compensation); Item 12 (requiring advisers to disclose to advisory clients their conflicts of interest regarding brokerage for client referrals); *see also* Item 10.C Form ADV Part 2A (requiring advisers to disclose to advisory clients their conflicts of interest regarding certain relationships with related persons). Advisers are not required to deliver Form ADV to private fund investors that are not otherwise advisory clients. Therefore, private fund investors may not receive the information required in these items of Form ADV. However, to satisfy advisers' obligations as fiduciaries or address potential liabilities under the antifraud provisions of the securities laws, advisers may also need to disclose to clients and private fund investors information not specifically required by Part 2 of Form ADV or in more detail than the brochure items might otherwise require.

[374] *See* Form CRS Release, *supra* footnote 227, at n.144 and accompanying text.

recorded media format.[375] Irrespective of the format, however, the adviser would be required, under the Act's books and records rule, to make and keep true, accurate and current copies of the solicitor disclosure delivered to investors under the solicitation rule. Accordingly, under the proposed rule the solicitor disclosure could not be delivered orally unless the oral disclosure is recorded and retained.

Our proposal would continue to require that the disclosure be separate. Because solicitors may prefer to deliver multiple communications to investors at once, we believe that this requirement would preserve the salience and impact of the disclosure to investors. Under our proposed rule, therefore, a solicitor could deliver the required solicitor disclosure with other communications, provided that the content and presentation of the solicitor disclosure is not combined with other content, such as any legal disclaimers and marketing messages. For example, a firm could deliver a solicitor disclosure to an investor via an email that contains other information by attaching the solicitor disclosure as a separate attachment. However, it would not be effective disclosure to merely include a hyperlink to disclosures available elsewhere.

We are proposing to permit either the adviser or the solicitor to deliver the solicitor disclosure, rather than requiring the solicitor to deliver the disclosure, provided that the written agreement designates the party responsible for its delivery. We believe that this provision would continue to promote investor protection, while providing firms with greater flexibility in meeting the rule's requirements. It would place the fact of the solicitor's interest in front of the investor at the time the investor is solicited so that the investor is provided the necessary tools to evaluate any potential bias on the part of the solicitor.

The proposed rule would require the solicitor disclosure to include the investment adviser's name, the solicitor's name, and a description of the investment adviser's relationship with the solicitor.[376] The current rule requires similar disclosures.[377] We are proposing these requirements because they provide important information and context to investors. The name of the adviser is a key part of any solicitation: Without disclosing the adviser's name, investors would not know to whom they are being referred. The name of the solicitor is important so the investor can seek to assess the reputation or other qualifications of the solicitor. Disclosure of the relationship between the adviser and the solicitor is important to give the investor context—that—when combined with the other proposed disclosures about the compensated nature of the solicitation—would inform investors about the solicitor's bias in referring the adviser. For example, this disclosure would inform an investor that the solicitor is an employee of the adviser, or an employee or person associated with the adviser's affiliate, or is an unaffiliated third party, as applicable in each case. If the solicitor is a current client, as for example in refer-a-friend solicitation arrangements that would exceed the proposed *de minimis* exemption, the solicitor disclosure would need to state this fact.

The proposed rule would also require disclosure of the terms of any compensation arrangement, including a description of the compensation provided or to be provided to the solicitor.[378] The current rule requires similar disclosure.[379] As required under the current rule, if a specific amount of cash compensation were being paid, that amount would be required to be disclosed.[380] As we stated when we adopted the rule and as we would continue to require for cash compensation: ''if, instead of a specific amount, the solicitor's compensation was to take the form of a percentage of the total advisory fee over a period of time, that percentage and the time period would have to be disclosed.'' [381] Furthermore: ''[i]f all, or part, of the solicitor's compensation is deferred or is contingent upon some future event, such as the client's continuation or renewal of the advisory relationship or agreement, such terms would also have to be disclosed.'' [382] For compensation that is non-cash, the solicitor disclosure should describe the terms of any compensation arrangement, including a description of the compensation provided or to be provided to the solicitor. If the value of the non-cash compensation is readily ascertainable, the solicitor disclosure generally should include that amount. We discuss examples below.

We believe that disclosure of the terms of the compensation, including a description of the compensation provided or to be provided to the solicitor, would be important to convey to the investor the solicitor's incentive to refer it to the adviser, whether the compensation is cash or non-cash. The incentive to solicit investors is often more or less material to an investor's evaluation of the referral depending on the type and magnitude of the compensation. Solicitors that receive little compensation may have less incentive to make referrals than a solicitor that receives higher compensation for the referrals. The incentive might also vary based on the structure of the compensation arrangement. A solicitor that receives a flat or fixed fee from an adviser for a set number of referrals might have a different incentive in referring to the adviser than a solicitor that receives a fee, such as a percentage of the investor's assets under management, for each investor that becomes a client of, or an investor with, the adviser. Furthermore, trailing fees (*i.e.,* fees that are continuing) that are contingent on the investor's relationship with the adviser continuing for a specified period of time present additional considerations in evaluating the solicitor's incentives. The proposed rule's requirement to disclose ''the terms of any compensation arrangement, including a description of the

[375] If the disclosure is made in writing, we have stated that an ''in writing'' requirement could be satisfied either through paper or electronic means consistent with existing Commission guidance on electronic delivery of documents. *See* Regulation Best Interest Release, *supra* footnote 359, at text accompanying footnotes 499–500. If delivery of the solicitor disclosure is made electronically, it should be done in accordance with the Commission's guidance regarding electronic delivery. *See* Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Release No. 34–37182 (May 9, 1996) [61 FR 24644 (May 15, 1996)]; *see also* Use of Electronic Media, Release No. 34–42728 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)]; and Use of Electronic Media for Delivery Purposes, Release No. 34–36345 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)]. *See also* Form CRS Release, *supra* footnote 227, at nn.678 and 153 and accompanying text.

[376] Proposed rule 206(4)–3(a)(1)(iii)(A)–(C).

[377] The current rule requires disclosure of the name of the solicitor; the name of the investment adviser; and the nature of the relationship, including any affiliation, between the solicitor and the investment adviser. Rule 206(4)–3(b)(1)–(3).

[378] Proposed rule 206(4)–3(a)(1)(iii)(D). The appropriateness of the compensation should be determined by the adviser, in light of the fiduciary duties an adviser owes its clients, based upon a general standard of reasonableness under the circumstances. *See, e.g.,* Mid-States Capital Planning, Inc. SEC Staff No-Action Letter (pub. avail. Apr. 11, 1983); Shareholder Service Corporation SEC Staff No-Action Letter (pub. avail. Feb. 3, 1989).

[379] The current rule requires that the solicitor disclosure contain a statement that the solicitor will be compensated for his solicitation services by the investment adviser, and the terms of such compensation arrangement, including a description of the compensation paid or to be paid to the solicitor. Rule 206(4)–3(b)(4) and (5).

[380] 1979 Adopting Release, *supra* footnote 27, at text accompanying nn.15 and 16.

[381] *Id.*

[382] *Id.*

compensation provided or to be provided to the solicitor'' should include, for trailing fee arrangements, disclosure of not only the fact that the solicitor continues to be compensated after the investor becomes a client of, or investor with, the adviser, but also the period of time over which the solicitor continues to receive compensation for such solicitation. A longer trailing period can present a greater incentive to solicit the investor, as a solicitor may be more inclined to refer an investor that will continue to pay the solicitor for a longer period of time.

In some directed brokerage arrangements, the solicitor and the adviser have arranged for the adviser to direct brokerage to the solicitor as compensation for solicitation of investors for, or referral of investors to, the adviser. In these cases, the solicitor disclosure should state the terms of this arrangement, including a description of the compensation provided or to be provided to the solicitor. As part of the disclosure of the terms of the compensation, the solicitor disclosure should state the range of commissions that the solicitor charges for investors directed to it by the adviser. Furthermore, if the solicitation is contingent upon the solicitor receiving a particular threshold of directed brokerage (and other services, if applicable) from the adviser, the disclosure should say so. Additional disclosure would be required, for example, if the solicitor and the adviser agree that as compensation for the solicitor's solicitation activities on behalf of the adviser, the adviser's directed brokerage activities would extend to other investors such as the solicited investor's friends and family.

In refer-a-friend solicitation arrangements that would be subject to the proposed rule, the compensation component of the solicitor disclosure would include the amount the solicitor receives per solicitation (*e.g.,* $10 or an equivalent gift card). The proposed rule's requirement to disclose ''the terms of any compensation arrangement, including a description of the compensation provided or to be provided to the solicitor'' should include, for refer-a-friend and other solicitation arrangements, disclosure of the time at which the solicitor would receive compensation for solicitation activities (*e.g.,* upon solicitation of the investor or upon the solicited investor becoming a client of, or an investor with, the adviser).

The solicitor disclosure would be required to include compensation that the adviser provides directly or *indirectly* to the solicitor for any solicitation activities.[383] For example, if an individual solicits an investor, and the adviser compensates another person for such solicitation (such as an employer or another entity that is associated with the individual), the solicitor disclosure would need to include this compensation. If a solicitor, such as a broker-dealer, refers investors to advisers that recommend the solicitor's or its affiliate's proprietary investment products or recommend products that have revenue sharing or other pecuniary arrangements with the solicitor or its affiliate, the solicitor disclosure should say so.[384] Regardless of whether the adviser enters into a solicitation agreement with an individual or the individual's firm, compensation to the firm for solicitation would constitute compensation for solicitation under the rule, as it would be likely to affect the solicitor's salary, bonus, commission or continued association with the firm.

Our proposal would newly require that the solicitor disclosure specifically include any potential material conflicts of interest of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement. Therefore, in addition to stating the facts that give the solicitor an incentive to solicit the adviser (*e.g.,* that the solicitor is compensated, the terms and description of the compensation, and the relationship between the solicitor and the adviser), the solicitor disclosure would also state that such incentives present a conflict of interest for the solicitor. We believe that this addition would enhance the solicitor disclosure by directly stating that there is a conflict of interest. It would alert the investor of the relevant conflict of interest in the solicitation arrangement at the time of solicitation or, in the case of a mass communication, as soon as practicable thereafter.[385]

For example, when advisers direct brokerage as compensation for solicitation, it presents a conflict of interest for the solicitor.[386] The solicitor's conflict is present to varying degrees in many types of directed brokerage referral arrangements, such as when the solicitation is contingent upon a specified amount (*e.g.,* certain thresholds) of directed brokerage, and when the broker-dealer more generally considers the receipt of directed brokerage as the primary factor or one of many factors that motivate it to refer investors to an adviser. Similarly, a solicitor associated with a commercial bank may refer investors in exchange for the adviser's referral of other investors to the firm's banking services, which is also a conflict of interest for the solicitor.

Other types of solicitation relationships between solicitors and advisers can also create conflicts of interest for the solicitor that would need to be disclosed under the proposed solicitor disclosure. For example, a broker-dealer that is a solicitor may refer investors to advisers that compensate it for the referrals by recommending the solicitor's proprietary investment products or products that have revenue sharing or other pecuniary arrangements with the solicitor.[387] This solicitation arrangement would be a conflict of interest for the solicitor that would be required to be disclosed in the solicitor disclosure.

Our proposal would also require disclosure of the amount of any additional cost to the investor as a result of solicitation.[388] This provision would revise the current rule's requirement that the solicitor state whether the client will pay a specific fee to the adviser in addition to the advisory fee, and

[383] *See* proposed rule 206(4)–3(a), stating that ''As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4), it is unlawful for an investment adviser that is registered or required to be registered under section 203 of the Act to compensate a solicitor, *directly or indirectly,* for any solicitation activities, unless the investment adviser complies with paragraphs (1) through (3) [of paragraph (a)].'' (emphasis added).

[384] *See also* Standard of Conduct Release, *supra* footnote 23, at 23 (''an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.'').

[385] Information about an adviser's conflict of interest is required to be disclosed in the adviser's brochure, which is provided to the client prior to entering into an investment advisory relationship with the adviser. *See supra* footnote 373 (referencing the Form ADV brochure required disclosures about compensated referral arrangements, including with respect to conflicts of interests). We believe it is important to state the solicitor's conflict of interest in the solicitor disclosure.

[386] The Commission adopted changes to an adviser's brochure in 2010 to require additional disclosure about the practice of using directed brokerage, including disclosure about the conflicts of interest it creates. *See* 2010 Form ADV Amendments Release, *supra* footnote 34, at n.143 and accompanying text (new required disclosure included that the adviser may have an incentive to select or recommend a broker-dealer based on its interest in receiving client referrals, rather than on its clients' interest in receiving most favorable execution).

[387] *See also* Regulation Best Interest Release, *supra* footnote 359, at text accompanying nn.193–194 (discussing the Commission's view that ''Regulation Best Interest should apply broadly to recommendations of securities transactions and investment strategies involving securities.'').

[388] *See* proposed rule 206(4)–3(a)(1)(iii)(F).

whether the client will pay higher advisory fees than other clients (and the difference in such fees) because the client was referred by the solicitor.[389] We believe that it is important for investors to understand whether they will bear any additional costs as a result of the solicitation. For investors that are advisory clients, the additional cost could be that they will pay a higher investment advisory fee. In such case, the solicitor disclosure would need to say so and state the amount of such additional fee. For investors that are private fund investors, we request comment below on whether investors would indirectly incur any additional costs as a result of the adviser's use of a solicitor, such as through the adviser charging the private fund a higher fee than another private fund it manages without using a solicitor and whether the solicitor disclosure should state such additional amounts, if applicable. In some contexts, there may not be any differences in fees to the investor. In directed brokerage arrangements, for example, the adviser's duty to seek best execution should mitigate against the risk that the directed brokerage arrangement would result in higher execution costs for the investor, but the rule would still require disclosure of the magnitude of any increased costs such as increased commissions (or higher custodian fees) as a result of the solicitation.

In addition, we are proposing a modification to the timing of the delivery of the solicitor disclosure for solicitations that are conducted through mass communications. Mass communications include communications that appear to be personalized to a single investor (and nominally addressed to only one person), but are actually widely disseminated to multiple investors, as well as impersonal outreach to large numbers of persons.[390] In these cases, we are proposing to permit the solicitor disclosure to be delivered at the time of solicitation or as soon as reasonably practicable thereafter, because it may not be practicable to deliver the solicitor disclosure at the time of initial solicitation.[391] Under the proposed rule, we would view delivery of the solicitor disclosure to be made be as soon as reasonably practicable after the time of a mass solicitation if it is provided promptly after the investor expresses an initial interest in the adviser's services.[392] If the adviser, rather than the solicitor, has agreed to deliver the disclosure, we would view ''as soon as reasonably practicable thereafter'' as being at the time the investor first reaches out in any manner to the adviser in response to the solicitation. We believe that this modification for mass communications would continue to promote investor protection, while providing firms with greater flexibility in meeting the rule's requirements.

We request comment on our proposal to revise the rule's solicitor disclosure requirement.

- Should we require a solicitor disclosure be delivered to investors at the time of any solicitation activities (or in the case of a mass communication, as soon as reasonably practicable thereafter)? If not, when should the solicitor disclosure be delivered to investors?
- Should we remove the current requirement that the solicitor disclosure be ''written''? Why or why not?
- Do commenters agree with the proposal to require the solicitor disclosure be separate disclosure? If not, what requirement(s) would make the presentation of solicitor disclosure salient and impactful? Should we include a specific requirement that if the solicitor delivers multiple communications to the investor, the solicitor disclosure must be presented first so that it is clearly and prominently disclosed? Are there any practical issues that arise with the requirement to deliver the solicitor disclosure *separately* in the context of delivery through electronic media or other forms of delivery? If so, what are they and how should we treat them?
- Do solicitors employ mass communications to solicit investors, and if so, what types of mass communications? For example, do solicitors send mass mailing via the postal service or electronic mail delivery? Do they provide mass communications in the form of compensated blog posts referring investors to an adviser?
- Do commenters agree that for solicitors that make their initial contact to investors by mass communications, delivery of the solicitor disclosure should be permitted to occur at, or as soon as reasonably practicable after, the time of the solicitation? Why or why not? Do commenters believe that solicitor disclosure provided promptly after the investor expresses an initial interest in the adviser's services would be effectively timed disclosure for investors solicited by mass communications? Would it provide such investor the necessary tools at an appropriate time to evaluate any potential bias on the part of the solicitor? Why or why not? In order for an adviser to deliver the solicitor disclosure at the time the investor first reaches out to the adviser in response to a solicitation made by mass communication, would it be clear to the adviser when the investor makes such contact?
- If delivery of the solicitor disclosure is made as soon as reasonably practicable after the time of solicitation, should we require that the mass communication include a statement alerting the investor of the solicitor disclosure to come? Why or why not? What disclosure, if any, would be sufficient to alert the investor of the disclosure to come?
- Are there specific types of mass communications that require similar, or different, treatment under the rule? For example, some solicitors may provide a mass communication in the form of a compensated blog post referring investors to an adviser. Should these solicitors be required to provide the solicitor disclosures at the time of solicitation (*i.e.,* as part of their blog posts)? Or, should we permit such a solicitor or the adviser engaging the solicitor to provide the solicitor disclosure when an investor clicks through the solicitor's blog post to learn more information about the adviser? By what other methods could disclosure be provided, for mass communications, to ensure that the disclosure is provided at the time of solicitation or as soon as reasonably practicable thereafter?
- Should the solicitor disclosure include more, or fewer, disclosures? If so, which disclosures should be

[389] Rule 206(4)–3(b)(6) (requiring disclosure of ''[t]he amount, if any, for the cost of obtaining his account the client will be charged in addition to the advisory fee, and the differential, if any, among clients with respect to the amount or level of advisory fees charged by the investment adviser if such differential is attributable to the existence of any arrangement pursuant to which the investment adviser has agreed to compensate the solicitor for soliciting clients for, or referring clients to, the investment adviser'').

[390] *See supra* footnote 88, and accompanying text (discussing template presentations and mass mailings).

[391] From time to time, solicitors that make their initial contact with prospective clients through mass mailings have asked whether they can forgo delivery of the solicitor's disclosure statement and the adviser's brochure until recipients of the mass mailings indicate preliminary interest by returning a reply card or telephoning the solicitor's call center. *See, e.g.,* E.F. Hutton & Company, Inc., SEC Staff No-Action Letter (Sept. 21, 1987) (''Hutton Letter''); AMA Investment Advisers, Inc., SEC Staff No-Action Letter (Oct. 28, 1993) (''AMA Letter''); and Moneta Group Investment Advisers, Inc., SEC Staff No-Action Letter (Oct. 12, 1993) (''Moneta Letter'').

[392] Commission staff has stated that it would not recommend enforcement action to the Commission under rule 206(4)–3 if a registered investment adviser, rather than its solicitor, delivers the solicitor disclosure, provided the adviser meets several other conditions. *See, e.g.,* Hutton Letter; AMA Letter; Moneta Letter, *id.*

omitted, or what disclosures should we add, and why? For example, should the solicitor disclosure require additional information about the nature of the relationship between the adviser and the solicitor, or about compensation?

• Do commenters agree that we should include the proposed additional disclosure requiring a statement of any potential material conflicts of interest resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement? Why or why not? Or should it be sufficient for the disclosure to state the relationship between the solicitor and the adviser (including any affiliation), and the terms of such compensation arrangement, including a description of the compensation paid or to be paid to the solicitor? Would the proposed additional disclosure requirement result in disclosure that is too lengthy? If so, how should we ensure that the conflict of interest in the solicitation relationship is effectively conveyed to the investor?

• Should we include an exception to the proposed disclosure requirement when the solicitor itself is registered with the Commission as an investment adviser and discloses the relevant conflicts of interest concerning the compensation for solicitation in its brochure and/or brochure supplements? In such a case would it be sufficient for the solicitor disclosure to briefly disclose that there is cash or non-cash compensation for the solicitation, and to state that the details of that compensation and any conflicts it creates are described in the brochure and/or brochure supplement?

• Should we include an exception to the proposed disclosure requirement when the solicitor itself is registered with the Commission as a broker-dealer and discloses the relevant conflicts of interest concerning the compensation for solicitation under the Commission's regulations, such as under Regulation Best Interest or Form CRS Relationship Summary? In such a case would it be sufficient for the solicitor disclosure to briefly disclose that there is a cash or non-cash compensation for the solicitation, and to state that the details of that compensation and any conflicts it creates are described in Form CRS or where applicable pursuant to Regulation Best Interest?

• In addition to the solicitor disclosure, should we require the solicitor or the adviser to deliver to the investor, at the time of solicitation, the adviser's Form CRS relationship summary, which would inform the investor about, among other things, the types of customer relationships and services provided? Why or why not?

• Should we continue to require that the solicitor disclosure describe the terms of the compensation arrangement, including a description of the compensation paid or to be paid to the solicitor? Why or why not? Should we require a different disclosure for cash or for non-cash compensation? Why or why not, and if so, what disclosure requirement should apply for cash or for non-cash compensation?

• Should we explicitly require that the solicitor disclose any compensation it receives indirectly? Why or why not?

• Should we, as proposed, replace the current rule's requirements that the solicitor disclosure include whether the client will pay a specific fee to the adviser and whether the client will pay higher advisory fees because the client was referred by the solicitor, with the requirement that the solicitor disclosure include the amount of any additional cost to the investor as a result of solicitation? Would such a proposed requirement result in disclosure that would effectively inform the investor of any increased costs to it as a result of the solicitation? What direct or indirect additional costs to investors that are private fund investors would be included in this disclosure?

• Would private fund investors indirectly incur any additional costs as a result of the adviser's use of a solicitor, such as through the adviser charging the private fund a higher fee than another private fund it manages without using a solicitor? Why or why not? If so, should the solicitor disclosure state such additional amounts, if applicable?

• Do commenters agree with the proposal that either the solicitor or the adviser could deliver the solicitor disclosure (as long as the contract designates the responsible party) at the time of the solicitation or, in the case of a mass communication, as soon as reasonably practical thereafter? Alternatively, should we continue to require the solicitor to deliver the disclosure? Why or why not, and if so, should we require that the adviser deliver a disclosure template to the solicitor, as a means reasonably designed to ensure that the solicitor has all of the information required to be disclosed (*e.g.,* the solicitor may be unaware of the amount of additional costs to the investor as a result of solicitation)? Why or why not?

5. Written Agreement

The proposed rule would require that the investment adviser's compensation to the solicitor be made pursuant to a written agreement with the solicitor, as is required under the current rule.[393] The written agreement would be required to: (*i*) Describe with specificity the solicitation activities of the solicitor and the terms of the compensation for the solicitation activities; (*ii*) require that the solicitor perform its solicitation activities in accordance with sections 206(1), (2), and (4) of the Act; and (*iii*) as discussed above, require and designate the solicitor or the adviser to provide the investor, at the time of any solicitation activities or, in the case of a mass communication, as soon as reasonably practicable thereafter, with a separate disclosure meeting the conditions of the rule.[394] While these requirements are similar to the requirements of the current rule, we are proposing to eliminate some of the current written agreement requirements, *i.e.,* the requirement that the solicitor deliver the adviser's brochure, and the requirement that the solicitor undertake to perform its duties consistent with the instructions of the adviser.[395] Our proposal would also modify the current requirement that the written agreement contain an undertaking by the solicitor to perform his duties under the agreement in a manner consistent with the provisions of the Act and the rules thereunder, replacing it with the requirement that the solicitor agree to perform its solicitation activities in accordance with sections 206(1), (2), and (4) of the Act.

We continue to believe the written agreement requirement is appropriate for unaffiliated solicitors.[396] Although an investment adviser may not be able to exercise control over a third party in the same manner as it could control its own employee, having the contours of the solicitation relationship spelled out in the written agreement between the

[393] Proposed rule 206(4)–3(a)(1); rule 206(4)–3(a)(iii)(A). Under our proposal, the written agreement requirement would not apply with respect to solicitation activities by the adviser's in-house personnel and certain affiliated persons or for the solicitation of impersonal investment advice. *See infra* section II.B.7.

[394] *See supra* section II.B.4.

[395] *See* rule 206(4)–3(a)(2)(iii)(A)(3) (requiring that the written agreement ''requires that the solicitor, at the time of any solicitation activities for which compensation is paid or to be paid by the investment adviser, provide the client with a current copy of the investment adviser's written disclosure statement required by [§ 275.204–3] of this chapter ('brochure rule'). . .''); rule 206(4)–3(a)(2)(iii)(A)(2) (requiring that the written agreement ''contains an undertaking by the solicitor to perform his duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the Act and the rules thereunder'').

[396] *See supra* footnote 393 (referencing the proposed exemption from the written agreement requirement for certain solicitation arrangements).

adviser and solicitor would establish some degree of control over aspects of the arrangement. The current rule achieves this by requiring that the solicitor agree to perform its duties consistent with the instructions of the adviser.[397] We believe this requirement could be difficult or impractical to implement in a number of contexts, however, such as when advisers enter into solicitation agreements with many different solicitors or the solicitor is a much larger institution than the adviser. Instead, under our proposal, the solicitor would be required to meet the specific requirements of the written agreement, including the solicitor's agreement to perform its solicitation activities in a manner consistent with sections 206(1), (2), and (4) of the Act.

Our proposed rule would eliminate the current rule's written agreement requirement that the solicitor deliver to clients a copy of the adviser's Form ADV brochure. We are proposing this change because the current requirement is duplicative of an adviser's delivery requirement under rule 204–3, the Act's brochure rule. Under the brochure rule, an adviser must provide its prospective clients with a current firm brochure before or at the time it enters into an advisory contract with them.[398] The same year we adopted the cash solicitation rule, we adopted for the first time the Form ADV brochure and rule 204–3.[399] We stated that the solicitor's delivery of the adviser's brochure could satisfy the investment adviser's obligation to deliver it under rule 204–3.[400] However, to the extent both the adviser and the solicitor deliver the adviser's brochure, clients may find this disclosure confusing or overwhelming, and it also could undermine disclosure effectiveness by taking away the spotlight from the conflict of interest disclosure.

In addition, since 1979, we have significantly amended the form and content of the brochure to better correspond to advisers' businesses and to be more accessible to investors.[401] Many advisers with multiple types of advisory services have developed different versions of their brochures for each type of service. The adviser is in the best position to ensure that the correct version of the brochure is delivered to the client.

We believe that our proposed solicitor disclosure and written agreement requirements would be adaptable to different types of solicitation arrangements, including refer-a-friend programs and other solicitation arrangements that may involve smaller amounts of compensation, to the extent advisers could not take advantage of the proposed *de minimis* exemption. Under refer-a-friend arrangements, current investors may solicit multiple investors for their adviser through social media or other electronic communications.[402] The adviser and solicitor could employ electronic media and communications to satisfy the rule's written agreement and disclosure requirements (*e.g.,* by entering into the required written agreement electronically). Solicitors could also provide the required concise disclosure in a format appropriate for the nature of the relationship, such as electronically via pop-ups or other electronic means.

We request comment on the proposed written agreement requirement.

• Should the adviser be required to enter into written agreements with solicitors who are engaged in solicitation activities (subject to certain exemptions such as for in-house solicitors, discussed *infra* section II.B.7)?

• Should the written agreement include more, or fewer, specific requirements? If so, what requirements should be added and/or what requirements should be removed, and why?

• Should we retain the current rule's written agreement requirement that the solicitor undertake to perform its duties consistent with the instructions of the adviser? Why or why not? Should the written agreement require that the solicitor perform its solicitation activities in accordance with sections 206(1), (2), and (4) of the Act, rather than more generally in accordance with the provisions of the Act and the rules thereunder? Why or why not? Or, are there other provisions of the Act and the rules thereunder that we should add to the solicitor's required undertakings? If so, what are they, and why?

• Should we require that the agreement include a provision under which the solicitor agrees to provide relevant books and records to the Commission or the adviser upon request?

• Should we retain the current rule's written agreement requirement for solicitors to deliver the adviser's brochure, in light of the adviser's brochure delivery requirement? Why or why not?

• Are there instances where an adviser would enter into a written solicitation agreement with an individual rather than the individual's associated firm or employer?[403] Should we specify that in such instances, an adviser must enter into a written agreement with a firm (as opposed to any individual solicitor at the firm)? Why or why not?

6. Adviser Oversight and Compliance; Elimination of Additional Provisions

Our proposal would require that the investment adviser must have a reasonable basis for believing that the solicitor has complied with the agreement.[404] In addition, the proposed rule would eliminate the current rule's requirement for the adviser to obtain a signed and dated acknowledgment from the client that the client has received the solicitor's disclosure.[405] Our proposal would also eliminate the current rule's explicit reminders of

[397] Rule 206(4)–3(a)(2)(iii)(A).

[398] Rule 204–3. The rule does not require advisers to deliver brochures to certain advisory clients receiving only impersonal investment advice for which the adviser charges less than $500 per year, or to clients that are RICs or BDCs provided that the advisory contract with such a company meets the requirements of section 15(c) of the Investment Company Act.

[399] *See* 1979 Adopting Release, *supra* footnote 27, at n.14 and accompanying text.

[400] *See id.* We stated that the solicitor's delivery of the brochure ''will be useful to clients and will not impose an undue burden upon solicitors or investment advisers'' and that ''[f]urthermore, delivery of a brochure by the solicitor will, in most cases, satisfy the investment adviser's obligation to deliver a brochure to the client under Rule 204–3.'' *Id.*

[401] *See* 2010 Form ADV Amendments Release, *supra* footnote 34, at section I. In the past, Form ADV Part 2 had required advisers to respond to a series of multiple-choice and fill-in-the-blank questions organized in a ''check-the-box'' format, supplemented in some cases with brief narrative responses. Advisers had the option of providing information required by Part 2 in an entirely narrative format, but few had done so. Form ADV Part 2 currently requires the ''brochure,'' which contains 18 narrative disclosure items about the advisory firm, and the ''brochure supplement,'' which contains information about certain advisory personnel on whom clients rely for investment advice.

[402] Refer-a-friend solicitation arrangements can often involve small amount of compensation, such as the adviser paying $10.00 to a current client for each client the current client solicits to enter into an investment advisory relationship with the adviser (some such solicitation arrangements are contingent upon the solicited client successfully entering into an investment advisory relationship with the adviser; others are not). Such compensation can also be, for example, free or lower-fee investment advisory services for a defined period of time, investment adviser subscription services, and gift cards.

[403] An individual associated with a registered broker-dealer who enters into a solicitation agreement in her individual capacity may, under some circumstances, be an investment adviser or a broker or dealer within the meaning of section 202(a)(11) of the Act or section 3(a)(4)(A) or 3(a)(5) of the Exchange Act, respectively, and may be subject to statutory or regulatory requirements under Federal law, including the requirement to register as an investment adviser or as a broker-dealer pursuant to section 15(a) of the Exchange Act, and/or state law and certain FINRA rules.

[404] Proposed rule 206(4)–3(a)(2).

[405] *See* rule 206(4)–3(a)(2)(iii)(B).

advisers' requirements under the Act's special rule for solicitation of government entity clients and their fiduciary and other legal obligations, which we believe are covered by other provisions of the Act and the rules thereunder.

a. Adviser Oversight and Compliance

Our proposed requirement that the investment adviser must have a reasonable basis for believing that the solicitor has complied with the rule's written agreement would replace the current requirement that ''the investment adviser makes a bona fide effort to ascertain whether the solicitor has complied with the agreement, and has a reasonable basis for believing that the solicitor has so complied.'' [406] We believe that this provision would protect investors' interests by requiring advisers to monitor their compensated solicitors for compliance with the rule's written agreement requirements. The question of what would constitute a reasonable basis would depend upon the circumstances. However, we believe that a reasonable basis generally should involve periodically making inquiries of a sample of investors referred by the solicitor in order to ascertain whether the solicitor has made improper representations or has otherwise violated the agreement with the investment adviser.[407] For example, depending on the facts and circumstances, an adviser could satisfy the proposed rule's compliance requirement by making the inquiries described above and being copied on any emails the solicitor sends to investors with the solicitor disclosure.

Under our proposal, the rule's compliance requirement would replace the current rule's requirement that an adviser obtain a signed and dated acknowledgment from the client that the client has received the solicitor's disclosure.[408] The proposed rule would allow advisers to tailor their compliance with the solicitation rule as appropriate for each adviser and the risks and operations in their particular solicitation relationships. We believe that advisers are better situated than most solicitors to determine appropriate policies and procedures to ensure that their solicitors comply with their written agreement (including, if applicable, the agreement that the solicitor deliver the solicitor disclosure to investors at the time of solicitation or as soon as reasonably practical thereafter). Some advisers may find that written acknowledgements from all solicited investors are most appropriate, but others may rely on other methods to satisfy themselves of the solicitor's compliance, such as making inquiries of investors referred by the solicitor in order to ascertain whether the solicitor disclosure has been delivered or whether the solicitor has made improper representations or has otherwise violated the agreement with the investment adviser.

Our principles-based proposal relating to compliance is consistent with the Act's compliance rule, adopted in 2003,[409] which contains requirements for advisers to adopt compliance policies and procedures.[410] When an adviser utilizes a solicitor as part of its business, the adviser must have in place compliance policies and procedures that address this relationship and are reasonably designed to ensure that the adviser is in compliance with rule 206(4)–3. Our proposed approach is also similar to recently adopted rules under the Investment Company Act.[411]

b. Elimination of Additional Provisions

We are also proposing to eliminate the current rule's explicit reminders of advisers' requirements under the Act's special rule for solicitation of government entity clients and their fiduciary and other legal obligations.[412] We believe these cross references to advisers' other obligations are not necessary under the solicitation rule because they are addressed by other provisions under the Act.

The current rule's paragraph (e) states that ''[s]olicitation activities involving a government entity, as defined in [the pay-to-play rule], shall be subject to the additional limitations set forth in that section.'' [413] The Commission added this provision when it adopted the pay-to-play rule in 2010, and explained that the provision ''alerts advisers and others that special prohibitions apply to solicitation activities involving government entity clients under rule 206(4)–5.'' [414] We believe that this provision is no longer necessary in light of the fact that advisers should now be well aware of their obligations under the pay-to-play rule.

We are also proposing to remove the current rule's provision that ''[n]othing in this section relieves any person of any fiduciary or other legal obligation.'' [415] When we adopted the solicitation rule, we included this provision as a reminder to investment advisers and solicitors.[416] We noted that it was not intended to suggest the scope and nature of any obligations an adviser or solicitor might have under the securities laws or under other laws.[417]

We request comment on our proposed adviser oversight and compliance provisions. We also request comment on the proposed elimination of the current rule's provisions that cross-reference other provisions under the Act.

• Do commenters believe that advisers should be required to have a reasonable basis for believing that the solicitor has complied with the written agreement required by the proposed rule? Why or why not? Should we maintain the current requirement that an adviser make a *bona fide* effort to ascertain whether the solicitor is in compliance with the terms of the

[406] Rule 206(4)–3(a)(2)(iii)(C).

[407] 1979 Adopting Release, *supra* footnote 27, at text accompanying nn.14 and 15.

[408] *See* rule 206(4)–3(a)(iii)(B) (the investment adviser must receive from the client, prior to, or at the time of, entering into any written or oral investment advisory contract with such client, a signed and dated acknowledgment of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document). Under the current rule, certain solicitors (*e.g.,* in-house solicitors, certain affiliates of the adviser, and solicitors for impersonal investment advice) are exempt from such requirement.

[409] Rule 206(4)–7. *See* Compliance Program Adopting Release, *supra* footnote 33.

[410] Under the compliance rule, each adviser that is registered or required to be registered under the Act is required to adopt and implement written policies and procedures reasonably designed to prevent the adviser and its personnel from violating the Advisers Act. *Id.*

[411] For example, rule 2a–7 under the Investment Company Act leverages rule 38a–1, the compliance rule under that statute, rather than prescribing requirements for how a retail money market fund determines that its beneficial owners are natural persons. *See* SEC Money Market Fund Reform Release, *supra* footnote 232 at text accompanying nn.715–716; *see also* Compliance Rule Adopting Release, *supra* footnote 33, at nn.24–28 and accompanying text. The Investment Company Act compliance rule also requires that the fund's procedures provide for the oversight of compliance by specified service providers.

[412] Rule 206(4)–3(c) and (e).

[413] Rule 206(4)–3(e).

[414] *See Political Contributions by Certain Investment Advisers,* Release No. IA–3043 (July 1, 2010) [75 FR 41018 (July 14, 2010)], at nn.429 and 430 and accompanying text.

[415] Rule 206(4)–3(c).

[416] *See* 1979 Adopting Release, *supra* footnote 27, at n.16 and accompanying text. With respect to the possible relevance of other laws, the Commission noted that, ''where the solicited client is a pension plan or other employee benefit plan, payment of a fee to the solicitor might, depending upon the circumstances, result in a prohibited transaction under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1954 (Code). The rule being adopted of course provides no relief from ERISA or the Code.'' *Id.*

[417] *Id.* (''The rule is not intended to suggest the scope and nature of any obligations an adviser or solicitor might have under the securities laws or under other laws. For this reason, and in response to a comment, the rule as adopted omits the proposed rule's reference to a solicitor's obligation to recommend an adviser 'best suited' to a client.''). It would continue to be the case that an adviser that is subject to the solicitation rule would be subject to any other applicable provisions in the Federal securities laws.

agreement and has a reasonable basis for believing that the solicitor is in compliance? Why or why not?

• Should the rule include a specific method or methods of demonstrating a solicitor's compliance with the rule's written agreement requirements, such as the current rule's requirement for an adviser to obtain a signed and dated acknowledgment of the solicitor disclosure statement? Why or why not? If not, what methods should advisers use to satisfy their compliance and oversight provision to form a reasonable basis for believing that the solicitor is in compliance? Would methods such as inquiring with some or all of its solicited investors reasonably ensure that an adviser's solicitor is in compliance with the rule's written agreement requirements? Are there other methods that would be more effective at assessing whether a solicitor is in compliance with its obligations under the required written agreement?

• Should the rule include a requirement for advisers to adopt and implement policies and procedures governing their use of solicitors, even though advisers are also required to do so under the Act's separate compliance rule? Why or why not?

• Should the rule continue to include a provision reminding advisers that solicitation activities involving a government entity, as defined in rule 206(4)–5 are subject to additional limitations in that rule? Why or why not?

• Should the rule continue to include a provision reminding advisers and solicitors that nothing in the rule is to be deemed to relieve any investment adviser or solicitor of any fiduciary or other obligation which he may have under any law? Why or why not?

7. Exemptions

a. Impersonal Investment Advice

The proposed rule would partially exempt from the rule solicitors that refer investors for the provision of impersonal investment advice.[418] This exemption would cover solicitation activities for investment advisory services that do not purport to meet the objectives or needs of specific individuals or accounts.[419] We propose to incorporate into the rule the Form ADV definition of ''impersonal investment advice,'' which would replace the current rule's definition of ''impersonal advisory services,'' to achieve consistency with Form ADV.[420] We do not believe, however, that modifying the definition for consistency would change the types of persons to whom the exemption would apply. For example, the proposed exemption would generally continue to apply to solicitations of subscribers to publishers of market newsletters and subscription services containing investment advice, when the adviser's services do not purport to meet the objectives or needs of specific individuals or accounts. The proposed exemption would be inapplicable to automated advisers (often colloquially referred to as ''robo-advisers''), which are registered investment advisers that use technologies to provide discretionary asset management services to their clients through online algorithmic-based programs.[421] This is because robo-advisers generate client portfolios for clients based on personal information and other data that clients enter into interactive platforms.[422] internet advisers—another type of automated adviser—would also fall outside of the exemption for impersonal investment advice. Internet advisers provide investment advice to their clients through interactive websites based on personal information that clients enter into the website.[423]

When we adopted the cash solicitation rule, we added a partial exemption from the rule with respect to solicitation activities for the provision of impersonal advisory services only, because we understood that ''prospective clients normally would be aware that a person selling such services was a salesman who was paid to do so.''[424] We continue to hold this belief. However, even though we are proposing to continue the partial exemption for such solicitors, advisers could not, under the proposed rule, compensate a solicitor for the solicitation of impersonal investment advice if the solicitor is disqualified under the rule.

Under the current rule, advisers making cash payments for solicitation for impersonal advisory services must have a written agreement with the solicitor and comply with the rule's disqualification provision.[425] However, they are exempt from the rule's disclosure requirements, the specific requirements of the written agreement, and the supervision provisions.[426] The proposed rule would maintain the current rule's partial exemption for compensated solicitors of impersonal investment advice, with one modification: Such solicitors would not be required to enter into a written agreement with the investment adviser.[427] We believe that applying the written agreement provision to such solicitors could result in an expense without a sufficient corresponding benefit. This is because the exemption would exempt the solicitor and the adviser from the substantive requirements of the written agreement, and the agreement itself without the requirements would not add any meaningful investor protections.

The partial exemption would continue to be available only to solicitation that is *solely* for impersonal investment advice.[428] A registered investment adviser that offers a full line of advisory services, including personal and impersonal investment advice, may only rely on the partial exemption when the solicitation activities relate exclusively to the investment adviser's impersonal investment advice. It would not be permitted to rely on the partial exemption under the proposed rule when an investor is solicited for both impersonal and personal investment

[418] Proposed rule 206(4)–3(b)(1).

[419] *Id.* The proposed rule incorporates the Form ADV definition of ''impersonal investment advice,'' which reads: ''investment advisory services that do not purport to meet the objectives or needs of specific individuals or accounts.'' Form ADV: Glossary of Terms.

[420] The Form ADV definition of ''impersonal investment advice'' would replace the current rule's definition of ''impersonal advisory services,'' which is ''investment advisory services provided solely by means of (i) written materials or oral statements which do not purport to meet the objectives or needs of the specific client, (ii) statistical information containing no expressions of opinions as to the investment merits of particular securities, or (iii) any combination of the foregoing services.'' Rule 206(4)–(3)(d)(3).

[421] *See generally Division of Investment Management, SEC, Staff Guidance on Robo-Advisers* (February 2017), *available at https://www.sec.gov/investment/im-guidance-2017–02.pdf.*

[422] *See id.* (''A client that wishes to utilize a robo-adviser enters personal information and other data into an interactive, digital platform (*e.g.,* a website and/or mobile application). Based on such information, the robo-adviser generates a portfolio for the client and subsequently manages the client's account.'')

[423] *See* Exemption for Certain Investment Advisers Operating Through the internet, Release No. IA–2091 (December 12, 2002) [67 FR 77619 (Dec. 18, 2002)]. In order to be eligible for registration with the Commission pursuant to rule 203A–2, an internet adviser must provide investment advice to its clients through an interactive website, which the rule defines as ''a website in which computer software-based models or applications provide investment advice to clients based on personal information each client supplies through the website.'' *Id.* Unlike typical robo-advisers, internet advisers do not manage the assets of their internet clients. *See id.*

[424] *See* 1979 Adopting Release, *supra* footnote 27, at text accompanying nn.12–13.

[425] Rule 206(4)–3(a)(2)(i) and (iii).

[426] *Id.*

[427] Proposed rule 206(4)–3(b)(1). Under the current rule, an adviser and a solicitor of impersonal investment advice are required to enter into a written agreement, although the rule does not specify any required provisions.

[428] *Id.*

advice, even if that investor receives only impersonal investment advice.

We request comment on our proposal to revise the rule's partial exemption for solicitors for the provision of impersonal investment advice.

- Should solicitors of investors for the provision of impersonal investment advice be subject to any or all of the requirements of the rule? If so, which requirements, and why? For example, should we continue to require that these solicitors enter into written agreements with the advisers? As another example, should we exempt these solicitors from the solicitor disqualification provisions? Why or why not?
- Should the rule include additional requirements specifically for such solicitors? If so, what should these requirements be?
- Should we replace the current definition of ''impersonal advisory services'' with the Form ADV definition of ''impersonal investment advice,'' as proposed? Would this definitional change have any practical effects in terms of the applicability of proposed rule 206(4)–3? If so, what would they be?
- Can commenters provide examples of investment advisory services that are offered today that would be ''impersonal investment advice'' (*i.e.,* the activities do not purport to meet the objectives or needs of specific individuals or accounts), other than, or in addition to, market newsletters or other periodicals and recommended lists? Do advisers that offer such impersonal investment advice typically provide it directly to investors? Do they typically provide it in addition to personalized investment advice? If so, do they provide impersonal investment advice as an add-on service to investors to whom they provide personalized investment advice, or do they provide it to a different set of investors, or do some (but not all) investors receive both types of investment advice?
- Do commenters agree that robo-advisers and internet advisers should not be eligible for the exemption for impersonal investment advice, because they typically provide personalized investment advice?

b. Advisers' In-House Solicitors and Other Affiliated Solicitors

The current rule provides a partial exemption for an adviser's solicitation relationship with any person that is an adviser's partner, officer, director and employee (sometimes referred to as in-house solicitors), and any partner, officer, director, or employee of a person which controls, is controlled by, or is under common control with the adviser (sometimes referred to as affiliated solicitors), provided that the affiliation is disclosed to the client at the time of the solicitation or referral.[429] Under the current rule, an adviser is exempt from the following requirements with respect to such solicitors: (i) The detailed provisions of the written agreement requirement (*e.g.,* to provide the solicitor disclosure and perform solicitation activities in accordance with the adviser's instructions and the Act), and (ii) the rule's other compliance and oversight provisions (*e.g.,* the client acknowledgement requirement and the adviser's supervisory requirement).[430] However, under the current rule, an adviser is subject to the following requirements with respect to such solicitors: (i) The rule's statutory disqualification provision; and (ii) the rule's requirement to enter into a written agreement with the adviser (although not the written agreement's detailed requirements).[431] Under the current rule, in order to rely on the partial exemption, any affiliation between the investment adviser and such other person must be disclosed to the client at the time of the solicitation or referral.[432]

We propose to generally maintain the central elements of the current rule's partial exemption for affiliated solicitors: That the solicitor disclosure, adviser oversight and the detailed provisions of the written agreement are not required with respect to affiliated solicitors under certain conditions. We would generally continue the partial exemption, with some modifications, provided that the status of such solicitor as in-house or affiliated is disclosed to the investor at the time of the solicitation unless such relationship is readily apparent, and the adviser documents such solicitor's status at the time of entering into the solicitation arrangement.[433]

We believe that when an investor is aware that a solicitor is an adviser's in-house solicitor or its affiliate, the solicitor disclosure is not necessary to inform the investor of the solicitor's bias in recommending such adviser. In these instances with respect to in-house solicitors, an investor is on notice that the solicitor has a stake in soliciting the investor for its own firm. Similarly, investors solicited by persons they know to be affiliated with the adviser would also be likely to be aware that the solicitor has a business interest in seeing its affiliate gain additional investors, and that the recommendation is not coming from a neutral party. We are proposing to modify the current rule's requirement, however, to permit an adviser to rely on the rule's partial exemption for in-house and affiliated solicitors not only when the status of such solicitor as in-house or an affiliate is disclosed to the investor at the time of the solicitation or referral, but also when such relationship is readily apparent to the investor at the time of solicitation. In some cases, the relationship between the in-house or affiliated solicitor and the adviser may be readily apparent to the investor, such as when the in-house solicitor shares the same name as the advisory firm, or clearly identifies itself as related to the adviser in its communications with the investor. For example, in the latter case, even if the solicitor does not share the same name as the adviser, its affiliation would be readily apparent if a business card distributed to investors at the time of the solicitation clearly and prominently states that the solicitor is a representative of the adviser. In these cases, we believe that an additional requirement under the proposed rule to disclose the solicitor's status as an in-house or affiliated solicitor would not result in a benefit to the investor, and would create additional compliance burdens for the adviser and solicitor.

In other situations, the relationship with an in-house solicitor is not readily apparent, such as when the solicitor is a representative of the adviser but operates its solicitation activities through its own DBA name or brand, and the legal name of the adviser is omitted or less prominent.[434] In these cases when the relationship is not readily apparent the adviser or solicitor

[429] Rule 206(4)–3(a)(2)(ii).

[430] *See id.;* Rule 206(4)–3(a)(2)(iii). Our proposed rule would cover ''[a] solicitor [that] is a person which controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person . . .'' subject to the provisions therein. Proposed rule 206(4)–3(b)(2). The current rule's exemption only covers solicitors who are principals or employees of certain related firms, but our staff has previously stated it would not recommend enforcement if, a solicitor which is a person (rather than an officer, director or employee of such person) which controls, is controlled by, or is under common control with, the investment adviser that is paying a cash referral fee to the solicitor pursuant to the cash solicitation rule comes within, and is subject to, the terms of clause (ii) of paragraph (a)(2) of such rule. *See, e.g.,* Allen Isaacson, SEC Staff No-Action Letter (pub. avail. Dec. 17, 1979); Stein, Roe and Farnham Inc., SEC Staff No-Action Letter (pub. avail. May 26, 1987).

[431] *Id.* The current rule requires solicitation payments to in-house and affiliated solicitors to be paid pursuant to a written agreement (although the rule does not specify the terms of that agreement).

[432] Rule 206(4)–3(a)(2)(ii).

[433] Proposed rule 206(4)–3(b)(2).

[434] Such solicitors could be employees, but are likely to more often be independent contractors. We request comment below on whether the rule should specifically address independent contractors.

would be required under the proposed rule to disclose the solicitor's status with respect to such investment adviser as its in-house solicitor or affiliated solicitor in order to avail itself of the rule's partial exemption. Similarly, for affiliated solicitors, when the affiliation is not disclosed or otherwise readily apparent to the investor, the adviser would not be permitted to rely on the proposed partial exemption. This could be the case, for example, when the soliciting affiliate does not share a company name with the adviser, and neither the adviser nor the solicitor discloses such affiliation at the time of solicitation. It could also be the case when the affiliation between two different company names is not commonly known, and neither the adviser nor the solicitor discloses such affiliation at the time of solicitation.

Another modification we are proposing to the current rule is to expand the partial exemption to cover any solicitor which is a person which controls, is controlled by, or is under common control with, the investment adviser that is compensating the solicitor pursuant to the solicitation rule.[435] This is because we believe that a person that controls, is controlled by, or is under common control with, the investment adviser, should be treated similarly under the proposed rule to any officers, directors or employees of such affiliated person. We are not proposing to continue the current rule's requirement that advisers and their in-house and affiliated solicitors enter into a written agreement.[436] Unlike the current rule's detailed requirements for the written agreement with unaffiliated solicitors (*i.e.,* that the solicitor perform its activities in a manner consistent with the adviser's instructions and the provisions of the Act and the rules thereunder), the current rule does not specify what a written agreement between an adviser and in-house solicitor must include.[437] We continue to believe that the detailed provisions of the written agreement are not necessary for in-house solicitors because this kind of oversight and authority over the solicitor already applies in the context of in-house solicitors and is addressed by the adviser's power to oversee its own personnel. Likewise, we do not believe we should continue to require advisers to enter into written agreements with their own affiliates in order to avail themselves of the proposed rule's partial exemption. Advisers and their affiliated solicitors may wish to enter into agreements, or they may find it more convenient and effective to delineate their responsibilities to one another in other ways. Such methods might include, for example, policies and procedures regarding such affiliated personnel. We are also proposing that the rule no longer require any written agreement between an adviser and its in-house personnel under the solicitation rule because we believe this requirement creates additional compliance obligations for the adviser and its in-house and affiliated solicitor that are not justified by any corresponding benefit.

We are proposing to continue to apply, with respect to in-house and affiliated solicitors, the exemption from the rule's separate compliance requirement, which would require that investment adviser have a reasonable basis for believing that the solicitor has complied with the agreement. As with the written agreement requirement, we believe that this kind of oversight over the solicitor already applies in the context of in-house solicitors, and is addressed by the adviser's power to oversee and supervise its own personnel. We also believe advisers and their affiliates are well positioned to determine how best to achieve an affiliated solicitor's compliance with the Act, and do not need the protections of the rule's compliance and oversight provision.

Finally, we are proposing to continue the application of the rule's disqualification provisions to in-house and affiliated solicitors. Some in-house solicitors with disciplinary events under the proposed rule would be disqualified from association with an investment adviser independent of the solicitation rule, if the Commission has barred or suspended that person from association with an investment adviser under section 203(f) of the Act. Other in-house or affiliated solicitors with such disciplinary events may not be subject to such Commission action and, absent the application of the rule's disqualification provision, would be permitted to solicit for the adviser in-house, notwithstanding their disqualifying event. Without the disqualification provision applicable to such solicitors, the adviser would risk that the Commission may bar or suspend that person from association with an investment adviser after the solicitation activities have commenced. We continue to believe that investors should be protected from solicitation by persons with certain disciplinary events, regardless of whether the solicitation is conducted in-house, by an affiliate or by a person unaffiliated with the adviser.

We are proposing a new requirement that in order to avail itself of the proposed partial exemption, each adviser must document such person's status as an in-house or affiliated solicitor contemporaneously with the solicitation arrangement.[438] We are proposing to add this requirement to the rule so that advisers do not make after-the-fact determinations as to whether or not a solicitor qualifies for the partial exemption.

We request comment on our proposal to revise the rule's requirements governing solicitation arrangements by in-house and affiliated solicitors.

- Should the proposed rule partially exempt the adviser's partners, officers, directors, and employees who are engaged in solicitation activities, or any solicitor that controls, is controlled by or that is under common control with the adviser or is a partner, officer, director, or employee of such person, from certain of the provisions of the solicitation rule? Why or why not? If so, which provisions of the rule should we exempt such solicitors from, and why? For example, should the proposed rule continue to exempt advisers and their in-house and affiliated solicitors from the detailed requirements of the written agreement (but not the requirement to enter into a written agreement) and the rule's oversight and compliance requirements? Alternatively, should we fully exempt such solicitations from the rule (including, for example, the rule's disqualification provisions)? Why or why not?

- Should the proposed rule exempt in-house and affiliated solicitors from the rule's solicitor disqualification provision, as discussed in detail below?[439] Without the application of the disciplinary provision, would investors be made aware in all cases of an in-house or affiliated solicitor's

[435] *See supra* footnote 430 (describing the specific proposed change in the rule text).

[436] Under the current rule, advisers and their in-house and affiliated solicitors are required to enter into written agreements, but they are not required to comply with the current rule's detailed requirements for the written agreements. From time to time, advisers have asked whether they can forego the written agreement requirement for employees of the adviser to refer business to the adviser for cash compensation. *See, e.g.,* Merchants Capital Management, Incorporated, SEC Staff No-Action Letter (Oct. 4, 1991) (stating that the staff cannot assure the requestor that it would not recommend any enforcement action to the Commission under rule 206(4)–3 if the requestor proceeds as described in the letter).

[437] *See supra* footnotes 393–395 and accompanying text regarding the written agreement requirement under the proposed rule.

[438] Proposed rule 206(4)–3(b)(2)(ii).

[439] *See infra* section II.B.7.c.

disqualifying events?[440] If we were to exempt affiliated solicitors from the rule's disqualification provision, should we nevertheless require some affiliated solicitors (such as affiliated solicitors that solicit investors in private funds) to be subject to the rule's disqualification provision (because private fund investors may not otherwise be aware of in-house solicitors' disciplinary events since advisers are not required to deliver Form ADV to them)? Do in-house and affiliated solicitors with disciplinary histories present less risk of misleading investors or otherwise conducting solicitations in a fraudulent manner than solicitors without disciplinary histories?

• Do commenters agree with the types of persons that would be covered by the partial exemption (*i.e.,* the adviser's partners, officers, directors, and employees, and any solicitor that controls, is controlled by or that is under common control with the adviser or is a partner, officer, director, or employee of such person)? If not, how should we adjust the rule's description of affiliated solicitors?

• Should the proposed rule's partial exemption for in-house and affiliated solicitors be conditioned on any factors or requirements (*e.g.,* as proposed, that the relationship is disclosed to the investor at the time of solicitation or is readily apparent to the investor at the time of solicitation)? What other conditions or factors, if any, should apply?

• Would advisers and solicitors have difficulty in interpreting or applying the ''readily apparent'' standard? Should we instead require in house solicitors to disclose to investors, as applicable, their relationship at the time of the solicitation or as soon as reasonably practicable thereafter in all cases?

• Do commenters agree that the proposed rule should apply the written agreement and compliance requirements to every in-house and affiliated solicitor relationship, where the conditions of the proposed rule are not met? If so, why? If not, which of these in-house and affiliated solicitor relationships should be exempt from the proposed rule's written agreement and compliance requirements, and why?

• Should advisers' relationships with certain affiliated solicitors be subject to different provisions under the proposed rule from its solicitation relationships with other affiliated solicitors? For example, should an adviser, with respect to an affiliated solicitor that is itself a Commission-registered investment adviser, be exempt from some or all of the rule's provisions for such solicitor? Conversely, for advisers that do not use SEC-registered affiliated solicitors, should we require an oversight provision, such as, for example, that the registered adviser take reasonable steps to ensure that its affiliated solicitor complies with provisions of the Act and the rules thereunder with respect to its solicitation activities? Is appropriate oversight otherwise achieved by an adviser's relationship with its affiliate?

• If the rule, as proposed, does not require in-house and affiliated solicitors that meet the rule's conditions to deliver to investors the solicitor disclosure, should we require in-house or affiliated solicitors (or the adviser) to deliver to investors another form of disclosure? For example, should we require a Form ADV brochure supplement for in-house and affiliated solicitors, even if the firm is not otherwise required to deliver one for such person? If so, why, and what additional information, if any, should we require the brochure supplement to include? Should we require the adviser to give investors, at the time of solicitation or as soon as reasonably practicable thereafter, its Form ADV disclosure, pursuant to which advisers are required to disclose any compensation to in-house and affiliated solicitors and any fee differential and the conflict of interest? If so, what disclosure should we require advisers to provide to investors (given that the relevant Form ADV provision does not require specific information about compensation by advisers to private funds)?

• Should we include a definition of ''employee'' for the purpose of the proposed partial exemption? If so, how should we define the term? Should we define it to include an adviser's independent contractors that are subject to the adviser's supervision and control? Why or why not? We believe that the Form ADV definition of ''employee'' would not work for the solicitation rule because many soliciting employees and independent contractors do not provide investment advisory services.[441] Do commenters agree? Do advisers use independent contractors to solicit investors on their behalf? If so, are those independent contractors subject to the adviser's supervision and control, or are those contractors subject to the supervision and control of another regulated entity such as a registered broker-dealer or a commercial bank? Should we provide that the partial exemption for in-house personnel does or does not apply to an adviser's independent contractors? Why or why not? Should we use another term instead of ''employee,'' such as ''supervised person''?

• Do commenters agree with the proposed requirement for an adviser to document the status of its solicitors as partners, officers, directors, or employees, or affiliated solicitors, as applicable? Do commenters agree that such documentation should be made at the time the adviser enters into the solicitation arrangement, to ensure that advisers do not make a determination as to the solicitor's status after-the-fact? Will such timing be feasible for advisers? Why or why not? Do commenters recommend another point in time, and if so, when, and why?

• Do commenters agree that in-house solicitors should be subject to the proposed rule's disqualification provisions? Why or why not?

c. De Minimis Compensation

The proposed rule contains an exemption for *de minimis* compensation. Specifically, the rule would not apply if the solicitor has performed solicitation activities for the investment adviser during the preceding twelve months and the investment adviser's compensation payable to the solicitor for those solicitation activities is $100 or less (or the equivalent value in non-cash compensation).[442] An adviser must come into compliance with the solicitation rule if it makes any compensation to a solicitor that, together with all compensation provided to that solicitor in the preceding 12 month period, exceeds the *de minimis* amount. Accordingly, if an adviser expects to make payments to a solicitor in excess of the *de minimis* amount, even though it has not yet done so, an adviser may wish to carefully consider whether it wishes to avail itself of the exemption. Although, as discussed above, we believe heightened safeguards would generally be

[440] An adviser is required to disclose to clients in its Form ADV brochure disciplinary information about the firm and its management persons, which likely do not include a solicitor that controls, is controlled by or that is under common control with the adviser or is a partner, officer, director, or employee of such person. *See* Form ADV Part 2A, Item 9 and Form ADV General Instructions. Some advisers are also required to deliver to clients brochure supplements containing disciplinary information about certain of their supervised persons. *See* Form ADV Part 2B. However, solicitors likely would not be considered to be providing advice that would trigger delivery at the time of solicitation. An adviser to a private fund, however, is not required to deliver the Form ADV brochure or brochure supplement to investors in the fund.

[441] *C.f.* Form ADV Glossary (defining ''employee,'' to include an adviser's independent contractors who perform advisory functions on the adviser's behalf).

[442] *See* proposed rule 206(4)–3(b)(3).

appropriate for an investor solicitation because a solicitor's incentives to defraud an investor likely would be greater than a promoter's, the solicitor's incentives are significantly reduced when receiving *de minimis* compensation. We believe the need for heightened safeguards is likewise reduced.

There is no *de minimis* exemption in current rule 206(4)–3; payment of *de minimis* cash referral fees to a solicitor is subject to the provisions of the current rule. We are proposing a *de minimis* exemption because we believe it could be overly burdensome for advisers and solicitors that engage in solicitation for *de minimis* compensation to comply with the rule, in light of the benefits. We have observed that changes in technology, such as the advent of social media, since the current rule was adopted have resulted in an increasing trend toward the use of solicitation and referral programs that involve *de minimis* compensation, such as refer-a-friend programs. Our proposed solicitor disclosure and written agreement requirements are designed to be adaptable to a variety of solicitation arrangements, including refer-a-friend programs and other solicitation arrangements that may involve small amounts of compensation; however, we acknowledge that the proposed solicitor disqualification provisions might present greater compliance challenges for advisers that compensate multiple solicitors for *de minimis* compensation than for other advisers. These advisers may be smaller advisers without the resources to make the necessary inquiry into each person's disciplinary history, as required by the proposed rule.[443] Accordingly, we believe a *de minimis* exemption is now appropriate to ease the burden for these solicitation arrangements. Moreover, to the extent a solicitation is also a testimonial or endorsement of the proposed advertising rule, one of the primary policy goals of the proposed solicitation rule—disclosure of the compensation to the solicitor—would be satisfied by applying the testimonials and endorsements provision of the proposed advertising rule.

Drawing from other rules applicable to certain dual registrants and broker-dealers, we chose a $100 threshold (or the equivalent value in non-cash compensation) payable to the solicitor for its solicitation activities for the investment adviser during the preceding twelve months.[444] We believe that proposing an aggregate *de minimis* amount over a trailing year period is more consistent with our goal of providing an exception for small or nominal payments than an exception of a certain amount per referral. A very engaged solicitor who is paid even a small amount per referral could potentially receive a significant amount of compensation from an adviser over time, and in such a case we believe that investors should be informed of the conflict of interest and gain the benefit of the other provisions of the rule. The proposed advertising rule's requirements for testimonials and endorsements would often apply even when an adviser provides *de minimis* compensation to a person for solicitation activity.[445]

We request comment on our proposed treatment of *de minimis* compensation under the solicitation rule.

- Is our belief correct that the fact of compensation would still be disclosed when a solicitor receives $100 or less because such referrals would often be testimonials or endorsements? Are there situations that might qualify for the proposed exemption that would not be subject to the proposed testimonials and endorsements provision of the proposed advertising rule? For example, because an oral statement by a person would not be an advertisement under the rule, would investors who are solicited through oral conversations not be informed of the payment made by the adviser for the referral? Should a *de minimis* exception be available only to the extent the referral is subject to the proposed advertising rule's provisions regarding testimonials and endorsements (notably, disclosure of the fact of compensation)? Should we require the fact of compensation to be disclosed by an adviser availing itself of the *de minimis* exception?
- Should the proposed rule include an exemption for *de minimis* compensation for solicitation? If so, what should the *de minimis* amount be, and how should it be calculated (*e.g.,* per referral, or per aggregated referrals over a certain time period)? Should it be higher or lower than $100? For example should it be $20, $50, $200, or $500? How should a *de minimis* exemption be applied to non-cash compensation?
- Should some of the rule's provisions continue to apply to a solicitation arrangement that qualifies for the *de minimis* exemption? If so, which ones?
- When a promotional communication triggers the application of both the proposed advertising and solicitation rules, as discussed above,[446] should a *de minimis* exemption apply? For example, if an adviser provides $50 per successful referral to its investors for writing a positive review about the adviser on the adviser's social media page, should the advertising rule, but not the solicitation rule, apply? Would an exemption in such a case meaningfully reduce an adviser's compliance burden? Would it reduce a solicitor's burden? Would potential investor harm weigh in favor of applying the additional safeguards under the proposed solicitation rule? What kinds of investor harm would that be?
- Basing the exemption on a specified dollar value means that over time inflation may cause such a value to become outdated or lose its utility. Should we consider a more principles-based *de minimis* exception rather than one based on a dollar value? For example, an exemption could alternatively or additionally be made for promotional items of nominal value and commemorative items,[447] or for an occasional meal, a ticket to a sporting event or the theater or comparable entertainment which is neither so frequent nor so extensive as to raise any question of propriety.[448] Should we

[443] *See infra* section II.B.8 (discussing current and proposed solicitor disqualification provisions).

[444] FINRA's ''gifts rule'' prohibits any member or person associated with a member, directly or indirectly, from giving anything of value in excess of $100 per year to any person where such payment is in relation to the business of the recipient's employer. FINRA Rule 3220 (Influencing or Rewarding Employees of Others) (''FINRA's Gifts Rule''). FINRA's Gifts Rule also requires members to keep separate records regarding gifts and gratuities. *Id.*

[445] *See supra* section II.A.4.

[446] *See supra* text accompanying footnotes 351–353.

[447] *See* Notice to Members, Guidance: Gifts and Gratuities: NASD Issues Additional Guidance on Rule 3060 (Influencing or Rewarding Employees of Others), December 2006, *available at http://www.finra.org/sites/default/files/NoticeDocument/p018024.pdf* (providing staff guidance that gifts of *de minimis* value (*e.g.,* pens, notepads or modest desk ornaments) or promotional items of nominal value that display the firm's logo (*e.g.,* umbrellas, tote bags or shirts) would not be subject to the restrictions of the Gifts Rule or its recordkeeping requirements). In 2008, the Commission approved the transfer of NASD Rule 3060 into the Consolidated FINRA Rulebook without material change and renumbered the rule as FINRA Rule 3220 (*i.e.,* FINRA's Gifts Rule). FINRA staff did not specify in its 2006 staff guidance at what value it would consider a gift to be of *de minimis* value. *Id. See* FINRA's Gifts Rule, which also requires members to keep separate records regarding gifts and gratuities.

[448] *See* letter from R. Clark Hooper, Executive Vice President, NASD, to Henry H. Hopkins, Director, and Sarah McCafferty, Vice President, T. Rowe Price Investment Services, Inc., dated June 10, 1999 (NASD staff interpretive letter taking this approach).

incorporate such an exemption? If so, should we provide guidance on when such items raise a question of propriety? If so, should we include a recordkeeping requirement in the rule to highlight that advisers must track their use of *de minimis* compensation?

d. Nonprofit Programs

Under our proposed rule, certain types of nonprofit programs would be exempt from the substantive requirements of the rule because we believe the potential for the solicitor to demonstrate bias towards one adviser or another is sufficiently minimal to make the protections of the rule unnecessary. Specifically, the rule would not apply to an adviser's participation in a program,

(i) when the adviser has a reasonable basis for believing that

(A) the solicitor is a nonprofit program,

(B) participating advisers compensate the solicitor only for the costs reasonably incurred in operating the program; and

(C) the solicitor provides clients a list of at least two advisers the inclusion of which is based on non-qualitative criteria such as, but not limited to, type of advisory services provided, geographic proximity, and lack of disciplinary history; and

(ii) the solicitor or the investment adviser prominently discloses to the client at the time of any solicitation activities:

(A) The criteria for inclusion on the list of investment advisers, and

(B) that investment advisers reimburse the solicitor for the costs reasonably incurred in operating the program.[449]

The first and second elements of the proposed exemption, taken together, are intended to mitigate the conflict of interest associated with the nonprofit solicitor's receipt of compensation. We believe that the absence of compensation that is related to the program's generation of referrals lessens the need for the protections of the rule. This is because a solicitor would be unlikely to demonstrate bias in referring one adviser over another when neither adviser compensates the solicitor based on the number of referrals made or any other indicator of the potential to earn the adviser profit. The third element of the proposed exemption (requiring the solicitor to provide a list of at least two advisers based on non-qualitative criteria) is intended to mitigate the risk that clients would view the nonprofit program as referring any one adviser. Requiring that the list be based on non-qualitative criteria would also reduce the likelihood of the solicitor appearing to favor or endorse the advisers in the program over other advisers that are not in its program, or any particular advisers in the program over other advisers in the program. Examples of non-qualitative criteria are the type of advisory services provided, geographic proximity, and lack of disciplinary history. Another example that would likely be a non-qualitative criterion is the presence of certain certifications for the firm or its personnel. If the list were to be sorted based on a qualitative assessment, such as adhering to a particular investment philosophy, that would not fall within the scope of the proposed exemption. Once the solicitor has selected a pool of advisers based on non-qualitative criteria, the program could permit a client to then screen for specific types of advisers within the pool based on the client's own selection criteria. Similar to other proposed solicitation rule requirements, we are proposing to require that, in order to rely on the nonprofit exemption, the adviser must have a reasonable belief that the program meets these requirements.

Finally, we are proposing to require, as a condition of the nonprofit exemption, disclosures to be made by the solicitor to the client at the time of any solicitation activities: The criteria for inclusion on the list of investment advisers, and that investment advisers reimburse the solicitor for the costs reasonably incurred in operating the program. We believe that these disclosures would inform clients of the basis for advisers' participation in the program. Depending on the context and content of the required disclosures, however, there could be circumstances where a solicitor's disclosures do not effectively convey to clients the scope and limitations of the program with respect to the selection of advisers in the program. For example, if it is not clear from the disclosures that the program does not assess the quality of any adviser or its appropriateness for any client, and that that the program does not present a client with all of the investment advisers that may be available to the client, an adviser should consider making such disclosures or requiring them of the solicitor.

We request comment on this aspect of the proposal.

- Should we provide the proposed nonprofit exemption? Should we define what types of programs qualify as ''nonprofit,'' perhaps through reference to IRS guidance? If so what entities should we include and why? Would such a list become outdated? Should there be any limit on the kind of compensation paid to the solicitor to ensure that the nonprofit status of the program does not serve merely as a conduit for circumventing the solicitation rule?
- Should some of the rule's provisions apply to a solicitation arrangement that qualifies for the proposed nonprofit exemption? If so, which ones?
- Should we limit the use of the fees paid to covering ''costs reasonably incurred in operating the program,'' as proposed? If not, what other types of costs should we permit, any why? How would an adviser seeking to rely on the exemption demonstrate that the fees paid to the solicitor only cover such costs? Should we include a recordkeeping requirement that the adviser maintain records of the fees paid to the solicitor, as we do in our proposed corresponding amendments to the books and records rule?
- Should we provide further guidance on what we mean by ''non-qualitative'' criteria? For example, should we provide a list of such criteria that a person could use in accepting advisers for the nonprofit program and/or sorting the list? What should that list include?
- Should we require the adviser or the solicitor to disclose to the client, at the time of any solicitation activities or as soon as reasonably practicable thereafter, the criteria for inclusion on the list of investment advisers, and that the advisers reimburse the program for the costs reasonably incurred in operating the program? Why or why not? Should we require disclosure of the amount of reimbursement? Should we also require that the program state that it does not assess or opine on the quality of any adviser or its appropriateness for any client, and/or that the program does not include all investment advisers that may be available to clients? Why or why not?
- As proposed, should we require that a list that includes more than a single adviser be provided clients to qualify for the exemption? Should a solicitor be allowed to provide the name

[449] Proposed rule 206(4)–3(b)(4). Some solicitors have, from time to time, requested no action relief from the cash solicitation rule from the Commission staff for referral programs with some, or all, of these features. *See* National Football League Players Association, SEC Staff No-Action Letter (Jan. 25, 2002) (''NFLPA Letter''); Excellence in Advertising, Limited, SEC Staff No-Action Letter (Nov. 13, 1986; pub. avail. Dec. 15, 1985) (''EIA Letter''); International Association for Financial Planning, SEC Staff No-Action Letter (Jun. 1, 1998) (''IAFP Letter''). As discussed in section II.D., staff in the Division of Investment Management is reviewing staff no-action and interpretative letters to determine whether any such letters should be withdrawn in connection with any adoption of this proposal.

of only a single adviser if such an adviser is the only participating adviser that meets the non-qualitative criteria established?

• Our staff has previously stated that it would not recommend enforcement action against certain persons that operate programs similar to what we are proposing today under the non-profit exemption.[450] Would such existing programs be able to meet the proposed exemption? If not, should we consider making any other changes to the proposed exemption to allow existing similar programs to continue to operate? What changes and why?

8. Disqualification for Persons Who Have Engaged in Misconduct

We are proposing to revise the current rule's disqualification provision, which prohibits persons who have engaged in certain misconduct from acting as solicitors.[451] The current rule generally disqualifies a person from acting as a solicitor if: (i) The person is subject to a Commission order issued under section 203(f) of the Act (*i.e.,* the Commission has barred or suspended that person from association with an investment adviser, or has censured or placed limitations on the activities of a person associated with an investment adviser, under section 203(f) of the Advisers Act); [452] or (ii) the Commission or a court has found that person to have engaged in enumerated misconduct that could subject them to sanctions under section 203(f), or that could subject the firm with which they are associated to disciplinary action by the Commission under section 203(e) of the Act.[453] These provisions reflect the Commission's concern that persons with a history of misconduct that might affect their prospects for direct employment with an adviser not seek to avoid our scrutiny by working as solicitors instead.[454] Drawing from statutory changes and Commission rules regarding limitations on activities since the rule was promulgated, including the Dodd-Frank Act and the rules disqualifying felons and other ''bad actors'' from certain securities offerings, our proposal would add to the types of disciplinary events that would disqualify a person from acting as a solicitor, including by adding certain disciplinary actions by other regulators and self-regulatory organizations. It would also provide a conditional carve-out for certain types of Commission actions.

a. Disqualification

Under our proposal, an investment adviser could not compensate, directly or indirectly, a person for any solicitation activities that it knows, or that it, in the exercise of reasonable care, should have known, is an *ineligible solicitor.*[455] An ''ineligible solicitor'' would be defined to mean a person who, at the time of the solicitation, is either subject to a disqualifying Commission action or is subject to any disqualifying event.[456] The proposal's inclusion of a reasonable care standard would be a change from the current rule, which contains an absolute bar on paying cash for solicitation activities to a person with any disciplinary history enumerated in the rule.

We believe that adding a proposed reasonable care standard would preserve the rule's benefits while reducing the risk that advisers would violate the rule as a result of disqualifying event or actions that they should not have known, in the exercise of reasonable care, existed.[457] Such a standard necessarily includes inquiry by the adviser into the relevant facts; however, we are not proposing to specify what method or level of due diligence or other inquiry would be sufficient to exercise reasonable care. We are also not proposing to prescribe the frequency of such inquiry, but whether the adviser satisfied the reasonable care standard would be determined in light of the circumstances of the solicitor and the solicitation arrangement. For example, as we have stated in other contexts implementing rules for the treatment of ''bad actors'', where we have included a reasonable care standard and have not prescribed or delineated what steps an issuer would be required to take to show reasonable care [458]: The steps an issuer should take to exercise reasonable care will vary according to the particular facts and circumstances. For example, we anticipate that issuers will have an in-depth knowledge of their own executive officers and other officers participating in securities offerings gained through the hiring process and in the course of the employment relationship, and in such circumstances, further steps may not be required in connection with a particular offering. Factual inquiry by means of questionnaires or certifications, perhaps accompanied by contractual representations, covenants and undertakings, may be sufficient in some circumstances, particularly if there is no information or other indicators suggesting bad actor involvement.[459]

The frequency of inquiry could vary depending upon, for example, the risk of using an ineligible solicitor, the impact of other screening and compliance mechanisms already in place, and the cost and burden of the inquiry.[460] For example, if the adviser has an ongoing relationship with a solicitor that solicits investors over

[450] *See, e.g.,* NFLPA Letter; EIA Letter; IAFP Letter, *id.*

[451] *See* rule 206(4)–3(a)(1)(ii).

[452] Section 203(f) of the Act authorizes the Commission to bar persons from association with an investment adviser, or to suspend them from association with an investment adviser. Under section 203(f), we may issue a bar or suspension order if the Commission, a court, or another regulatory authority has found the person to have engaged in categories of misconduct specified in section 203(e) of the Act, discussed below. Section 203(f) also authorizes us to censure or place limitations on the activities of a person associated with an investment adviser instead of barring or suspending them.

[453] Section 203(e) of the Act [15 U.S.C. 80b–3(e)] authorizes the Commission to, by order, censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser, under certain circumstances described therein. Under section 203(e), we may take these disciplinary actions in connection with our finding that a firm, or a person associated with the firm, has engaged in categories of misconduct specified in section 203(e), such as violating the Federal securities laws or willfully filing a false registration form. Section 203(e) also authorizes us to commence disciplinary action if a court or certain other regulatory authority find an adviser or an associated person has engaged in categories of misconduct specified in section 203(e), such as committing a crime in connection with the conduct of a securities business or a violating a foreign regulation regarding transactions in securities.

[454] *See* 1978 Proposing Release, *supra* footnote 27, at n.1 and accompanying text.

[455] Proposed rule 206(4)–3(a)(3)(i). The proposed rule would, however, provide exemptions for referrals for the provision of *de minimis* compensation and for certain nonprofit programs. *See supra* section II.B.7.c.

[456] Proposed rule 206(4)–3(a)(3)(ii). *See* proposed rule 206(4)–3(a)(3)(iii) for the defined terms ''disqualifying Commission action'' and ''disqualifying event.''

[457] *Cf.,* Disqualification of Felons and Other ''Bad Actors'' from Rule 506 Offerings, Release No. 33–9414 (Jul. 10, 2013) [78 FR 44729 (Jul. 24, 2013)] (''Bad Actor Disqualification Adopting Release''). As with the ''bad actor'' disqualification provisions adopted therein, our proposed reasonable care standard would address the potential difficulty for advisers in establishing whether any solicitors are the subject of disqualifying events, particularly given that there is no central repository that aggregates information from all the Federal and state courts and regulatory authorities that would be relevant in determining whether solicitors have a disqualifying event in their past. *Id.,* at text accompanying nn.190–191.

[458] *Id. See* Rule 506(d)(2)(iii) and instruction thereto (providing an exception to the rule's disqualification provision: ''If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (d)(1) of this section'').

[459] Bad Actor Disqualification Adopting Release, *supra* footnote 457, at nn. 201–202 and accompanying text.

[460] Advisers should address such methods in their policies and procedures under the compliance rule. *See* rule 206(4)–7.

time, the adviser should consider inquiring into the solicitor's status on a periodic basis during the relationship as appropriate based on the applicable facts and circumstances. In this circumstance, an annual inquiry could be sufficient if there is no information or other indicators suggesting changes in circumstance that would be disqualifying under the rule. Conversely, if an adviser compensates a solicitor on a one-time basis at the time of solicitation, an inquiry into the solicitor only once no later than the time of solicitation generally should be sufficient.

Additionally, our proposal would prohibit adviser compensation of a solicitor if the solicitor is subject to a disqualifying Commission action or is subject to any disqualifying event at the time of the solicitation.[461] We believe the time of solicitation—rather than the time the adviser compensates, or engages, the solicitor for solicitation—is the appropriate point in time to tie the disqualifying event or action to the solicitor's status as an ineligible solicitor.[462] The time of solicitation is when investors are most vulnerable to fraud or deceit regarding the solicitation. However, even though our proposed provision is tied to the time of solicitation, as a practical matter advisers generally should conduct due inquiry into the solicitor's eligibility at the time of engagement, because an adviser that engages a solicitor that is ineligible at the time of engagement runs the risk that the solicitor will remain ineligible and conduct solicitations before the adviser becomes aware of such status. Under our proposed rule, if a solicitor was eligible at the time of solicitation but subsequently became ineligible, an adviser would be permitted to compensate the solicitor for the solicitation activity that occurred prior to the ineligibility.

Our proposed rule would also apply the rule's definition of ineligible solicitor to certain persons associated with a firm that is an ineligible solicitor.[463] For each ineligible solicitor, the following persons would also be ineligible solicitors: (i) Any employee, officer or director of an ineligible solicitor and any other individuals with similar status or functions; (ii) if the ineligible solicitor is a partnership, all general partners; (iii) if the ineligible solicitor is a limited liability company managed by elected managers, all elected managers; (iv) any person directly or indirectly controlling or controlled by the ineligible solicitor as well as any person listed in (i)–(iii) with respect to such person.[464] These persons would therefore be ineligible solicitors even if they do not themselves have any of the rule's disqualifying events. However, under our proposal, a *firm* would not necessarily be an ineligible solicitor if one or more of such listed persons are ineligible solicitors under the proposed rule, provided that such persons do not conduct solicitation activities. Because a solicitor that is a firm engages in solicitation activities through its associated individuals, we believe that an individual's conduct should be subject to the rule's disqualification when the firm is disqualified. A firm sets the compliance tone for its personnel, and many types of regulated entities are responsible under their regulatory regimes for the supervision and control of their personnel.

We request comment on the proposed disqualification provision; particularly the ''reasonable care'' standard, the point of time referenced in the ineligible solicitor definition, and the application of the rule's ineligible solicitor definition to certain individuals associated with a firm that is disqualified.

- Should the rule *per se* prohibit advisers from compensating for solicitation activities persons that have certain disqualifying events that meet the rule's definition of ineligible solicitor? Or, should the rule include the reasonable care standard we have proposed? Should we further specify in the rule or in guidance what would constitute reasonable care for knowing that the solicitor is an ineligible solicitor? For example, should we specify a method or level of due diligence that would be sufficient to establish reasonable care? Should we prescribe the frequency of such inquiry? Why or why not? Should we specifically require that the adviser conduct due inquiry as part of exercising reasonable care? Why or why not?
- Should the definition of ineligible solicitor refer to a person's disqualifying events or orders at the time of solicitation, as proposed? Or, should it refer to a different point in time, such as the adviser's engagement of the solicitor or when the adviser compensates the solicitor? Why or why not? For example, under our proposed rule, if a solicitor was eligible at the time of solicitation but subsequently became ineligible, an adviser would be permitted to compensate such person for the solicitation activity that occurred prior to the solicitor becoming ineligible. Do commenters agree with this result? Why or why not?
- Should we apply the rule's definition of ineligible solicitor to any individual associated with a firm that is an ineligible solicitor, even if the individual would not otherwise be an ineligible solicitor absent the particular association with the ineligible solicitor firm? Do commenters agree with the categories of persons as proposed? Why or why not? Should we list in the rule different categories of persons we would presume to be associated with a firm? For example, should the proposed rule specify whether or not an independent contractor would be included as ''any employee, officer or director of such ineligible solicitor and any other individuals with similar status or functions''? The Form ADV definition of ''employee'' includes an adviser's independent contractors who perform advisory functions on the adviser's behalf. Should these persons be included in the rule as associated with a firm? Why or why not?
- Should we specify in the rule that a firm would be an Ineligible Solicitor if an individual who is an ineligible solicitor controls the firm, even if the firm is not otherwise an ineligible solicitor and the individual who is an ineligible solicitor does not engage in solicitation activities on behalf of the adviser? Why or why not? If so, should we define the term ''control'', and if so, how? For example, should we use the Act's definition of ''control,'' which means ''the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company''? Should we use the definition of ''control'' in Form ADV, which includes, but is not limited to, each of the firm's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions)? Should we use another definition, and if so, what should that definition be, and why?
- If the rule permits an adviser to compensate for solicitation a firm that employs one or more individuals who are ineligible solicitors, should we specify the level of diligence an adviser should conduct in order to establish that

[461] The proposed disqualification provision would apply to an ''ineligible solicitor'', which would mean a person who *at the time of the solicitation* is either subject to a disqualifying Commission action or has any disqualifying event. Proposed rule 206(4)–3(a)(3)(ii) (emphasis added).

[462] The time of solicitation (or, in the case of mass communications, as soon as reasonably practicable thereafter) is also when the solicitor or the adviser, as applicable, is required under the required written agreement to deliver the solicitor disclosure. Proposed rule 206(4)–3(a)(1)(iii).

[463] Proposed rule 206(4)–3(a)(3)(ii).

[464] *Id.*

none of the firm's ineligible solicitors conducts solicitation activities on the adviser's behalf?

b. Disqualifying Commission Action

Under our proposal, a person who at the time of solicitation is subject to a disqualifying Commission action would be an ineligible solicitor.[465] A disqualifying Commission action would be a Commission opinion or order barring, suspending, or prohibiting a person from acting in any capacity under the Federal securities laws, or ordering the person to cease and desist from committing or causing a violation or future violation of (1) any scienter-based antifraud provision of the Federal securities laws, including a non-exhaustive list of such laws and the rules and regulations thereunder; or (2) Section 5 of the Securities Act of 1933.[466] Under our proposal, if the Commission prohibits an individual from acting in a specific capacity under the Federal securities laws (*e.g.,* supervisor, compliance officer), the individual would be disqualified as a solicitor under the proposed rule, even if the Commission has not barred or suspended the individual from association with an investment adviser, broker-dealer or other registrant. In addition, if the Commission has ordered a person to cease and desist from committing or causing a violation or future violation of a scienter-based antifraud provision of the Federal securities laws, but has not barred or suspended that person, that person would be disqualified under the proposed rule.[467] We believe that this provision would cover a wide scope of Commission orders concerning misconduct that could call into question the person's trustworthiness or ability to act as a solicitor. We believe that the Commission's cease and desist orders we propose to include as a disqualifying Commission action would call into question that person's trustworthiness or ability to act as a solicitor even if the Commission did not bar, suspend, or prohibit that person from acting in any capacity under the Federal securities laws.

c. Disqualifying Event

Under our proposal, a person that at the time of the solicitation is subject to any disqualifying event would also be an ineligible solicitor.[468] A disqualifying event would generally include a finding, order or conviction by a United States court or certain regulatory agencies (other than the Commission) that a person has engaged in any act or omission referenced in one or more of the provision's four prongs, as discussed below. Any such finding, order or conviction would generally be a disqualifying event if it occurred within the previous ten years or if the bar or injunction is in effect at the time of solicitation.

We are proposing a ten-year time limit (or ''look-back period'') on certain of the disqualifying events, as described below, because this look-back period is used in section 203(e), which is a basis for Commission action to censure, place limitations on the activities, or revoke the registration of any investment adviser or its associated persons.[469] It is also used for certain disciplinary events in the rules disqualifying felons and other ''bad actors'' from certain securities offerings.[470] For regulatory and court-ordered bars and injunctions, we are proposing that such bar or injunction be in effect at the time of solicitation in order to be disqualifying. This is consistent with the current rule as well as the bad actor disqualification requirements under rule 506.[471]

Under our proposal, certain solicitors that are not currently disqualified under the rule would be disqualified under the amended rule as ''ineligible solicitors'' solely as a result of the proposed changes to the rule's disqualification provisions. To the extent that the proposed amendments would expand disqualifying events under the proposed rule (*i.e.,* any disqualifying Commission action or disqualifying event) beyond the scope of disqualifying events listed in the current rule's disqualification provision, the proposed disqualification provision would apply only to any disqualifying Commission action or disqualifying event occurring after the effective date (or the compliance date, as applicable) of the proposed rule amendments. Any disqualifying Commission action or disqualifying event that occurs prior to the effectiveness of the proposed rule (or the compliance date, as applicable) would be subject to the current rule's disqualification provision. We recognize that some advisers and solicitors rely on letters issued by the Commission staff stating that the staff would not recommend enforcement action to the Commission under section 206(4) and rule 206(4)–3 if an investment adviser paid cash solicitation fees to a solicitor that was subject to particular disciplinary events that fall within the current rule's disqualification provision.[472] We request comment, below, on whether we should ''grandfather'' such persons into compliance with the proposed rule by permitting advisers to continue to compensate such solicitors after the effective date of the proposed rule, if the solicitors continue to comply with the conditions specified in the letters and, except for the disciplinary events described in the applicable letter, would not otherwise be ineligible solicitors under the proposed rule.

The first prong of the proposed disqualifying event definition describes a conviction by a court of competent jurisdiction within the United States, within the previous ten years, of any

[465] In addition, as discussed below, a person who at the time of solicitation has any disqualifying event is also an ineligible solicitor. *See infra* footnote 468 and accompanying text.

[466] Proposed rule 206(4)–3(iii)(A). The imposition of a bar, suspension, or prohibition may appear in an opinion of the Commission or in an administrative law judge initial decision that has become final pursuant to a Commission order. In both cases, such a bar, suspension, or prohibition would be a disqualifying Commission action. These would include, for example, officer and director bars imposed in Commission cease and desist orders, limitations on activities imposed under section 203(e) or 203(f) of the Advisers Act that prevent persons from acting in certain capacities, penny stock bars imposed under section 15(b) of the Exchange Act, and investment company prohibitions imposed under section 9(b) of the Investment Company Act.

[467] The reference to a scienter-based anti-fraud provision of the Federal securities laws is based on the bad actor disqualification provisions under Rule 506 of Regulation D. *See* Rule 506(d)(1)(v) (including, in a non-exhaustive list of scienter-based anti-fraud provisions of the Federal securities laws, section 17(a)(1) of the Securities Act, section 10(b) of the Exchange Act and rule 10b–5, section 15(c)(1) of the Exchange Act, section 206(1) of the Advisers Act).

[468] Proposed rule 206(4)–3(a)(3)(iii)(B).

[469] Section 203(e)(2) and (3) (containing a ten-year look-back period for convictions for certain felonies and misdemeanors). *See supra* footnotes 453 and 452 (describing sections 203(e) and 203(f), respectively).

[470] *See, e.g.,* paragraph (d)(1)(iii)(B) of Rule 506 of Regulation D (disqualifying a covered person subject to a final order of the U.S. Commodity Futures Trading Commission or another regulatory entity described therein, based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before the sale described in the rule).

[471] *See* rule 206(4)–3(a)(1)(ii)(D) (applying the disqualification provision to a solicitor that ''is subject to an order, judgment or decree described in section 203(e)(4) of the Act); *see also* paragraphs (d)(1)(ii), (d)(1)(iii)(A) and (d)(1)(iv) of rule 506 of Regulation D (requiring that the applicable order, judgment or decree be in effect at the time of the sale, and also in some cases that the order, judgment or decree have been entered within a look-back period of five or ten years).

[472] *See, e.g.,* the ''bad actor'' letters listed below in Section II.D. While these staff letters generally only apply to the solicitor or adviser to which the letter is addressed, the staff has issued one letter which it stated would apply with respect to any cash solicitation arrangement under which an investment adviser proposes to pay cash solicitation fees to a solicitor subject to a specific type of disqualification event under the circumstances described in the letter. *See* Dougherty & Co., LLC, SEC Staff No-Action Letter (Jul. 3, 2003) (''Dougherty Letter''), discussed *infra* footnote 495.

felony or misdemeanor involving conduct described in paragraphs (2)(A) through (D) of section 203(e) of the Act.[473] This prong generally follows the provision of the current rule that disqualifies persons convicted within the previous ten years of any felony or misdemeanor involving conduct described in section 203(e)(2)(A) through (D) of the Act, which are bases for Commission action to censure, place limitations on the activities, or revoke the registration of any investment adviser or its associated persons.[474] We are proposing, however, not to include as a disqualifying event a conviction by a foreign court of competent jurisdiction with respect to the misconduct described in section 203(e)(2)(A) through (D) of the Act because we do not believe advisers should be required to incur the cost and burden, with respect to their solicitors,[475] of inquiry into foreign proceedings or to make a determination of what is a ''substantially equivalent crime'' to a felony or misdemeanor, as is part of the conditions of section 203(e)(2).[476] A person subject to any such foreign conviction might still be an ineligible solicitor, however, to the extent that the Commission uses its authority to bar, suspend or place limits on that person's association with an investment adviser, or otherwise issues a disqualifying Commission action based on such conduct.[477]

The second prong of the proposed disqualifying event definition describes a conviction by a court of competent jurisdiction within the United States, within the previous ten years, of engaging in any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act.[478] This prong is derived from the third prong of the current rule's disqualification provision, which describes persons the Commission finds to have engaged, or that have been convicted of engaging, in any of the conduct specified in paragraphs (1), (5) or (6) of section 203(e) of the Act.[479] We believe that these felony and misdemeanor convictions should continue to be disqualifying under the rule, subject to the rule's carve-out as described below. In many cases, conduct underlying a felony or misdemeanor would be picked up by our proposed rule as a disqualifying Commission action (*i.e.,* to the extent the Commission has issued an opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws or issued certain types of cease and desist orders described in the proposed rule).

We are not proposing to add to the provision's second prong any references to conduct specified in paragraphs (3) and (8) of section 203(e) of the Act (*e.g.,* certain felony convictions not described in paragraph (2) of section 203(e) and certain findings by foreign financial regulatory authorities).[480] Similar to our rationale for not proposing to include in the first prong any ''substantially equivalent crime by a foreign court of competent jurisdiction,'' we do not believe advisers should be required to incur the cost and burden of inquiry into findings by foreign financial regulatory authorities, as is required in section 203(e)(8).[481] In addition, we are not convinced that the rule should prohibit the compensation of solicitors subject to certain felony convictions not described in paragraph 203(e)(2) or substantially equivalent crimes by a foreign court of competent jurisdiction. We believe that including such felony convictions could overly broaden the scope of the disqualifying provision because such types of convictions are less likely to call into question the credibility of such solicitor's referral. However, a person subject to such felony convictions might still be an ineligible solicitor under our proposed rule, if the Commission has used its authority to bar, suspend or place limits on that person's association with an investment adviser, or otherwise issue a disqualifying Commission action based on such conduct.

The third prong of the proposed disqualifying event definition generally describes the entry of a bar or final order based broadly on the person's fraudulent conduct, by certain regulators and self-regulatory organizations. In particular, this section refers to: The Commodity Futures Trading Commission (''CFTC''), any self-regulatory organization, a State securities commission (or any agency or officer performing like functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration. The proposed provision refers to any final order of any such body that (i) bars a person from association with an entity regulated by such body, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or (ii) constitutes a final order, entered within the previous ten years, based on violations of any laws, regulations, or rules that prohibit fraudulent, manipulative, or deceptive conduct.[482]

This proposed third prong is not part of the current rule's statutory disqualification provision.[483] It is derived from section 203(e)(9) of the Act, which is a basis for Commission action to censure, place limitations on the activities, or revoke the registration of any investment adviser or its associated persons.[484] However, our

[473] Proposed rule 206(4)–3(a)(3)(iii)(B)(1). Paragraphs (2)(A) through (D) of section 203(e) of the Act include, for example, felonies or misdemeanors involving dishonesty or misappropriation of funds or securities, and any felony or misdemeanor arising out of the conduct of the business of certain types of entities such as a broker, dealer, investment adviser, bank, and insurance company. Section 203(e)(A)–(D).

[474] Rule 206(4)–3(a)(1)(ii)(B).

[475] *Compare* Item 11 of Part 1A of Form ADV (requiring advisers to report certain foreign court actions about themselves and their affiliates). We believe that requiring an adviser to gather such information about foreign court actions affecting the solicitors they use (who may or may not be affiliated) may be significantly more difficult than gathering and reporting such data about the adviser *itself* or its affiliates as required under Form ADV.

[476] Section 203(e)(2)(A)–(D). *Cf* section 9(b) of the Investment Company Act, pursuant to which foreign court convictions are not automatically disqualifying.

[477] *See* section 203(f). Any Commission order issued under this section would be a disqualifying Commission action under the proposed rule.

[478] Proposed rule 206(4)–3(a)(3)(iii)(B)(2). Paragraphs (1), (5), or (6) of section 203(e) of the Act generally include, but are not limited to, a person who: (i) Has willfully made or caused to be made certain false reports with the Commission; (ii) has willfully violated any provision of the Act or other Federal securities laws; and (iii) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the of the Act or other Federal securities laws.

[479] Rule 206(4)–3(a)(1)(ii)(C).

[480] Since 1979, section 203 has been amended to expand the types of misconduct for which the Commission has the authority to bar or suspend a person from being associated with an adviser, including by the addition of paragraphs (3) and (8) of section 203(e) of the Act. *See* Securities and Exchange Commission Authorization Act of 1987, Public Law 100–181 (amending section 203(e) and 203(f) of the Act); Securities Act Amendments of 1990, Public Law 101–550 (amending section 203(e) and 203(f) of the Act); National Securities Markets Improvement Act of 1996, Public Law 104–290 (amending section 203(e) and 203(f) of the Act); Securities Litigation Uniform Standards Act of 1998, Public Law 105–353 (amending section 203(e) of the Act); and Sarbanes-Oxley Act of 2002, Public Law 107–204 (amending section 203(e) of the Act).

[481] Section 203(e)(8).

[482] Proposed rule 206(4)–3(a)(3)(iii)(B)(3).

[483] The current rule's statutory disqualification provision includes findings of certain misconduct by another regulatory authority only insofar as such findings form a basis of a finding by the Commission (including a Commission order issued under section 203(f) of the Act) or certain convictions by a court of competent jurisdiction, including a foreign court of competent jurisdiction. *See* rule 206(4)–3(a)(1)(ii).

[484] *See* sections 203(e)(9) and 203(f).

proposal would add self-regulatory organizations and the CFTC to the list of regulators incorporated from section 203(e)(9). Adding these entities would be consistent with the rules disqualifying felons and other ''bad actors'' from certain securities offerings.[485] Our reference to the definition of self-regulatory organization in section 3 of the Exchange Act in the proposed provision would also be consistent with such rules: It would mean any registered national securities exchange or a registered national or affiliated securities association.[486] As we determined when adopting such rules, the conduct that would typically give rise to CFTC sanctions is similar to the type of conduct that would result in disqualification if it were the subject of sanctions by another financial services industry regulator.[487] In addition, we believe that the type of conduct that would typically give rise to a self-regulatory organization's bar or final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct is similar to the type of conduct that would result in disqualification if it were the subject of sanctions by another financial services industry regulator. We believe that including applicable bars and orders of such regulators will also make the disqualification provisions more internally consistent with other bad actor disqualification provisions in the Federal securities laws, treating similar types of sanctions similarly for disqualification purposes.

The fourth prong of the proposed disqualifying event definition describes the entry of an order, judgment, or decree described in paragraph (4) of section 203(e) of the Act, of any court of competent jurisdiction within the United States.[488] Paragraph (4) of section 203(e) describes certain orders, judgments or decrees that permanently or temporarily enjoin persons from acting in multiple capacities within the securities industry, and they are bases for Commission action to censure, place limitations on the activities, or revoke the registration of any investment adviser or its associated persons.[489] This prong would generally follow the corresponding provision of the current rule's disqualification provision, except that we are proposing not to include orders, judgments, or decrees by a foreign court, as we discuss below.[490] As when we adopted the cash solicitation rule, we continue to believe that these events should be disqualifying under the rule, subject to our proposed carve-out, because such events call into question the credibility of a solicitor's referral or solicitation.

Similar to our rationale for not proposing to include in our first prong convictions by foreign courts, we do not believe advisers should be required to incur the cost and burden of inquiry into foreign proceedings or to make a determination of what is a ''foreign person performing a function substantially equivalent to'' the functions described in the section, or what is a ''foreign entity substantially equivalent'' to the entities described in the section, as is required under section 203(e)(4).[491] A person subject to any such order, judgment, or decree by a foreign court might still be an ineligible solicitor, however, to the extent that the Commission uses its authority to bar, suspend, or place limits on that person's association with an investment adviser or otherwise issue a disqualifying Commission action based on such conduct.[492]

d. Conditional Carve-Out From Definition of ''Ineligible Solicitor''

We are proposing a conditional carve-out from the determination of whether a person is an ineligible solicitor due to a person's act or omission that is the subject of a disqualifying event and that is also the subject of a ''non-disqualifying Commission action'' with respect to that person.[493] The term ''non-disqualifying Commission action'' would mean (i) an order pursuant to section 9(c) of the Investment Company Act (commonly referred to as a ''waiver''), or (ii) a Commission opinion or order that is not a disqualifying Commission action.[494] For either such opinion or order to be disregarded in determining whether the person is an ineligible solicitor, (i) the person must have complied with the terms of the opinion or order, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties and fine; and (ii) for a period of ten years following the date of each opinion or order, the person must include in its solicitor disclosure a description of the acts or omissions that are the subject of, and the terms of, the opinion or order.

Our proposed conditional carve-out would permit advisers to compensate for solicitation activities, in certain circumstances, persons with disciplinary events that would otherwise be disqualifying events. Our proposed approach would carve out of the definition of ineligible solicitor a person whose only disqualifying events are those for which the Commission has issued a waiver under the Investment Company Act or the Commission has issued an opinion or order that is not disqualifying Commission action (*e.g.,* an order that does not bar or suspend the person from association with a Commission-registered entity or prohibit the person from acting in any capacity under the Federal securities laws). We are proposing this carve-out because, in those instances where the Commission has acted on the conduct yet not barred or suspended the person or prohibited the person from acting in any such capacity, and has not made a finding of a violation of a scienter-based anti-fraud provision of the Federal securities laws, it would be appropriate to likewise permit such person to engage in solicitation activities. This approach will obviate the need for the Commission to consider how to treat under the solicitation rule a person with disciplinary events for which the Commission has issued one or more opinions or orders but did not bar or suspend the person or prohibit the person from acting in any capacity under the Federal securities laws, and did not order the person to cease and desist from committing or causing a violation or future violation of certain

[485] *See, e.g.,* paragraph (d)(iii) of rule 506 of Regulation D; paragraph (d)(vi) of rule 506 of Regulation D (disqualifying a person who is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade). To the extent that a person is subject to both the disqualification provision of rule 506 and the proposed amendments to the disqualification provision under the solicitation rule, there would be some overlapping categories of disqualifying events (*i.e.,* certain bad acts would disqualify a person under both provisions). For instance, certain types of final orders of certain state and Federal regulators would be disqualifying events under both provisions.

[486] Proposed rule 206(4)–3(a)(3)(iii)(B)(3).

[487] For example, both registered broker-dealers and investment advisers may be subject to Commission disciplinary action based on their conduct that gave rise to violations of the Commodity Exchange Act. *See, e.g.,* section 15(b)(4)(D) of the Exchange Act (15 U.S.C. 80(b)(4)(C)) and section 203(e)(5) of the Advisers Act (15 U.S.C. 80b–3(e)(5)).

[488] Proposed rule 206(4)–3(a)(3)(iii)(B)(4).

[489] *See* sections 203(e)(4) and 203(f) of the Act.

[490] Rule 206(4)–3(a)(1)(ii)(D).

[491] Section 203(e)(2)(A)–(D). *Cf.* section 9(b) of the Investment Company Act, pursuant to which foreign court convictions are not automatically disqualifying (in such instances, in order for its action to be disqualifying, the Commission would have to use its authority to bar, suspend or place limits on that person's activity).

[492] *See* section 203(f). Any Commission order issued under this section would be a disqualifying Commission action under the proposed rule.

[493] Proposed rule 206(4)–3(a)(3)(iii)(C).

[494] *Id.*

provisions of the Federal securities laws.[495]

Under our proposal, a solicitor that is subject to a disqualifying event would be an ineligible solicitor unless the Commission has issued a non-disqualifying Commission action covering such event.[496] However, in the event that (i) the Commission has not previously evaluated the disqualifying event and, (ii) neither the solicitor nor any person on its behalf has previously sought a waiver under the Investment Company Act with respect to the disqualifying event, the solicitor could contact the Commission to seek relief.

We believe that the two conditions of the proposed carve-out are important for solicitors with certain disciplinary events to meet in order for the events to be disregarded in determining whether the person is an ineligible solicitor. Our first condition—that the person has complied with the terms of the non-disqualifying Commission action, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties and fines—would demonstrate the person's compliance regarding the Commission opinion or order. We believe that our second condition—that for a period of ten years following the date of each non-disqualifying Commission action, the solicitor disclosure includes a description of the acts or omissions that are the subject of, and the terms of, the opinion or order—would provide investors with important information regarding the solicitor's misconduct. Investors should be aware of the solicitor's misconduct and the terms of the Commission opinion or order so that the investor can fully evaluate the integrity of the solicitor. Knowledge of a solicitor's misconduct may affect the degree of trust and confidence an investor would place in the solicitor's referral. We believe that these two conditions should sufficiently address the risks associated with a solicitor who has engaged in the type of misconduct that results in a Commission sanction, but not a bar, suspension, or prohibition, or certain cease and desist orders described in the proposed rule. However, we believe the two conditions described above may not sufficiently address the risks associated with allowing a person to solicit investors who has engaged in such significant misconduct that the person has been barred from acting in the capacities described above or has been subject to certain cease and desist orders described above.

The time period of ten years is consistent with the proposed look-back period for the rule's disqualifying events.[497] We believe that a ten year look back period should provide for a sufficient period of time after the disqualifying event that the past actions of the ineligible solicitor may no longer pose as significant a risk. We believe that a limited look back period is more appropriate than a permanent bar on acting as a solicitor because a limited look back period would allow for the potential of a barred solicitor who has not continued to engage in misconduct to act as a solicitor after a period of time.

We request comment on our proposed disqualification provision; particularly, the proposed definitions of disqualifying Commission action, disqualifying event, and non-disqualifying Commission action.

- Do commenters agree with the proposed definition of disqualifying Commission action? Why or why not? Should we narrow the proposed definition of disqualifying Commission action, and if so, how? Alternatively, should we expand the proposed definition to capture other types of misconduct? If so, why, and how? For example, should a disqualifying Commission action include, as proposed, officer and director bars imposed in Commission cease and desist orders and penny stock bars under section 15(b) of the Exchange Act? Should a disqualifying Commission action include, as proposed, a Commission opinion or order to cease and desist from committing or causing a violation or future violation of any scienter-based antifraud provision of the Federal securities laws or Section 5 of the Securities Act of 1933, even if that person is not barred, suspended, or prohibited from acting in any capacity under the Federal securities laws?
- Do commenters agree with the proposed definition of disqualifying event, including the types of misconduct and events enumerated in its four prongs? Should we add or subtract any misconduct or events to the proposed definition? If so, why, and how should the proposed definition be changed?
- Should we, as proposed, include as disqualifying events certain final orders by the CFTC, any self-regulatory organization, a State securities commission, State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission, certain Federal banking agencies, or the National Credit Union Administration? Do commenters agree with the proposed definition of self-regulatory organization, or should the proposed definition be modified, for example, to include any national commodities exchange? Should we modify the scope of these final orders?
- We have not proposed to include in the definition of disqualifying event any convictions and orders, judgments, or decrees by foreign courts and findings by foreign financial regulatory authorities, on the basis that advisers should not be required to incur the cost and burden of inquiry into foreign proceedings and foreign regulatory

[495] *Cf.* Dougherty Letter. In the Dougherty Letter, Commission staff stated that it would not recommend enforcement action to the Commission under section 206(4) and rule 206(4)–3 if an investment adviser pays cash solicitation fees to a solicitor who is subject to an order issued by the Commission under section 203(f) of the Advisers Act, or who is subject to an order issued by the Commission in which the Commission has found that the solicitor: (a) Has been convicted of any felony or misdemeanor involving conduct described in section 203(e)(2)(A) through (D) of the Advisers Act; (b) has engaged, or has been convicted of engaging, in any of the conduct specified in paragraphs (1), (5) or (6) of section 203(e) of the Advisers Act; or (c) was subject to an order, judgment or decree described in section 203(e)(4) of the Advisers Act (for purposes of the Dougherty Letter, such Commission orders are collectively referred to as ''Rule 206(4)–3 Disqualifying Orders''), provided that certain conditions are met, including that no Rule 206(4)–3 Disqualifying Order bars or suspends the solicitor from acting in any capacity under the Federal securities laws.

[496] Under the current rule, Commission staff has issued several staff no-action letters stating that it would not recommend enforcement action to the Commission under section 206(4) and rule 206(4)–3 if any investment adviser registered or required to be registered with the Commission pays solicitation fees to a solicitor in accordance with the solicitation rule, notwithstanding a final judgment entered by a U.S. court of competent jurisdiction that otherwise would preclude such an investment adviser from paying such a fee to the solicitor, subject to the conditions therein. *See, e.g.,* Stifel, Nicolaus & Company, Inc. (Dec. 6, 2016); Macquarie Capital (USA) Inc., (June 1, 2017); F. Porter Stansberry, (pub. avail. Sept. 30, 2015); and Royal Bank of Canada, (Dec. 19, 2014). Under the proposed rule, however, a solicitor subject to a conviction by U.S. court of competent jurisdiction that meets the second prong of the disqualifying event definition would be an ineligible solicitor unless such person is subject to a non-disqualifying Commission action with respect to the disqualifying event.

[497] In the Dougherty Letter, discussed *supra* footnote 495, the staff stated that it would not recommend enforcement action under the cash solicitation rule if: (i) The solicitor has complied with the terms of each Rule 206(4)–3 Disqualifying Order, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties and fines; and (ii) for a period of ten years following the date of each Rule 206(4)–3 Disqualifying Order, the solicitor discloses the order to each person whom the solicitor solicits in the separate written disclosure document required to be delivered to such person under rule 206(4)–3(a)(2)(iii)(A) or, if the solicitor is a person specified in rule 206(4)–3(a)(2)(i) or (ii), the solicitor discloses the order to each person whom the solicitor solicits by providing the person at the time of the solicitation with a separate written disclosure document that discusses the terms of the order.

actions or to make a determination of what is a ''substantially equivalent crime'' to certain felonies or misdemeanors. Do commenters agree?

- Do commenters agree that the definition of disqualifying event should generally capture enumerated events that occurred within the previous ten years or, in the case of bars and injunctions, that are in effect at the time of solicitation? Why or why not? Should the look-back period be longer (or permanent) or shorter?

- Do commenters agree with the proposed carve-out to disregard, in determining whether a person with a disqualifying event is an ineligible solicitor, the same act(s) or omission(s) that are also the subject of a non-disqualifying Commission action with respect to that person? Are the conditions for such carve-out appropriate (*i.e.,* to have complied with the terms of the order and making required disclosures for 10 years)? Why or why not? Should we modify the conditions or impose additional conditions?

- Given that the term non-disqualifying Commission action would include a Commission opinion or order that does not bar, suspend, or prohibit the person from acting in any capacity under the Federal securities laws, and certain Commission ceases and desist orders relating to scienter-based antifraud provisions of the Federal securities laws and Section 5 of the Securities Act of 1933, subject to conditions described herein, should we specify whether or not non-disqualifying Commission action'' should also include a Commission opinion or order requiring an adviser, broker-dealer or other registrant to hire an independent compliance consultant?

- Are there any other types of misconduct or act(s) or omission(s) that should be disregarded for a person in determining whether that person is an ineligible solicitor?

- Are there additional conditions that we should place on an adviser's ability to compensate for solicitation activity persons whose only disqualifying events are also subject to non-disqualifying Commission actions? For example, should the Commission include a similar mechanism to the one used under Securities Act rule 405 and in the rules disqualifying felons and other ''bad actors'' from certain securities offerings, which states that the Commission may grant waivers of ineligible issuer status ''upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer''? [498] If so, how should the Commission incorporate these or other considerations into the rule?

- Should we require advisers that compensate for solicitation activity persons whose only disqualifying events are also subject to non-disqualifying Commission actions report such events to the Commission in Form ADV or to disclose such events to investors?

- Are there additional terms that should be defined in the rule, such as ''felony,'' ''misdemeanor,'' ''convicted,'' ''found,'' ''bar,'' ''suspend,'' ''sanctions,'' ''final order,'' ''order,'' ''judgment,'' or ''decree''? If so, how should we define those terms?

- As discussed above, under our proposal, certain solicitors that are not currently disqualified under the rule would be disqualified under the amended rule as ''ineligible solicitors'' solely as a result of the proposed changes to the rule's disqualification provisions. For example, under the current rule, an adviser would not be prohibited from using a solicitor based solely on the entry of a final order of the CFTC or a self-regulatory organization. But under the proposed rule, such a solicitor would be an ineligible solicitor if, for example, the final CFTC or self-regulatory order bars the solicitor from association with an entity regulated by the CFTC or the self-regulatory authority, respectively. While the proposed disqualification provision would apply only to any disqualifying Commission action or disqualifying event occurring after the effectiveness of the proposed rule amendments (or the compliance date, as applicable), we request comment on whether we should provide a longer transition period for any such solicitors that are not currently disqualified under the rule but would be disqualified under the amended rule as ''ineligible solicitors'' solely as a result of the proposed changes to the rule's disqualification provisions. If so, how long a transition period for such solicitors should we provide, and why?

- Should we, as discussed above, ''grandfather'' certain advisers and solicitors that currently rely on letters issued by the Commission staff stating that the staff would not recommend enforcement action to the Commission under section 206(4) and rule 206(4)–3 if an investment adviser paid cash solicitation fees to a solicitor that was subject to particular disciplinary events that fall within the current rule's disqualification provision? [499] Why or why not? Should we permit some, but not all, persons to be grandfathered under the proposed rule, if the solicitors continue to comply with the conditions specified in the Commission staff no-action letters and, except for the disciplinary events described in the applicable letter, would not otherwise be ineligible solicitors under the proposed rule? Why or why not? If so, what standards should we apply in making such determination?

C. Recordkeeping

We are also proposing to amend Advisers Act rule 204–2, the books and records rule, which sets forth requirements for maintaining, making, and retaining advertisements and books and records relating to the solicitation of clients.[500] These proposed amendments would help facilitate the Commission's inspection and enforcement capabilities.

First, we are proposing to amend the current rule to require investment advisers to make and keep records of all advertisements they disseminate to one or more persons.[501] The current rule requires investment advisers to keep a record of advertisements sent to 10 or more persons. We are proposing this change to conform the books and records rule to the definition of ''advertisement'' in the proposed amendments to the advertising rule, which would not be defined in terms of the number of persons to whom it is disseminated.[502] We are not proposing to change the requirement that advisers keep a record of communications other than advertisements (*e.g.,* notices, circulars, newspaper articles, investment letters, and bulletins) that the investment adviser disseminates, directly or indirectly, to 10 or more persons. The proposed books and recordkeeping revision would not apply to live oral communications that are not broadcast, as those communications are excluded from the proposed definition

[498] Securities Act Rule 405. *See* paragraphs (d) and (e) of rule 506 of Regulation D.

[499] *See, e.g.,* the ''bad actor'' letters listed below in section II.D. While these staff letters generally only apply to the solicitor or adviser to which the letter is addressed, the staff has issued one letter that it stated would apply with respect to any cash solicitation arrangement under which an investment adviser proposes to pay cash solicitation fees to a solicitor subject to a specific type of disqualification event under the circumstances described in the letter. *See* Dougherty Letter, discussed *supra* footnote 495.

[500] Provisions of rule 204–2 that relate to advertising or solicitation under the proposed rules do not apply to registered investment companies.

[501] An adviser's live oral communications that are broadcast would be excluded from the recordkeeping requirements. *See* proposed rule 206(4)–1(d)(2).

[502] *See* proposed rule 206(4)–1(e)(1).

of ''advertisement.'' [503] It would, however, apply to any information provided under proposed rule 206(4)–1(c)(1)(v), which permits hypothetical performance in an advertisement subject to certain conditions, including a requirement that the investment adviser provides (or offers to provide promptly to a recipient that is a Non-Retail Person) sufficient information to enable the person to understand the risks and limitations of using such hypothetical performance in making investment decisions. We consider any such supplemental information that would be required by proposed rule 206(4)–1 to be a part of the advertisement and therefore subject to the books and records rule.[504]

Second, we are proposing to add a provision to the books and records rule that would explicitly require investment advisers to maintain records related to third-party questionnaires and surveys, as applicable. Specifically, the proposed amendment would require investment advisers that use third-party ratings in an advertisement to make and keep a record of any questionnaire or survey used to create the third-party rating. This requirement would include any questionnaire or survey completed by the adviser for the third party, as well as the form of any questionnaire or survey sent by the third party to the adviser's investors or other participants. This proposal would track the proposed provision of the advertising rule that would permit the use of third-party ratings in advertisements so long as the investment adviser reasonably believes that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses and is not designed or prepared to produce any predetermined result.[505] Requiring that such information be retained can provide helpful information to examiners or internal compliance personnel, especially since the persons providing the rating often will not be registered with the Commission and subject to the Commission's books and records requirements.[506]

Third, we are proposing to add a provision to the books and records rule that would require investment advisers to maintain a copy of all written approvals of advertisements by designated employees.[507] Requiring that such information be retained can also provide helpful information to examiners or internal compliance personnel.

Fourth, we are proposing to amend the provisions of the books and records rule that require investment advisers to maintain communications containing any performance or rate of return in their advertisements. Specifically, we are proposing to require that investment advisers make and keep originals of written communications received, and copies of written communications sent, relating to the performance or rate of return of any or all portfolios, as defined in the proposed advertising rule.[508] Similarly, we are proposing to require that investment advisers make and keep all supporting records regarding the calculation of the performance or rate of return of any or all portfolios, as defined in the proposed advertising rule, in any advertisement or other communication.[509] The current books and records rule requires investment advisers to make and keep these communications and supporting records with respect to the performance or rate or return of any or all managed accounts or securities recommendations.[510] The proposed amendments seek to impose the same requirements with respect to the performance or rates of return of any or all ''portfolios,'' a defined term that the proposed advertising rule would use to impose specific requirements on the presentation of performance.[511]

Fifth, we are proposing two changes to paragraph (a)(16) of the current books and records rule, which requires investment advisers to make and keep all ''accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations'' appearing in any advertisement.[512] First, as described above, we are proposing to require investment advisers to make and keep all supporting records regarding the calculation of the performance or rate of return of any or all ''portfolios,'' in addition to the managed accounts and securities recommendations already addressed in the provision.[513] Second, we are proposing to amend the provision to clarify that such supporting records must include copies of all information provided or offered pursuant to the hypothetical performance provisions of the proposed advertising rule.[514] Although we believe that this provision of the current books and records rule, which we recently amended,[515] is broad and would apply to the proposed advertising rule's performance provisions, we want to ensure that copies of the information provided to investors in connection with hypothetical performance requirements of the proposed advertising rule are available to our examination staff to better review compliance with that proposed rule and other applicable law. As a result, investment advisers would be required to create and retain records for any performance-related data the proposed rule permits an investment adviser to include in an advertisement.

Finally, to correspond to changes we are proposing to make to the solicitation rule 206(4)–3, we are proposing to amend the current books and records rule to require investment advisers to make and keep records of: (i) Copies of the solicitor disclosure delivered to investors pursuant to rule 206(4)–3(a)(1)(iii), and, if the adviser participates in any nonprofit program pursuant to rule 206(4)–3(b)(4), copies of all receipts of reimbursements of payments or other compensation the adviser provides relating to its inclusion in the program; (ii) any communication or other document related to the investment adviser's determination that it has a reasonable basis for believing that (a) any solicitor it compensates under rule 206(4)–3 has complied with the written agreement required by rule 206(4)–3(a)(1), and that such solicitor is not an ineligible solicitor, and (b) any nonprofit program it participates in pursuant to rule 206(4)–3(b)(4) meets

[503] Proposed rule 206(4)–1(e)(1)(i).

[504] Among other conditions, the proposed rule also would require the adviser to provide (rather than simply offer to provide) information sufficient to enable Retail Persons to understand the risks and limitations of using such hypothetical performance in making investment decisions. *See* proposed rule 206(4)–1(c)(1)(v)(C); *see also supra* footnote 317 and accompanying text.

[505] *See* proposed rule 206(4)–1(b)(2).

[506] *See supra* section II.A.4.

[507] Proposed rule 204–2(a)(11)(iii).

[508] Proposed rule 204–2(a)(7)(iv).

[509] Proposed rule 204–2(a)(16).

[510] Rule 204–2(a)(7)(iv) and (a)(16). *See also* Recordkeeping by Investment Advisers, Release No. IA–1135 (Aug. 17, 1988) [53 FR 32033 (Aug. 23, 1988)] (describing as ''supporting records'' the documents necessary to form the basis for performance information in advertisements that are required under rule 204–2(a)(16)).

[511] *See, e.g.,* proposed rule 206(4)–1(c)(2)(ii) (requiring the inclusion of performance results of the same ''portfolio'' for specific time periods in any Retail Advertisement presenting performance results of such portfolio); proposed rule 206(4)–1(e)(4) (defining ''gross performance'' by reference to the performance results of a specific portfolio); proposed rule 206(4)–1(e)(6) (defining ''net performance'' by reference to the performance results of a specific portfolio).

[512] *See* rule 204–2(a)(16); *see also supra* footnote 512.

[513] *See supra* footnote 511 and accompanying text.

[514] Proposed rule 206(4)–1(c)(1)(v).

[515] *See* Form ADV and Investment Advisers Act Rules, Release No. IA–4509 (Aug. 26, 2016) [81 FR 60417 (Sept. 1, 2016)].

the requirements of rule 206(4)–3(b)(4); and (iii) a record of the names of all solicitors who are an adviser's partners, officers, directors or employees or other affiliates, pursuant to rule 206(4)–3(b)(2).[516]

The current books and records rule requires investment advisers to keep a record of all written acknowledgments of receipt obtained from clients pursuant to rule 206(4)–3(a)(2)(iii)(B), and copies of the disclosure documents delivered to clients by solicitors pursuant to rule 206(4)–3.[517] Even though our proposed amendments to the solicitation rule would remove the current rule's acknowledgment requirement, an adviser may still choose to receive acknowledgements as a means to inform its belief that the solicitor has satisfied the terms of the written agreement. If the adviser uses investor acknowledgments to evidence its compliance with the proposed solicitation rule, then the adviser would be required to maintain the communications or other documents containing those acknowledgments in accordance with this provision.[518] Requiring that such information be retained can also provide helpful information to our examiners or internal compliance personnel.

The current rule also requires investment advisers to keep a record of copies of the disclosure documents delivered to clients by solicitors pursuant to rule 206(4)–3. We are proposing to maintain this requirement with adjustments to correspond to our proposed changes to the solicitation rule, which would permit either the adviser or the solicitor to deliver the solicitor disclosure. We believe that such proposed changes to the solicitation rule and corresponding changes to the recordkeeping rule aid internal compliance personnel by making it easier for advisers to comply with the books and records requirement to keep records of the solicitor disclosure. Further, our proposed amendment to the solicitation rule would remove the current rule's requirement to include the adviser's brochure in the disclosures. Accordingly, the corresponding books and records requirement would be removed as no longer relevant or necessary.

Additionally, our proposal to add to the books and records rule a new requirement that advisers keep a record of the names of all solicitors who are an adviser's partners, officers, directors or employees or other affiliates, would correspond to our proposed changes to the solicitation rule. Our proposed amendments to the solicitation rule would require advisers that employ the solicitation rule's limited exemptions for solicitors that are partners, officers, directors or employees or certain other affiliates, to document such solicitor's status at the time the adviser enters into the solicitation arrangement.[519] Amending rule 204–2 as proposed will therefore correspond to the proposed changes to the solicitation rule. Our proposal would also add to the books and records rule new recordkeeping requirements for advisers that participate in nonprofit referral programs pursuant to the nonprofit exemption from the solicitation rule. This recordkeeping requirement would correspond to the solicitation rule's proposed nonprofit exemption by requiring an adviser to maintain communications relating to its determination that it has a reasonable basis for believing the nonprofit program meets the requirements of the proposed solicitation rule exemption for nonprofit programs. In addition, the proposed new books and record requirement would require advisers that use the nonprofit exemption to retain copies of all receipts of reimbursements the adviser provides relating to its inclusion in the program. This information would be critical for an adviser to demonstrate that it compensates the solicitor only to reimburse it for the administrative costs incurred in operating the program, as required under the exemption. Requiring that such information be retained can also provide helpful information to our examiners or internal compliance personnel, especially since we believe that under our proposed solicitation rule, solicitors would often deliver to investors the solicitor disclosure; solicitors (rather than advisers) would operate nonprofit referral programs, and; solicitors would oftentimes not themselves be registered with the Commission and therefore not subject to the Commission's books and records requirements.

We are not proposing amendments to the books and records rule that would specifically reference the adviser's obligation to retain any written agreements with solicitors entered into pursuant to the requirements of the solicitation rule.[520] Such a provision would be duplicative of the current books and records rule, which requires advisers to retain ''[a]ll written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of such investment adviser as such.'' [521] We are not proposing to make any changes to this provision of the rule because we believe that this provision currently applies, and would continue to apply, to the solicitation rule written agreement requirement.

We request comment on the proposed books and recordkeeping amendments.

- Do commenters agree that the recordkeeping requirement should be revised to apply to advertisements distributed to one or more persons? If we were to require records only for advertisements disseminated to a minimum number of people, as under the current rule, what is the appropriate minimum? Is it less or more than 10?
- Do advisers have concerns it will be difficult to retain advertisements distributed to one or more persons? Would this place an undue burden on smaller advisers? How many advertisements do advisers disseminate via electronic correspondence, and do advisers already have processes in place to automatically retain all such correspondence?
- Proposed rule 204–2(a)(11), like the current rule, would require advisers to make and keep records of communications other than advertisements (*e.g.,* notices, circulars, newspaper articles, investment letters, and bulletins) distributed to 10 or more person. While we believe many of these communications nonetheless would fall under the proposed definition of ''advertisement,'' should we treat any such communications that are not advertisements differently (*e.g.,* subject them to the recordkeeping rule if distributed to one or more persons)?
- Is it clear to commenters what supplemental information would be required to be maintained by advisers advertising hypothetical performance?
- Have advisers had difficulty retaining communications that are not advertisements under this provision of the current rule? How many communications do advisers disseminate via electronic correspondence, and do advisers already have processes in place to automatically retain all such correspondence?

[516] Proposed rule 204–2(a)(15)(i)–(iii).

[517] Rule 206(4)–3(a)(2)(iii)(B) requires that, as a condition to paying a cash fee to a solicitor for solicitation activity, the adviser must receive from the client, prior to, or at the time of, entering into any written or oral investment advisory contract with such client, a signed and dated acknowledgment of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document.

[518] Proposed rule 204–2(a)(15)(ii).

[519] *See* proposed rule 206(4)–3(b)(2).

[520] *See* proposed rule 206(4)–3(a)(1).

[521] *See* rule 204–2(a)(10).

• Do commenters believe it will be difficult for any investment advisers to obtain a copy of a survey or questionnaire used to create third-party rating?

• Do commenters agree with the proposed amendments to the performance recordkeeping requirements in 204–2(a)(16)? Why or why not?

• Should we consider amending the rule to address specifically other provisions of the proposed advertising rule? For example, should the books and recordkeeping rule require specific records related to testimonials and endorsements?

• Do commenters agree that the recordkeeping requirement should be revised to correspond to our proposed changes to the solicitation rule? Why or why not?

• Given that our proposed solicitation rule would remove the current requirement that an adviser obtain signed and dated client acknowledgments of the rule's required disclosures, should we require that the adviser maintain any communication with a solicitor or another person related to the investment adviser's determination that it has a reasonable basis for believing that any solicitor it compensates under rule 206(4)–3 has complied with the written agreement required by rule 206(4)–3(1), and that such solicitor is not an ineligible solicitor? Why or why not?

• Proposed rule 204–2(a)(15) does not currently require advisers to make and keep records of their written agreements with solicitors required under the solicitation rule, but advisers are required to make and keep records of such agreements under another provision of the books and records rule that applies more broadly to an adviser's business. Should we clarify, in the books and records provision relating specifically to the solicitation rule, the requirement to keep such records? Why or why not?

• Is it currently difficult for investment advisers to obtain copies of the solicitor disclosure that the solicitor delivers to clients, even though the adviser is also required to obtain signed and dated client acknowledgments of receipt of such disclosure? Why or why not? If so, would the proposed change to the solicitation rule—that would allow advisers to deliver the solicitor disclosure—improve compliance with the books and records rule's requirement to retain copies of the solicitor disclosure? Why or why not?

• Should the books and records rule require that advisers make and keep records of the names of solicitors that are in-house or otherwise affiliated with the adviser? Why or why not?

• Are there other records related to advertisements that we should require investment advisers to keep and maintain? For example, should we require advisers to retain materials substantiating the policies and procedures reasonably designed to ensure that a Non-Retail Advertisement is disseminated solely to Non-Retail Persons, as defined in the proposed rule?

• Investment advisers would be required to maintain the proposed records for the same period of time as required under the current books and recordkeeping rule. Do commenters believe advisers should be required to maintain these records for a shorter or longer period of time? Why?

• Should we require that investment advisers include a unique identifier, such as the adviser's SEC number or Central Registration Depository (CRD) number, on all advertisements?

D. Existing Staff No-Action Letters and Other Related Guidance

Staff in the Division of Investment Management is reviewing certain of our staff's no action letters and other guidance addressing the application of the advertising and solicitation rules to determine whether any such letters should be withdrawn in connection with any adoption of this proposal. If the rule is adopted, some of these letters and other guidance would be moot, superseded, or otherwise inconsistent with the amended rules and, therefore, would be withdrawn. We list below the letters that are being reviewed for withdrawal as of the dates the proposed rules, if adopted, would be effective after a transition period.[522] If interested parties believe that additional letters should be withdrawn, they should identify the letter, state why it is relevant to the proposed rule, and how it should be treated and the reason therefor. To the extent that a letter listed relates both to a topic identified in the list below and another topic, the portion unrelated to the topic listed is not being reviewed in connection with the adoption of this proposal.

1. Letters To Be Reviewed Concerning Rule 206(4)–1

Letter and date	Topic subject to withdrawal
A.R. Schmeidler & Co. Inc. (pub. avail. June 1, 1976)	Hypothetical performance.
Alphadex Corp. (pub. avail. Feb. 21, 1971)	Graphs, charts, and formulas. hypothetical performance, past specific recommendations.
Amherst Financial Services Inc. (pub. avail. May 23, 1995)	Prohibition and scope of testimonials, generally, including audio files.
Analytic Investment Management Incorporated (pub. avail. March 22, 1971).	Prohibition and scope of testimonials, such as client reference letters.
Anametrics Investment Mgmt. (pub. avail. May 5, 1977)	Misleading performance.
Andrew M. Rich (pub. avail. Feb. 22, 1989)	False or misleading advertisements.
Association for Investment Management and Research (pub. avail. Dec. 18, 1997).	Performance advertisements.
Bache & Company (pub. avail. Feb 5, 1976)	Graphs, charts, and formulas, false or misleading advertisements, hypothetical performance.
Bradford Hall (pub. avail. Jul. 19, 1991)	Performance advertisements, gross performance.
BullBear Indicator, Inc. (pub. avail. Apr. 14, 1976)	Past specific recommendations.
Bypass Wall Street, Inc. (pub. avail. Jan. 17, 1992)	Performance advertisements, gross performance.
Cambiar Investors, Inc., (pub. avail. Aug. 28, 1997)	Prohibition and scope of testimonials, generally, including partial client lists.
CIGNA Securities, Inc. (pub. avail. May 8, 1991)	Prohibition and scope of testimonials, generally.
Clover Capital Management (pub. avail. July 19, 1991)	Performance advertisements, gross performance.
Clover Capital Management (pub. avail. Oct. 28, 1986)	Performance advertisements, model or actual results.
Covato/Lipsitz, Inc. (pub. avail. Oct. 23, 1981)	Past specific recommendations.
Cubitt-Nichols Associates (pub. avail. Dec. 22, 1971)	Past specific recommendations, hypothetical performance.

[522] *See infra* Section II.E, discussing the proposed transition periods.

Letter and date	Topic subject to withdrawal
DALBAR, Inc., (pub. avail. March 24, 1998)	Prohibition and scope of testimonials, generally, including third-party ratings.
Denver Investment Advisors, Inc. (pub. avail. July 30, 1993)	Prohibition and scope of testimonials, generally, including partial client lists.
Donaldson, Lufkin & Jenrette Securities Corp. (pub. avail. Mar. 2, 1977).	Misleading advertisements, past specific recommendations.
Dow Theory Forecasts, Inc. (pub. avail. May 21, 1986)	Report, analysis or service provided "free of charge".
Dow Theory Forecasts, Inc. (pub. avail. Nov. 7, 1985)	Past specific recommendations.
Edward F. O'Keefe (pub. avail. Apr. 13, 1978)	False or misleading advertisements, past specific recommendations.
Executive Analysts, Inc. (pub. avail. Aug. 6, 2972)	False or misleading advertisements.
F. Eberstadt & Co., Inc. (pub. avail. Jul. 2, 1978)	False or misleading advertisements.
Ferris & Company, Inc. (pub. avail. May 23, 1972)	Performance advertisements, model or actual results.
Foster & Marshall, Inc. (pub. avail. Feb, 18, 1977)	Past specific recommendations.
Franklin Management, Inc. (pub. avail. Dec. 10, 1998)	Past specific recommendations.
Gallagher and Associates, Ltd. (pub. avail. July 10, 1995)	Prohibition and scope of testimonials, generally, including non-investment related commentary (*e.g.,* religious affiliation or moral character) *. * Note that staff has previously partially rescinded its Gallagher position. See IM Guidance Update No. 2014–04, at note 12 and accompanying text.
Investment Adviser Association (pub. avail. Dec. 2, 2005)	Prohibition and scope of testimonials, generally, including third-party ratings.
Investment Company Institute (pub. avail. Aug. 24, 1987)	Performance advertisements, gross performance.
Investment Company Institute (pub. avail. Sept. 23, 1988)	Performance advertisements, gross performance.
Investment Counsel Association of America (pub. avail. Mar. 1, 2004)	Past specific recommendations.
Investor Intelligence (John Anthony) (pub. avail. April 18, 1975)	False or misleading advertisements.
J.D. Minnick & Co. (pub. avail. Apr. 30, 1975)	Past specific recommendations.
J.P. Morgan Investment Mgmt., Inc. (pub. avail. May 7, 1996)	Performance advertisements, gross performance, model fees.
J.Y. Barry Arbitrage Management, Inc. (pub. avail. October 18, 1989)	Prohibition and scope of testimonials, generally.
James B. Peeke & Co., Inc. (pub. avail. Sept. 13, 1982)	Past specific recommendations.
James Maratta (pub. avail. June 3, 1977)	Graphs, charts, and formulas, false or misleading advertisements.
Kurtz Capital Management (pub. avail. Jan. 18, 1988)	Prohibition and scope of testimonials, generally, and third-party reports.
Mark Eaton (pub. avail. June 9, 1977)	Past specific recommendations.
Multi-Financial Securities Corp. (pub. avail. November 9, 1995)	Prohibition and scope of testimonials, generally, including audio files.
New York Investors Group, Inc. (pub. avail. Sept. 7, 1982)	Prohibition and scope of past specific recommendations and testimonials, generally, and reprints of articles; false or misleading advertisements.
Norman L. Yu (pub. avail. Apr. 12, 1971)	Past specific recommendations.
Oberweis Securities, Inc. (pub. avail. July 25, 1983)	Past specific recommendations.
Richard Silverman (pub. avail. March 27, 1985)	Prohibition and scope of testimonials, generally.
S.H. Dike & Co., Inc. (pub. avail. Apr. 20, 1975) [523]	Past specific recommendations, hypothetical performance, graphs, charts, and formulas.
Schield Stock Services, Inc. (pub. avail. Feb. 26, 1972)	False or misleading advertisements.
Scientific Market Analysis (pub. avail. Mar. 24, 1976)	Hypothetical performance, past specific recommendations.
Securities Industry Association (pub. avail. Nov. 27, 1989)	Performance advertisements, gross performance.
Stalker Advisory Services (pub. avail. Jan. 18, 1994)	Prohibition and scope of testimonials, generally, and reprints of articles.
Starr & Kuehl, Inc. (pub. avail. Apr. 17, 1976)	Past specific recommendations.
Taurus Advisory Group, Inc. (pub. avail. July 15, 1993)	Performance advertisements, past performance.
The Mottin Forecast (pub. avail. Nov. 29, 1975)	Graphs, charts, and formulas, false or misleading advertisements.
The TCW Group (pub. avail. Nov. 7, 2008)	Performance advertisements, past specific recommendations.
Triad Asset Management (pub. avail. Apr. 22, 1993)	Past specific recommendations.

2. Letters To Be Reviewed Concerning Rule 206(4)–3

Letter and date	Topic subject to withdrawal
Allen Isaacson (pub. avail. Dec. 17, 1979)	Scope of the rule's exemption for certain affiliates.
AMA Investment Advisers, Inc. (pub. avail. Oct. 28, 1993)	Delivery of solicitor brochure (timing and the requirement for the solicitor to deliver it).
Ameriprise Financial Services, Inc. (pub. avail. Apr. 5, 2006)	Timing of delivery of required disclosures (solicitor disclosure and/or adviser brochure).
Bond Timing Securities Corporation (pub. avail. Nov. 29, 1984)	Solicitation for impersonal investment advice.
Charles Schwab & Co. (pub. avail. Dec. 17, 1980)	Discussion of "person associated with an investment adviser".
Charles Schwab & Co. Inc. (pub. avail. Apr. 29, 1998)	Timing of delivery of required brochure.
Cunningham Advisory Services, Inc. (pub. avail. Apr. 27, 1987)	"Person associated with an investment adviser".

[523] The portion of this letter pertaining to rule 206(4)–1 would be withdrawn, but the portions pertaining to the adviser's investment management arrangements potentially involving the creation of investment companies under section 3(a) of the Investment Company Act, as well as the participations in those investment companies as securities as defined in section 2(1) of the Securities Act, would not be withdrawn.

Letter and date	Topic subject to withdrawal
Dana Investment Advisors, Inc. (pub. avail. Oct. 12, 1994) *	Application of rule to solicitation of investors in investment pool managed by the adviser.
* Staff has previously partially retracted statements it made in this letter about the application of the rule to solicitation of investors in investment pool managed by the adviser (see *e.g.,* Mayer Brown, below).	
Dechert Price and Rhoads (pub. avail. Dec. 4, 1990) *	Application of rule to solicitation of investors in investment pool managed by the adviser.
* Staff has previously retracted statements it made in this letter about the application of the rule to solicitation of investors in investment pool managed by the adviser (see *e.g.*, Mayer Brown, below).	
Denver Credit Union (pub. avail. Sept. 15, 1988)	General applicability of the rule.
E. Magnus Oppenheim & Co. (pub. avail. Mar. 25, 1985)	Written agreement requirement for an adviser's in-house (employee) solicitors, including solicitor disclosure.
E.F. Hutton and Co. Inc. (pub. avail. Sept. 21, 1987)	Delivery of solicitor brochure (timing and the requirement for the solicitor to deliver it).
Excellence in Advertising, Ltd. (pub. avail. Dec. 15, 1986)	Scope of rule.
Fried, Frank, Harris, Shriver & Jacobson (pub. avail. Dec. 17, 1979)	Scope of the rule's exemption for certain affiliates.
Heys, Robert J. (pub. avail. May 12, 1986)	Scope of rule.
International Association for Financial Planning (pub. avail. June 1, 1998).	Scope of rule.
JMB Financial Managers, Inc. (pub. avail. June 23, 1993)	General application of the rule.
Koyen, Clarke and Assoc. Inc. (pub. avail. Nov. 10, 1986)	Discussion of "person associated with an investment adviser".
Lincoln National Investment Management Co. (pub. avail. Mar. 26, 1992).	Timing of delivery of required disclosures.
Mayer Brown LLP (pub. avail. July 15, 2008, superseded by letter with minor, non-substantive changes, pub. avail. July 28, 2008).	Application of rule to cash payments by registered advisers to persons who solicit investors to invest in investment pool managed by the adviser.
Merchants Capitol Management, Inc. (pub. avail. Oct. 4, 1991)	Written agreement requirement for an adviser's in-house (employee) solicitors, including solicitor disclosure.
Mid-States Capital Planning (pub. avail. Apr. 11, 1983)	Setting the amount of the solicitation fee.
Moneta Group Investment Advisors, Inc. (pub. avail. Oct. 12, 1993)	Delivery of solicitor brochure (timing and the requirement for the solicitor to deliver it).
National Football League Players Ass'n (pub. avail. Jan. 25, 2002)	Scope of rule.
Redmond Associates, Inc. (pub. avail. Jan. 12, 1985)	General requirements of the rule.
Roy Heybrock (pub. avail. Apr. 5, 1982)	General applicability of the rule.
Securities International, Ltd., dba ITZ, Ltd. (pub. avail. Mar. 14, 1989)	General applicability of the rule.
Shareholder Service Corporation (pub. avail. Feb. 3, 1989)	Setting the amount of the solicitation fee.
Stein, Roe and Farnham Inc. (pub. avail. May 26, 1987)	Scope of the rule's exemption for certain affiliates.
Stein, Roe and Farnham, Inc. (pub. avail. June 29, 1990) *	Application of rule to solicitation of investors in investment pool managed by the adviser; satisfaction of the rule's disclosure provisions.
* Staff has previously partially retracted statements it made in this letter about the application of the rule to solicitation of investors in investment pool managed by the adviser (see *e.g.,* Mayer Brown, above)	
Stonebridge Capital Management (pub. avail. Dec. 12, 1979)	General applicability of the rule.
The Lowry Management Corp. (pub. avail. Sept. 7, 1982)	Definition of solicitor (specifically, the term "person" as used in the definition of solicitor).
Trident Investment Management, Inc. (pub. avail. Dec. 18, 1981)	Content of solicitor disclosure.
Trinity Investment Management Corp. (pub. avail. Mar. 7, 1980)	General application of the rule.
Van Eerden Investment Advisory Services, Inc. (pub. avail. May 21, 1984).	Requirements for the written agreement.
All rule 206(4)–3 "bad actor" letters (see list below). But see requests for comment on grandfathering some disqualification letters, *infra* section II.E.	Solicitor disqualification.

Solicitor disqualification letters that are being reviewed in full:

1. Aeltus Investment Management, Inc. (pub. avail. July 17, 2000)
2. American International Group, Inc. (pub. avail. Dec. 8, 2004)
3. American International Group, Inc. (pub. avail. Feb. 21, 2006)
4. Automated Trading Desk Specialists, LLC (pub. avail. Mar. 13, 2009)
5. BAC Home Loans Servicing, LP (formerly Countrywide Home Loans Servicing LP) (pub. avail. June 2, 2011)
6. Banc of America Securities LLC (pub. avail. June 10, 2009)
7. Bank of America, N.A. (pub. avail. Nov. 25, 2014)
8. Barclays Bank, PLC (pub. avail. June 6, 2007)
9. Bear Sterns & Co., Inc., and several settling firms (pub. avail. Jan. 1, 1999).
10. Bear, Stearns & Company Inc. (pub. avail. Oct. 31, 2003)
11. Bear, Stearns Securities Corp. (pub. avail. Aug. 5, 1999)
12. BT Alex. Brown Inc. (pub. avail. Nov. 17, 1999)
13. BT Securities Corp. (pub. avail. Mar. 30, 1992)
14. Carnegie Asset Management, Inc. (pub. avail. July 11, 1994)
15. CIBC Mellon Trust Company (pub. avail. Feb. 24, 2005)
16. Citigroup Global Markets Inc. (pub. avail. Oct. 31, 2003)
17. Citigroup Inc. (pub. avail. Oct. 22, 2010)
18. Credit Suisse First Boston Corp. (pub. avail. Aug. 24, 2000)
19. Credit Suisse First Boston LLC (pub. avail. Oct. 31, 2003)
20. Credit Suisse (pub. avail. May 20, 2014)
21. Deutsche Bank Securities Inc. (pub. avail. Sept. 24, 2004)
22. Deutsche Bank Securities Inc. (pub. avail. June 9, 2009)
23. Dougherty & Company LLC (pub. avail. July 3, 2003)
24. Dougherty & Company LLC (pub. avail. Mar. 21, 2003)
25. E*Trade Capital Markets LLC (pub. avail. Mar. 12, 2009)
26. E-Invest, Inc. (pub. avail. Sept. 22, 2000)

27. F. Porter Stansberry (pub. avail. Sept. 30, 2015)
28. Fahnestock & Company Inc. (pub. avail. Apr. 21, 2003)
29. First City Capital Corp. (pub. avail. Feb. 9, 1990)
30. Founders Asset Management LLC (pub. avail. Nov. 8, 2000)
31. GE Funding Capital Market Services, Inc. (pub. avail. Jan. 25, 2012)
32. General Electric Company (pub. avail. Aug. 12, 2009)
33. General Electric Company (pub. avail. Aug. 2, 2010)
34. Goldman, Sachs & Co. (pub. avail. Feb. 23, 2005)
35. Goldman, Sachs & Co. (pub. avail. July 22, 2010)
36. Goldman, Sachs & Co. (pub. avail. Oct. 31, 2003)
37. Gruntal & Co. (pub. avail. July 17, 1996)
38. Hickory Capital Management (pub. avail. Feb. 11, 1993)
39. In re William R. Hough & Co./In the Matter of Certain Municipal Bond Refundings (pub. avail. Apr. 13, 2000)
40. In the Matter of Market Making Activities on Nasdaq (pub. avail. Jan. 11, 1999)
41. ING Bank N.V. (pub. avail. Aug. 31, 2005)
42. Interstate/Johnson Lane Corp. (pub. avail. Apr. 21, 1997)
43. J.B. Hanauer (pub. avail. Apr. 27, 1999)
44. J.B. Hanauer (pub. avail. Dec. 12, 2000)
45. J.P. Morgan Securities Inc. (pub. avail. Oct. 8, 2003)
46. J.P. Morgan Securities LLC (pub. avail. Jan. 9, 2013)
47. J.P. Morgan Securities LLC (pub. avail. July 11, 2011)
48. J.P. Morgan Securities LLC (pub. avail. June 29, 2011)
49. J.P. Morgan Securities Inc. (pub. avail. Oct. 31, 2003)
50. J.P. Turner & Company, L.L.C., et al. (pub. avail. Sept. 10, 2012)
51. James DeYoung (pub. avail. Oct. 24, 2003)
52. Janney Montgomery Scott LLC and Norman T. Wilde, Jr. (pub. avail. July 18, 2000)
53. JPMorgan Chase & Co. (pub. avail. May 20, 2015)
54. Kidder Peabody & Co. (pub. avail. Mar. 30, 1992)
55. Kidder Peabody & Co., Inc. (pub. avail. Oct. 11, 1990)
56. Legg Mason Wood Walker, Inc. (pub. avail. June 11, 2001)
57. Lehman Brothers (pub. avail. Oct. 31, 2003)
58. Macquarie Capital (USA) Inc. (pub. avail. June 1, 2017)
59. McDonald Investments Inc. (pub. avail. Apr. 2, 1999)
60. Merrill Lynch, Pierce, Fenner & Smith Inc. (pub. avail. Sept. 15, 1999)
61. Merrill Lynch, Pierce, Fenner & Smith Inc. (pub. avail. Aug. 7, 1997)
62. Merrill Lynch, Pierce, Fenner & Smith Inc. (pub. avail. Oct. 31, 2003)
63. Millennium Partners, L.P. (pub. avail. Mar. 9, 2006)
64. Mitchell Hutchins Asset Management, Inc. (pub. avail. Jan. 2, 1998)
65. Morgan Keegan & Co., Inc. (pub. avail. Jan. 9, 1998)
66. Morgan Stanley & Co., Inc. (pub. avail. Feb. 4, 2005)
67. Morgan Stanley & Co. (pub. avail. Oct. 31, 2003)
68. Nationsbanc Investments, Inc. (pub. avail. May 6, 1998)
69. Norman Zadeh and Prime Advisors, Inc. (pub. avail. Nov. 8, 2001)
70. Oppenheimer & Co., Inc. (pub. avail. June 5, 1992)
71. PaineWebber Inc. (pub. avail. Dec. 22, 1998)
72. Paul Laude, CFP (pub. avail. June 22, 2000)
73. Prudential Financial, Inc. (pub. avail. Sept. 5, 2008)
74. Prudential Securities Inc. (pub. avail. Feb. 7, 2001)
75. Ramius Capital Management (pub. avail. Apr. 5, 1996)
76. RBC Capital Markets Corp. (pub. avail. June 10, 2009)
77. RBS Securities, Inc. (pub. avail. Nov. 26, 2013)
78. RNC Capital Management Inc. (pub. avail. Feb. 7, 1989)
79. Royal Bank of Canada (pub. avail. Dec. 19, 2014)
80. Salomon Brothers, Inc. (pub. avail. Jan. 26, 1994)
81. Stein Roe & Farnham Inc. (pub. avail. Aug. 25, 1988)
82. Stein Roe Farnham—Touche Remnant Holdings Ltd. (pub. avail. Jan. 20, 1990)
83. Stephanie Hibler (pub. avail. Jan. 24, 2014)
84. Stephens Inc. (pub. avail. Dec. 27, 2001)
85. Stifel, Nicolaus & Company, Inc. (pub. avail. Dec. 6, 2016)
86. The Dreyfus Corp. (pub. avail. Mar. 9, 2001)
87. Thomas Weisel Partners LLC (pub. avail. Sept. 24, 2004)
88. Tucker Anthony Inc. (pub. avail. Dec. 21, 2000)
89. U.S. Bancorp Piper Jaffray Inc. (pub. avail. Oct. 31, 2003)
90. UBS AG (pub. avail. Mar. 20, 2009)
91. UBS AG (pub. avail. May 20, 2015)
92. UBS Financial Services Inc. (pub. avail. May 9, 2011)
93. UBS Securities LLC (pub. avail. Oct. 31, 2003)
94. UBS Securities LLC (pub. avail. Dec. 23, 2008)
95. Wachovia Securities LLC (pub. avail. Feb. 18, 2009)
96. Wells Fargo Bank, N.A. (pub. avail. July 15, 2013)
97. Wells Fargo Bank, N.A. (pub. avail. Sept. 21, 2012)
98. Wells Fargo Bank, N.A. (pub. avail. Dec. 12, 2011)

E. Transition Period and Compliance Date

We are proposing that advisers registered or required to be registered with the Commission would be permitted to rely on each amended rule after its effective date as soon as the adviser could comply with the rule's conditions, and would be required to comply with each amended rule applicable to it starting one year from the rule's effective date (the ''compliance date''). This would provide a one-year transition period during which we would permit registered investment advisers to continue to rely on the current rules. If any final rule is adopted, the proposed transition period would permit firms to develop and adopt appropriate procedures to comply with the proposed new advertising rule and the proposed changes to the solicitation rule.

Pursuant to our proposal, any advertisements and solicitations made on or after the compliance date by advisers registered or required to be registered with the Commission would be subject to the new and amended rules, respectively. Our proposed transition period would also address solicitation arrangements where an adviser continues to compensate a solicitor for soliciting an investor for a period of time (*i.e.,* trailing payments). Under our proposal, an adviser would not be subject to the proposed amendments to the solicitation rule with respect to trailing payments for any solicitations made prior to the compliance date. However, any solicitation arrangement structured to avoid the solicitation rule's restrictions, depending on the facts and circumstances, would violate section 208(d) of the Act's general prohibitions against doing anything indirectly which would be prohibited if done directly.[524]

We request comment on the following:

- Do commenters agree that a one-year transition period following each rule's effective date is appropriate? If not, how long of a transition period following each rule's adoption would be appropriate? For example, would 90 days be an appropriate amount of time? Would longer be necessary, *e.g.,* eighteen months, and if so, why? Should we have different compliances dates for each rule? Why or why not? Should we have different compliances dates for larger or smaller entities? Why or why not?
- Under our proposal, certain solicitors that are not currently disqualified under the rule would be disqualified under the amended rule as ''ineligible solicitors'' solely as a result of the proposed changes to the rule's disqualification provisions. For example, under the current rule, an adviser would not be prohibited from using a solicitor based solely on the entry of a final order of the CFTC or a self-regulatory organization. But under the proposed rule, such solicitor would be an Ineligible Person if, for example, the final CFTC or self-regulatory order bars the solicitor from association with

[524] Section 208(d) of the Act.

an entity regulated by the CFTC or the self-regulatory authority, respectively. We request comment on whether the rule should include a provision that grandfathers an adviser's arrangement with a solicitor when the solicitor was engaged immediately prior to the proposed rule's effective date and was not subject to disqualification under the current rule, but would be an ineligible solicitor under the proposed rule because of the changes to the rule's disqualification provision. We would not apply such a grandfathering provision where a solicitor becomes subject to disqualification during the rule's transition period. Should we? We would not apply such grandfathering provision to solicitation arrangements established after the rule's effective date. Do commenters agree? Would a different grandfathering provision be appropriate? Why or why not?

III. Economic Analysis

A. Introduction

The Commission is proposing amendments to rule 206(4)–1 related to investment adviser advertising. The proposed amendments expand the scope of the definition of ''advertisement.'' The proposed amendments also include general prohibitions of certain advertising practices, and the proposed approach (i) would impose requirements on investment adviser performance in advertisements, and (ii) would require investment advisers that use certain features in an advertisement, such as testimonials and endorsements, to disclose information that would help investors evaluate the advertisement. The proposal would also amend rule 206(4)–3 to, among other things, broaden its application to all forms of compensation while also removing requirements that are duplicative of more recent rules adopted under the Act, and extend the solicitation rule requirements to solicitors of investors in private funds. The Commission is also proposing amendments to Form ADV that are designed to provide additional information regarding advisers' advertising practices, and amendments to the Advisers Act books and records rule to correspond to the proposed changes to the advertising and solicitation rules. Some portion of these provisions would create a collection of information burden under rule 206(4)–1 and would have an impact on the current collection of information burdens of rules 206(4)–3 and 204–2 under the Investment Advisers Act (''the Act'') and Form ADV, which we discuss in the next section. The proposed rules reflect market developments since 1961 and 1979, when rules 206(4)–1 and 206(4)–3 respectively were adopted, as well as practices consistent with conditions in staff no-action letters and guidance. These market developments include advances in communication technology and advertising practices that did not exist at the time the rule was adopted and may fall outside of the scope of the current rules.

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Whenever we engage in rulemaking and are required to consider or determine whether an action is necessary or appropriate in the public interest, section 202(c) of the Investment Advisers Act requires the Commission to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. The following analysis considers, in detail, the potential economic effects that may result from the proposed rule, including the benefits and costs to market participants as well as the broader implications of the proposal for efficiency, competition, and capital formation. Where possible, the Commission quantifies the likely economic effects of the proposal; however, the Commission is unable to quantify certain economic effects because it lacks the information necessary to provide estimates or ranges. In some cases, quantification is particularly challenging due to the number of assumptions that it would need to make to forecast how investment advisers would respond to the new conditions of the proposed rules, and how those responses would in turn affect the broader market for investment advice and the investors' participation in this market. Nevertheless, as described more fully below, the Commission is providing both a qualitative assessment and quantified estimate of the economic effects, where feasible. The Commission invites commenters to include estimates and data that could help it form useful estimates of the economic effects of the proposed amendments.

B. Broad Economic Considerations

The proposed rule and form amendments would affect many different methods and practices that investment advisers use to advertise their services. While we discuss each of these methods and practices in detail later, in this section we discuss the broad economic considerations that frame our economic analysis of the proposed amendments and describe the relevant structural features of the market for investment advice and its relationship to marketing of advisory services and pooled investment vehicles. Key to this framework is the concept of ''information asymmetry''—in this case, the lack of information that investors have about the ability and potential fit of investment advisers available to them—and the difficulties certain investors may face in verifying the ability and potential fit of investment advisers. By setting up this economic framework, we can see how the characteristics of the market for investment advice and its participants can influence the costs and benefits of elements of the proposed amendments, as well as their impact on efficiency, competition, and capital formation. This economic framework demonstrates how the features of the market for investment advice and its participants can influence whether certain investment adviser advertising practices promote or hinder economic efficiency.

The accuracy of investment adviser advertisements is an important factor in determining how investors decide which investment advisers to engage with. If investment advisers faced fewer consequences for making untruthful statements about their performance in advertisements, investors would have more difficulty choosing an investment adviser. For the purposes of the proposed advertising rule, we use the term ''ability'' to refer to the usefulness and accuracy of advice an investment adviser is willing to provide for a given fee. The ''potential fit'' of an investment adviser refers to attributes that investors may have specific preferences for, such as communication style, investment style, or risk preference. For example, some investors would prefer an investment adviser that does not proactively provide advice or suggest investments, while others might prefer a more active communication style.

While the effectiveness and accuracy of an investment adviser's advertisements can have direct effects on the quality of the matches that investors make with investment advisers—in terms of both fit and better returns from the investment, there may be important indirect effects as well. If the proposed rules provide additional methods for investment advisers to credibly and truthfully advertise the quality of their services, investment advisers may have a greater incentive to invest more in the quality of their services, because advisers would be able to communicate the quality of these services more easily through advertisements. Additionally, because investors might be able to better observe the relative qualities of competing investment advisers, the proposed rules may also enhance competition between investment advisers. To the extent that the proposed rules improve the effectiveness and accuracy of investment adviser advertisements, the proposed rules could also have a secondary effect of increasing competition among investment advisers, and encourage investment in the quality of services.

Investors generally have access to a variety of sources of information on the ability and potential fit of an investment adviser. Advertisements, word of mouth referrals, and independent research are all ways in which investors acquire information about investment advisers as they search for them. During this search, investors trade off the benefits of finding a better investment adviser against the costs of searching for one, or for more information about one. If the costs of search are too high, investors will contract with lower quality investment advisers on average, because they either do not know a higher quality alternative exists with the available information or are unable to evaluate the quality of the investment adviser they have found. Thus, higher search costs can result in inefficiencies because the same expected quality of match requires an investor to incur higher search costs. Similarly, for a fixed amount of spending on a search, an investor is less able to find information about investment advisers, and finds a lower expected quality of match.

Advertising and investor solicitation can potentially mitigate inefficiencies associated with the costs of searching for good products or suitable services. To the extent that advertising and investor solicitation provide accurate and useful information to investors about investment advisers at little or no cost to investors, advertising and investor solicitation can reduce the search costs that investors bear to acquire information and improve the ability of investors to identify high quality investment advisers. Investors have a variety of preferences over investment adviser characteristics such as investment strategies or communication styles. Investment adviser advertisements and use of solicitors can help communicate information about an investment adviser that may aid an investor in selecting an investment adviser who is a good ''fit'' for the investor's preferences.

While advertisements and communications by investment advisers and solicitors may reduce search costs, their incentives are not necessarily aligned with those of their potential investors, which may undercut the potential gains to efficiency. For example, investment advisers and solicitors have incentives to structure their advertisements to gain potential investors, regardless of whether their advertisements correspond to their ability and potential fit with an investor. In addition, advertisements might make claims that are costly for investors to verify or are inherently unverifiable. For example, evaluating a claim that an investment adviser's strategy generates ''alpha'' or returns in excess of priced risk factors generally requires information about the strategy's returns and permitted holdings, as well as a model that attributes returns to risk factors. While some investors may have ready access to these resources or information, other investors may not. In some cases, an investor may be unable to assess the plausibility of an investment adviser's claims. An investment adviser or solicitor might also state facts but omit the contextual details that an investor would need to properly evaluate these facts.

Notably, there are considerable differences among investors and potential investors of investment advisers in their ability to process and evaluate information communicated by investment advisers. Many investors and prospective investors may lack the financial knowledge needed to evaluate and interpret the types of financial information contained in investment adviser advertisements. In 2010, the Dodd-Frank Act required the Commission to conduct a study to identify the existing level of financial literacy among retail investors as well as methods and efforts to increase the financial literacy of investors.[525] The Commission then contracted with the Federal Research Division at the Library of Congress to conduct a review of the quantitative studies on the financial literacy of retail investors in the United States.[526] According to the Library of Congress Report, studies show consistently that American retail investors[527] lack basic financial literacy. For example, studies have found that investors do not understand many elementary financial concepts, such as compound interest and inflation. Studies have also found that many investors do not understand other key financial concepts, such as diversification or the differences between stocks and bonds, and are not fully aware of investment costs and their impact on investment returns.[528] A 2016 FINRA survey found that 56 percent of respondents correctly answered less than half of a set of basic financial literacy questions, and yet 65 percent of respondents assessed their own knowledge about investing as high (between five and seven on a seven-point scale).[529]

The general lack of financial literacy among some investors makes it difficult for those investors to evaluate claims about financial services made in advertisements, which increases the risk that such investors are unable to effectively use the information in advertisements to find an investment adviser that has high ability and is a good fit.[530] Moreover, evidence presented in recent research suggests that market forces alone may not be sufficient to discipline financial professionals. Egan, Matvos and Seru (2019) observe that 44 percent of associated persons of broker-dealers with a history of misconduct are re-employed in the financial services industry within a year.[531] Furthermore,

[525] U.S. Securities and Exchange Commission, *Study Regarding Financial Literacy Among Investors As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Aug. 2012), *available at https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf.* (''Financial Literacy Study'').

[526] *See id.* Although the report does not link American investors specifically to those who would become clients of SEC registered investment advisers or investors in private pooled investment vehicles, we believe that the study may be indicative of the level of financial literacy for prospective investors.

[527] The financial literacy studies in the Library of Congress Report (2011) fall into three categories, depending on the population or special topic under investigation. Most studies survey the general population. For example, the FINRA Investor Education Foundation's 2009 National Financial Capability study, which was included in the Library of Congress Report, consisted of a national sample of 1,488 respondents. Other research included in the report focus on particular subgroups, such as women, or specific age groups or minority groups. A third type of study deals specifically with investment fraud. These studies do not differentiate between qualified purchasers, knowledgeable employees, and other investors. Results from studies conducted on general populations may not apply to private fund investors.

[528] *See* Financial Literacy Study *supra* footnote 524.

[529] ''Investors in the United States.'' FINRA Investor Education Foundation, 2016.

[530] Annamaria Lusardi and Olivia S. Mitchell, *The Economic Importance of Financial Literacy: Theory and Evidence,* 52 J. ECON. LITERATURE 5 (2014).

[531] Mark Egan, Gregor Matvos and Amit Seru, *The Market for Financial Adviser Misconduct,* 127 J. POL. ECON. 233 (2019). The dataset used in the paper covers all financial services employees registered with FINRA from 2005 to 2015. The paper's results apply to the population represented by the dataset used in the study, some of which are investment adviser representatives. Roughly 84 percent of active registered investment adviser representatives were also dually registered with FINRA as broker-dealer representatives in 2017. (There were 286,799 dual broker-dealer–IA representatives, and 56,472 non-broker-dealer RIA representatives in 2017.) See, 2018 FINRA Industry

Continued

prior offenders are found to be five times as likely to engage in new misconduct as the average registered representative.[532] Approximately 84 percent of active registered investment adviser representatives are dually registered with FINRA as broker-dealer representatives, who are the subjects studied in the paper.[533] To the extent that these results carry over to investment adviser advertisements, they potentially highlight the risk that false or exaggerated advertising exacerbates information asymmetries by providing investors, especially investors that lack financial literacy, an incorrect impression of an investment adviser's ability or quality of fit.

C. Baseline

1. Market for Investment Advisers

a. Current Rule

As mentioned in adopting current rule 206(4)–1, the Commission targeted advertising practices that it believed were likely to be misleading by imposing four per se prohibitions. In addition to these prohibitions, the current rule prohibits any advertisement that contains any untrue statement of a material fact, or which is otherwise false or misleading. This prohibition operates more generally than the specific prohibitions to address advertisements that do not violate any per se prohibition but still may be fraudulent, deceptive, or manipulative and, accordingly, risk misleading investors.

b. Market Practice

In addition to rule 206(4)–1, investment adviser advertising practices have been shaped by staff no-action letters and other staff guidance. For example, staff have issued no-action letters stating that the staff would not recommend enforcement actions under rule 206(4)–1(b) based on certain questions related to the definition of ''advertisement,'' taking the position that, in general, a written communication by an adviser to an existing client or investor about the performance of the securities in the investor's account is not an ''offer'' of investment advisory services but is part of the adviser's advisory services (unless the context in which the performance or past specific recommendations are provided suggests otherwise), and that communications by an adviser in response to an unsolicited request by an investor, prospective client, or consultant for specified information is not an advertisement.[534]

The staff has also stated that it would not recommend enforcement action under section 206(4) on issues relating to third-party ratings and testimonials. The staff has stated that it would not recommend enforcement action if certain conditions were met regarding the use of ratings or testimonials, such as: (i) References to independent third-party ratings that are developed by relying significantly on client surveys or clients' experiences more generally;[535] (ii) the use of ''social plug-ins'' such as the ''like'' feature on an investment adviser's social media site;[536] and (iii) references regarding, for example, an adviser's religious affiliation or moral character, trustworthiness, diligence or judgement, in addition to more typical testimonials that reference an adviser's technical competence or performance track record.[537] The Commission has also stated that an adviser should consider the application of rule 206(4)–1, including the prohibition on testimonials, before including hyperlinks to third-party websites on its website or in its electronic communications.[538] For example, staff has stated that it would not recommend enforcement action, under certain conditions, when an adviser provided: (i) Full and partial client lists[539]; and (ii) references to unbiased third-party articles concerning the investment adviser's performance.[540]

Staff no-action letters have stated that the staff would not recommend enforcement action under rule 206(4)–1 for references to specific investment advice in an advertisement, notwithstanding the rule's general prohibition of the use of past specific recommendations. An adviser that is able to rely on a staff no-action letter may include past specific recommendations in an advertisement provided the recommendations were selected using performance-based or objective, non-performance-based criteria, and in either case, the adviser practices are consistent with a number of specific conditions articulated in the no action letters.[541] For example, the staff stated that it would not recommend enforcement action if an adviser included in an advertisement a partial list of recommendations provided that, in general, the list: (i) Includes an equal number (at least five) of best and worst-performing holdings; (ii) takes into account consistently the weighting of each holding within the portfolio (or representative account) that contributed to the performance during the measurement period; (iii) is presented consistently from measurement period to measurement period; and (iv) discloses how to obtain the calculation methodology and an analysis showing every included holding's contribution to the portfolio's (or representative account's) overall performance.[542]

Snapshot report, *https://www.finra.org/sites/default/files/2018_finra_industry_snapshot.pdf*).

[532] *Id.*

[533] *Id.*

[534] *See supra* footnote 59.

[535] *See* Investment Adviser Association, SEC Staff No-Action Letter (Dec. 2, 2005) (not recommending enforcement action if in determining whether a third-party rating is a testimonial, the adviser considers the criteria used by the third party when formulating the rating and the significance to the ratings formulation of criteria related to client evaluations of the adviser); DALBAR, Inc., SEC Staff No-Action Letter (Mar. 24, 1998) (not recommending enforcement action if an adviser used references to third-party ratings that reflect client experiences, provided certain conditions were met and certain disclosures made, both of which designed to ensure the that rating is developed in a fair and unbiased manner and that disclosures provide investors with sufficient context to make informed decisions).

[536] *See, e.g.,* National Examination Risk Alert, Office of Compliance, Inspections and Examinations (Jan. 4, 2012).

[537] *See* Gallagher and Associates, Ltd., SEC Staff No-Action Letter (July 10, 1995) (where the staff reiterated its view that rule 206(4)–1 prohibits testimonials of any kind concerning the investment adviser); *see also* IM Guidance Update No. 2014–04, at note 12 and accompanying text, in which staff partially withdrew its Gallagher position.

[538] *See* Interpretive Guidance on the Use of Company websites, Release No. IC–28351 (Aug. 1, 2008); *see also* Guidance on the Testimonial Rule and Social Media, IM Guidance Update No. 2014–04, at n.19 and accompanying text.

[539] *See, e.g.,* Cambiar Investors, Inc., SEC Staff No-Action Letter (Aug. 28, 1997) (stating it would not recommend enforcement action when the adviser proposed to use partial client lists that do no more than identify certain clients of the adviser, the Commission staff stated its view that partial client lists would not be testimonials because they do not include statements of a client's experience with, or endorsement of, an investment adviser); *see also* Denver Investment Advisors, Inc., SEC Staff No-Action Letter (July 30, 1993) (providing that partial client lists can be, but are not necessarily, considered false and misleading under 206(4)–1(a)(5)).

[540] *See* New York Investors Group, Inc., SEC Staff No-Action Letter (Sept. 7, 1982) (stating that an unbiased third-party article concerning an adviser's performance is not a testimonial unless the content includes a statement of a customer's experience with or endorsement of the adviser).

[541] *See, e.g.,* Scientific Market Analysis, SEC Staff No-Action Letter (Mar. 24, 1976) (the staff would not recommend enforcement action when an investment adviser offers a list of past specific recommendations, provided that the adviser offers to provide the list free of charge); and Kurtz Capital Management, SEC Staff No-Action Letter (Jan. 18, 1988) (the staff would not recommend enforcement action relating to an adviser's distribution of past specific recommendations contained in third-party reports, provided that the adviser sends only bona-fide unbiased articles).

[542] *See* The TCW Group, SEC Staff No-Action Letter (Nov. 7, 2008) (not recommending enforcement action provided that the adviser met certain other conditions such as presenting best and worst-performing holdings on the same page with equal prominence; disclosing that the holdings identified do not represent all of the securities purchased, sold or recommended for the adviser's clients and that past performance does not

The staff has also stated that it would not recommend enforcement action if an adviser includes in an advertisement a partial list of recommendations selected using objective, non-performance-based criteria, provided that, in general: (i) The same selection criteria are used consistently from measurement period to measurement period (ii) there is no discussion of the profits or losses (realized or unrealized) of any specific securities; and (iii) the adviser maintains certain records, including, for example, records that evidence a complete list of securities recommended by the adviser in the preceding year for the specific investment category covered by the advertisement and the criteria used to select the specific securities listed in the advertisement.[543]

Finally, the Commission has brought enforcement actions related to the presentation of performance results in advertisements. For example, we have alleged in settled enforcement actions that the performance information that certain advisers included in their advertisements failed to disclose all material facts, and thus created unwarranted implications or inferences.[544] Our staff has also expressed its views as to the types of disclosures that would be necessary in order to make the presentation of certain performance information in advertisements not misleading.[545] Our staff has taken the position that the failure to disclose how material market conditions, advisory fee expenses, brokerage commissions, and the reinvestment of dividends affect the performance results would be misleading.[546] Our staff has also considered materially misleading the suggestion of potential profits without disclosure of the possibility of losses.[547]

Our staff has taken the position that prior performance results of accounts managed by a predecessor entity may be used so long as: (i) The person responsible for such results is still the adviser; (ii) the prior account and the present account are similar enough that the performance results would provide relevant information; (iii) all prior accounts that are being managed in a substantially similar fashion to the present account are being factored into the calculation; and (iv) the advertisement includes all relevant disclosures.[548] More recently, our staff has taken the position that, subject to certain conditions, a surviving investment adviser following an internal restructuring may continue to use the performance track record of a predecessor advisory affiliate to the same extent as if the restructuring had not occurred.[549]

Regarding the use of model performance results, our staff has indicated it would consider such results misleading under rule 206(4)–1(a)(5) if the investment adviser fails to make certain disclosures.[550] Our staff has also indicated it would find the use of backtested performance data to be misleading unless accompanied by disclosure detailing the inherent limitations of data derived from the retroactive application of a model developed with the benefit of hindsight.[551] Moreover, staff have taken the position that the rule 204–2(a)(16) requirement to keep records of documents necessary to form the basis for performance data provided in advertisements also applies to a successor's use of a predecessor's performance data.[552]

c. Data on Investment Advisers

Based on Form ADV filings, as of Sep 30, 2019, 13,463 investment advisers were registered with the Commission. Of these registered investment advisers (''RIAs''), 11,289 reported that they were ''large advisory firms,'' with regulatory assets under management (''RAUM'') of

guarantee future results; and maintaining certain records, including, for example, evidence supporting the selection criteria used and supporting data necessary to demonstrate the calculation of the chart or list's contribution analysis).

543 *See* Franklin Management, Inc., SEC Staff No-Action Letter (Dec. 10, 1998) (not recommending enforcement action provided that the adviser met certain other conditions such as requiring that the adviser disclose in the advertisement that the specific securities identified and described do not represent all of the securities purchased, sold, or recommended for advisory clients, and that the investor not assume that investments in the securities identified and discussed were or will be profitable).

544 *See, e.g.,* In re Van Kampen Investment Advisory Corp., Release No. IA–1819 (Sept. 8, 1999) (settled order); In re Seaboard Investment Advisers, Inc., Release No. IA–1431 (Aug. 3, 1994) (settled order).

545 *See, e.g.,* Clover Capital Mgmt., Inc., SEC Staff No-Action Letter (Oct. 28, 1986) (not recommending enforcement action provided that certain disclosures about included performance results are made). Regarding mutual funds, our staff has stated that it would not recommend enforcement action if an advertisement included performance data from private accounts that are substantially similar in size and investment strategy to the fund in the fund's prospectus or sales literature provided that the prospectuses or advertisements: (i) Disclose that the performance results are not those of the fund and should be considered a substitute for such performance; (ii) include the fund's performance results if such results exist and; (iii) disclose all material differences between the institutional accounts and the fund. *See* Nicholas-Applegate Mutual Funds, SEC Staff No-Action Letter (Aug. 6, 1996); GE Funds, SEC Staff No-Action Letter (Feb. 7, 1997); ITT Hartford Mutual Funds, SEC Staff No-Action Letter (Feb. 7, 1997).

546 *See* Clover Capital Management, Inc., SEC Staff No-Action Letter (Oct. 28, 1986) (not recommending enforcement action provided that that if an adviser compares performance to that of an index, they must disclose all material factors affecting the comparison) *See also* Investment Company Institute, SEC Staff No-Action Letter (May 5, 1988); Association for Investment Management and Research, SEC Staff No-Action Letter (Dec. 18, 1996) (not recommending enforcement action provided that gross performance results may be provided to clients so long as this information is presented on a one-on-one basis or alongside net performance with appropriate disclosure.) *See Also* Securities Industry Association, SEC Staff No-Action Letter (Nov. 27, 1989) (not recommending enforcement action provided that an adviser that advertises historical net performance using a model fee makes certain disclosures.)

547 *Id.*

548 *See* Horizon Asset Management, LLC, SEC Staff No-Action Letter (Sept. 13, 1996); *see also* Great Lakes Advisers, Inc., SEC Staff No-Action Letter (Apr. 3, 1992) (not recommending enforcement action if a successor adviser, composed of less than 100 percent of the predecessor's committee, used the preceding performance information in their calculation so long as there is a substantial identification of personnel, and noting that without substantial identification of personnel in such a committee, use of the data would be misleading even with appropriate disclosure.)

549 *See* South State Bank SEC Staff No-Action Letter (May 8, 2018) (conditioning the staff's position not to recommend enforcement action on representations including, for example, that the successor adviser would operate in the same manner and under the same brand name as the predecessor adviser).

550 *Id. See also In re LBS Capital Mgmt., Inc.,* Release No. IA–1644 (July 18, 1997) (not recommending enforcement action provided that the Commission will look into the identity of the intended recipient of advertisement when determining if the results were misleading.)

551 *See re Market Timing Systems, Inc., et al.,* Release No. IA–2047 (Aug. 28, 2002) (settled order) (the Commission brought an enforcement action against, among others, a registered investment adviser, asserting that its advertising was misleading because it failed to disclose that performance results advertised were hypothetical and generated by the retroactive application of a model, and in other cases failed to disclose the relevant limitations inherent in hypothetical results and the reasons why actual results would differ); *see also In re Leeb Investment Advisers, et al.,* Release No. IA–1545 (Jan. 16, 1996) (settled order) (the Commission brought an enforcement action against, among others, a registered investment adviser, asserting that advertising mutual fund performance using a market-timing program based on backtested performance was misleading because the program changed during the measurement period and certain trading strategies were not available at the beginning of the measurement period). *See also In re Schield Mgmt. Co., et al.,* Release No. IA–1872 (May 31, 2000) (settled order) (The Commission brought an enforcement action against, among others, a registered investment adviser, asserting that advertisements presenting backtested results were misleading in violation of section 206(2) and rule 206(4)–1 because, among other things, they failed to disclose or inadequately disclosed that the performance was backtested, and stating that labeling backtested returns ''hypothetical'' did not fully convey the limitations of the performance).

552 Rule 204–2(a)(16); *See* Great Lakes Advisors, Inc., SEC Staff No-Action Letter (Apr. 3, 1992) (not recommending enforcement action and stating the staff's view that the requirement in rule 204–2(a)(16) applies to a successor's use of a predecessor's performance data.)

at least $90 million. 538 reported that they were ''mid-sized advisory firms,'' with RAUM of between $25 million and $100 million, and 1,639 did not report as either, which implies that they have regulatory assets under management of under $25 million.[553]

Form ADV disclosures show $83.9 trillion RAUM for all registered investment advisers, with an average of $6.23 billion RAUM and a median of $318 million. These values show that the distribution of RAUM is skewed, with more RIAs managing assets below the average, than above.

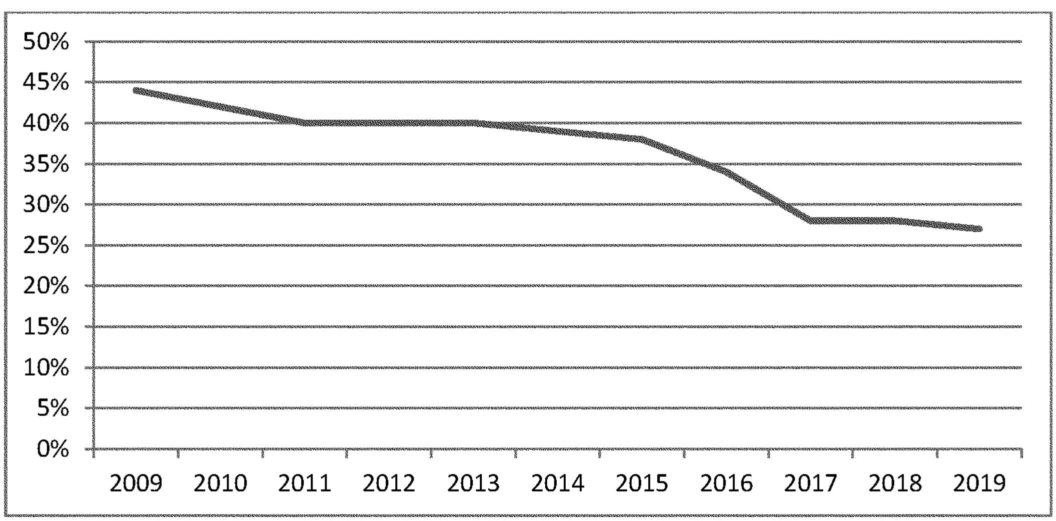
The majority of Commission-registered investment advisers report that they provide portfolio management services for individuals and small businesses.[554] In aggregate, investment advisers have over $83 trillion in assets under management (''AUM''). A substantial percentage of AUM at investment advisers is held by institutional investors, such as investment companies, pooled investment vehicles, and pension or profit-sharing plans.[555] Based on staff analysis of Form ADV data, 8,396 (62 percent) have some portion of their business dedicated to individual clients, including both high net worth and non-high net worth individual clients.[556] However, using the number of high-net worth clients as a basis for estimating the number of non-retail clients likely significantly overstates the number of non-retail clients. In total, these firms have approximately $41.2 trillion of AUM,[557] of which $11 trillion is attributable to clients, including both non-high net worth and high net worth clients. Approximately 7,330 registered investment advisers (54 percent) serve 31.4 million non-high net worth individual [558] clients and have approximately $4.8 trillion in AUM attributable to the non-high net worth clients, while nearly 8,143 registered investment advisers (60 percent) serve approximately 4.6 million high net worth clients with $6.1 trillion in AUM attributable to the high-net worth clients. The Commission preliminarily believes that many advisers currently prepare and present Global Investment Performance Standards (''GIPS'')-compliant performance information, and also that many advisers, particularly private fund advisers, currently prepare annual performance for investors.

2. Market for Solicitors

a. Current Rules

The current rule makes paying a cash fee for referrals of advisory clients unlawful unless the solicitor and the adviser enter into a written agreement that, among other provisions, requires the solicitor to provide the client with a current copy of the investment adviser's Form ADV brochure and a separate written solicitor disclosure document at the time of solicitation.[559] The solicitor disclosure must contain information highlighting the solicitor's financial interest in the investor's choice of an investment adviser.[560] In addition, the rule prescribes certain methods of compliance, such as requiring an adviser to receive a signed and dated acknowledgment of receipt of the required disclosures.[561] The current rule also prohibits advisers who have engaged in certain misconduct from acting as solicitors.[562]

Figure [1] Percent of RIA that Compensate Persons besides Employees for Client Referrals



[553] From Form ADV: A ''Large advisory firm'' either: (a) Has regulatory assets under management of $100 million or more or (b) has regulatory assets under management of $90 million or more at the time of filing its most recent annual updating amendment and is registered with the SEC; a ''mid-sized advisory firm'' has regulatory assets under management of $25 million or more but less than $100 million and either: (a) Not required to be registered as an adviser with the state securities authority of the state where they maintain their principal office and place of business or (b) not subject to examination by the state securities authority of the state where they maintain their principal office and place of business.

[554] Of the 13,463 SEC-registered investment advisers, 8,569 (64 percent) report in Item 5.G.(2) of Form ADV that they provide portfolio management services for individuals and/or small businesses. In addition, there are approximately 17,933 state-registered investment advisers. Approximately 14,360 state-registered investment advisers are retail facing (see Item 5.D. of Form ADV).

[555] See Table 1. High-net worth clients are not necessarily qualified purchasers for purposes of the rule's distinction between retail and non-retail advertisements.

[556] We use the responses to Items 5(D)(a)(1), 5(D)(a)(3), 5(D)(b)(1), and 5(D)(b)(3) of Part 1A of Form ADV. If at least one of these responses was filled out as greater than 0, the firm is considered as providing business to retail investors. Form ADV Part 1A. Of the 8,396 investment advisers serving individual clients, 311 are also registered as broker-dealers.

[557] The aggregate AUM reported for these investment advisers that have retail investors includes both retail AUM as well as any institutional AUM also held at these advisers.

[558] A high net worth (HNW) individual is an individual who is a ''qualified client''. Generally, this means a natural person with at least $1,000,000 assets under the management of an adviser, or whose net worth exceeds $2,100,000 (excluding the value of his or her primary residence).

[559] *See supra* footnote 28.

[560] *See supra* footnote 29.

[561] *See supra* footnote 30.

[562] *See* rule 206(4)–3(a)(1)(ii).

Given that there is no registration requirement for solicitors of investment advisers, our only view on solicitation practices is through the disclosures made by registered investment advisers in Form ADV. As of August 2019, 27 percent of registered investment advisers reported compensating any person besides an employee for client referrals.[563] Based on Figure [1], the share of registered investment advisers that reported this type of arrangement has declined since 2009. However, this figure does not capture employees of an investment adviser that are compensated for client referrals, who are solicitors under the current rule. The downward trend of Figure [1] may suggest that the use of solicitors is declining through an overall decline in client referral activity. Or, the chart may suggest that employers are shifting their solicitation activities in-house.

b. RIAs to Private Funds

Based on Form ADV data from Sep 30 2019, 4865 RIAs report that they are advisers to private funds, and 44 of them report that they are a small entity.[564] Of the RIAs that advise private funds, 1590 RIAs report to use the services of solicitors (''marketers'' in Form ADV) that are not their employees or themselves (''related marketers'' in Form ADV). Among the RIAs that hire solicitors, each RIA uses 3 solicitors on average, while the median number of solicitors reported is 1, and the maximum is 79. There are 340 RIAs indicate that they have at least one related marketer, and 210 of them indicate that they only hire related marketers. Among RIAs that report using a related marketer, the average number of related marketers reported is 1.7, while the median reported is 1 and the maximum is 21. 1315 RIAs indicate that they have at least one marketer which is registered with the SEC: The average number of SEC registered marketers employed by these RIAs is 2.1, while the median number reported is 1 and the maximum is 49. Finally, 556 RIAs indicate that they have at least one non-US marketer: The average number of non-US marketers reported among these RIAs is 2.9, while the median is 1 and the maximum is 71.[565]

3. RIA Clients

SEC-registered advisers are required to report their specific number of clients in 13 different categories and a catch-all ''Other'' category.[566] Based on Form ADV data collected as of September, 2019, SEC-registered advisers report having a total of approximately 38 million clients, and 84 trillion RAUM. Individual investors constitute the majority (92 percent) of the RIA client base. Columns 2 and 3 of Table 1 present the breakdown of the RIA client base, and column 4 shows the total RAUM from each investor category as of October 2018.

Non-high net worth (HNW) individuals comprise the largest group of advisory clients by client number—78 percent of total clients. The number of HNW individuals is only 13 percent of advisory clients, but RAUM from HNW individuals makes up almost 7 percent of the industry-wide RAUM ($82.5 trillion) in 2018, while RAUM from non-HNW individuals accounts for about 5.5 percent. Investment companies and other pooled investment vehicles and pension plans represent the largest portion of RAUM among all non-retail investors.

TABLE 1

Investor categories	Clients	Clients (%)	RAUM (billions)	RAUM (%)	Advisers
Non-HNW individuals	27,996,201	78.288	$4,842.93	5.429	7,068
HNW individuals	4,763,963	13.322	6,119.78	6.860	7,854
Other investment advisers	824,986	2.307	1,784.57	2.000	1,045
Corporations or other businesses	434,859	1.216	2,975.73	3.336	5,050
Pension and profit sharing plans	426,570	1.193	6,233.17	6.987	5,626
Other	338,150	0.946	2,365.03	2.651	1,484
Pooled Investment Vehicles (PIVs)—Other	221,594	0.620	21,856.89	24.500	5,384
State/municipal entities	219,058	0.613	3,805.27	4.265	1,399
Charities	200,256	0.560	1,261.84	1.414	4,832
Banking or thrift institutions	183,886	0.514	1,078.13	1.209	633
Insurance companies	101,171	0.283	5,374.18	6.024	1,079
PIVs—Investment companies	47,188	0.132	29,673.14	33.262	1,831
Sovereign Wealth Funds and Foreign official institutions	1,412	0.004	1,691.79	1.896	193
PIVs—Business development companies	1,175	0.003	148.61	0.167	109

A number of surveys show that individuals[567] predominantly find their current financial firm or financial professional from personal referrals by family, friends, or colleagues, rather than through advertisements.[568] For instance, a 2008 study conducted by RAND reported that 46 percent of survey respondents indicated that they located a financial professional from personal referral, although this percentage varied depending on the type of service provided (*e.g.,* only 35 percent of survey participants used personal referrals for brokerage services). After personal referrals, RAND 2008 survey participants ranked professional referrals (31 percent), print advertisements (4 percent), direct mailings (3 percent), online advertisements (2 percent), and television advertisements (1 percent), as their source of locating individual professionals. The RAND 2008 study separately inquired about locating a financial firm,[569] in which respondents reported selecting a financial firm (of

[563] Response to Item 8(h)(1) of Part 1A of Form ADV.

[564] Form ADV Item 5.F. and Item 12.

[565] Data on solicitors (marketers) hired by RIAs to private funds are collected from Form ADV Section 7.B(1) (28).

[566] Form ADV Item 5.D. of Part 1A.

[567] The surveys generally use ''retail investors'' to refer to individuals that invest for their own personal accounts.

[568] *See* Angela A. Hung, et al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Institute for Civil Justice Technical Report (2008), *available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR556.pdf* (''RAND 2008''), which discusses a shift from transaction-based to fee-based brokerage accounts prior to recent regulatory changes; *see also* Financial Literacy Study, *supra* footnote 524.

[569] The Commission notes that only one-third of the survey respondents that responded to ''method to locate individual professionals'' also provided information regarding locating the financial firm.

any type) based on: Referral from family or friends (29 percent), professional referral (18 percent), print advertisement (11 percent), online advertisements (8 percent), television advertisements (6 percent), direct mailings (2 percent), with a general ''other'' category (36 percent).

The Commission's 2012 Financial Literacy Study provides similar responses, although it allowed survey respondents to identify multiple sources from which they obtained information that facilitated the selection of the current financial firm or financial professional.[570] In the 2012 Financial Literacy Study,[571] 51 percent of survey participants received a referral from family, friends, or colleagues. Other sources of information or referrals came from: Referral from another financial professional (23 percent), online search (14 percent), attendance at a financial professional-hosted investment seminar (13 percent), advertisement (*e.g.,* television or newspaper) (11.5 percent), other (8 percent), while approximately 4 percent did not know or could not remember how they selected their financial firm or financial professional. Twenty-five percent of survey respondents indicated that the ''name or reputation of the financial firm or financial professional'' affected the selection decision.

D. Costs and Benefits of the Proposed Rule and Form Amendments

In this section, we first outline the overall costs and benefits of the general structure and prohibitions of the proposed rule and form amendments, and later discuss the costs and benefits of specific provisions of the proposed amendments. We have considered the potential costs and benefits of the amendments, but these economic effects are generally difficult to quantify. Several factors make quantification of the potential effects of the proposed rule difficult. First, there is little to no direct data suggesting how investment advisers might alter their advertising practices as a result of the proposed rule or mitigate the compliance burdens related to the proposed rule. Second, it is difficult to quantify the impact that the specific disclosures required in the proposed rule would have on investor behavior because we cannot meaningfully predict the impact on investor behavior that the proposed rule might have. In addition, the specific provisions of the proposed rule sometimes contain multiple effects that could potentially affect investor behavior in opposing directions. Without knowing the magnitude of these opposing effects, it is not possible to quantify the net effect of specific provisions of the proposed rule. Finally, it is difficult to quantify the extent to which certain changes in adviser and investor behavior enhance or diminish the welfare of specific market participants. For example, if investors increased the amount of regulatory assets under management as a result of the proposed rule, it is not clear that investor welfare would have improved, without knowing the extent to which the proposed rule also affected the quality of investment advisers that investors chose. Some advisers might have to advertise at a (net) cost due to competitive pressure; or they might seek to increase their fees due to marketing, and the burden could be partially transferred to investors. In addition, the total welfare effects of the rule are distinct from the welfare effects on a specific type of market participant.

Instead of directly quantifying the effect brought by the proposed rule in the market of investment advice, a close alternative is to learn from a comparable market that is also advised by registered investment advisers, *i.e.,* the mutual fund market. The study mentioned in section D.1 quantifies the effect of advertising on investor welfare in the mutual fund market, which serves as a reference, though the finalized effect of the proposed rule still will not be exactly the same. We encourage commenters to provide data and information to help quantify the benefits, costs, and the potential impacts of the proposed rule on efficiency, competition, and capital formation. In those circumstances in which we do not currently have the requisite data to assess the impact of the proposal quantitatively, we have qualitatively analyzed the economic impact of the proposed rule.

1. General Costs and Benefits of the Advertising Rule

Broadly speaking, the proposed advertising rule expands the definition of ''advertisement,'' and expands the set of permissible elements in advertisements that an investment adviser can disseminate relative to the baseline. This expanded set of permissible elements are subject to additional required disclosures.

The proposed rule would change the definition of ''advertisement'' to any communication, disseminated by any means, by or on behalf of an investment adviser, that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients or investors in any pooled investment vehicle advised by the investment adviser. This would expand the set of communications subject to the advertisement prohibitions, including both the general anti-fraud prohibitions, as well as the specific prohibitions of the proposed rule.

In addition, the proposed general anti-fraud prohibitions would prohibit certain advertising practices, and would include disclosure requirements designed to prevent other misleading statements. By reducing the potential for misleading or fraudulent statements in these additional communications, the prohibitions of the proposed rule would provide investors with protections. While expanding the set of communications covered by the definition of ''advertisement'' and subject to prohibitions applicable to all advertisements, the proposed advertising rule permits some new elements in advertisements, and provides advisers with additional flexibility in the creation and dissemination of advertisements and communications, conditional on meeting disclosure requirements designed to support investor protection. At the same time, this additional flexibility for advisers could impose costs on investors, particularly individuals with less access to financial knowledge and resources, if new advertisements are unrelated to the underlying performance of an investment adviser, or if the disclosures cannot be properly digested by the recipients of the advertisements—especially those without relevant financial knowledge or resources. However, we anticipate that these costs would be limited by the additional requirements for fair and balanced references to specific investment advice and portrayals of advisers' performance in advertisements. These new elements and the additional flexibility could also lead to more spending on advertising, and these additional costs could be passed through to investors.

The proposed amendments would provide additional flexibility to investment advisers in certain respects, but also impose additional restrictions on certain types of advertisements that investment advisers currently use. In evaluating whether to take advantage of the flexibility provided by new amendments, investment advisers must weigh the potential benefits of newly

[570] *See* Financial Literacy Study, *supra* footnote 524.

[571] The data used in the 917 Financial Literacy Study comes from the Siegel & Gale, Investor Research Report (Jul. 26, 2012), *available at https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part3.pdf.*

permitted forms of communication against the compliance burdens of additional disclosure requirements associated with those forms of communication. Thus, an investment adviser that modifies its advertisements as a result of the proposed rule has likely determined the benefits of the modifications justify the costs. However, we acknowledge that this does not necessarily mean that investment advisers would experience a net benefit as a result of those provisions of the proposed rules that provide additional flexibility. As we discuss further below, there is a possibility that investment advisers may also enter a costly ''arms race'' in advertising spending. Investment advisers that modify their advertising might expend resources on more expensive advertisements to compete against other investment advisers that are also producing expensive advertisements, without necessarily experiencing increases in revenues.

Investment adviser advertising under the proposed rule will likely include more information given the changes in information permitted by the rule, with additional disclosures provided to protect investors.[572] On its face, an increase in information could improve investor outcomes in several ways. The additional information in advertisements could aid investors by increasing investor awareness of different service providers' offerings, thus reducing search costs. Reducing the cost of search may not only aid investors as they search for investment advisers, but might also promote competition among investment advisers if expanded options for advertising permits investment advisers with higher ability to more credibly signal that ability to potential investors and clients under the proposed rule. For example, to the extent that third party ratings are correlated with investment adviser ability, investment advisers would be able to present these ratings to potential clients under the proposed rule, who could, in turn use these ratings as part of their overall assessment of the investment adviser as they consider entering into an advisory relationship.

The proposed rule generally would require investment advisers to include disclosures to provide investors with additional context that would help them evaluate an investment adviser's claims. While information contained in required disclosures might be useful to investors, it is not clear to what extent investors, especially retail investors, would have the financial knowledge, experience or access to resources to (i) fully process these disclosures to assess an investment adviser's claims, and (ii) fully account for an investment adviser or solicitor's conflicts of interest when choosing among investment advisers. Disclosures may reduce or eliminate information awareness and acquisition costs, but individuals may still face difficulties utilizing this information in their decision-making process, which may also vary depending on the investor's level of financial sophistication and access to expertise.

In order to gauge the general effect of the proposed advertising rule on the market for investment advice, the practices in a neighboring market could lend some insight. Mutual funds, which are managed by registered investment advisers, advertise to reach more investors. Although mutual funds, private pooled investment vehicles, and investment adviser separate account advisory services are not subject to identical regulatory requirements, similarities among their economic features lend themselves to comparison: Specifically, they all may target similar types of clients and investors and all have an information asymmetry problem between investors and financial service providers.[573]

Academic literature on marketing for mutual funds has examined: (i) How advertising affects investors—both in terms of flows (cash to be managed by financial service providers) and returns (return net of fees back to investors); (ii) how marketing may help imperfectly informed investors find better service providers, *i.e.,* reduce search cost; and (iii) the extent to which competition among financial service providers generates wasteful spending on advertising. To the extent that the market for mutual funds shares common features with the market for private funds and for other types of investment adviser services, evidence from the mutual fund industry may help us understand the potential impact of the proposed advertising rule on the market for investment advisory services and private funds.

A positive relation between funds' marketing efforts and investor flows (cash investment from investors) is well-documented among mutual funds.[574] Because marketing brings in more business and revenues for asset managers, it is important to understand the expenditure associated with marketing, especially its significance to investors. In the context of mutual funds, marketing expenses[575] contribute to an advisory firm's total operational cost, and fund shareholders will bear at least part of the cost in the form of fund expense, unless shareholders switch to a similar fund with lower expenses. One study observes that firms also choose to charge more fees to cover the marketing cost as they engage in an ''arms race'' for a similar pool of investors.[576] While

[572] While we preliminarily believe that the advertising rule will improve the information available to investors, there is a possibility that investment advisers would not alter their advertisements as a result of the rule.

[573] Note that while mutual funds are often marketed to retail investors, private funds are marketed to at least accredited investors and often to qualified purchasers.

[574] *See* Prem Jain and Joanna Wu, *Truth in Mutual Fund Advertising: Evidence on Future Performance and Fund Flows,* 2 J. FIN 937 (2000) finding that advertising in funds increases flows (comparing advertised funds with non-advertised funds closest in returns and with the same investment objective). Reuter and Zitzewitz (2006) find indirect evidence that advertising can increase fund flows. Controlling for past media mentions and a variety of fund characteristics, a single additional positive media mention for a fund is associated with inflows ranging from 7 to 15 percent of its assets over the following 12 months. Jonathan Reuter and Eric Zitzewitz, *Do Ads Influence Editors? Advertising and Bias in the Financial Media,* 121 Q. JOURNAL ECON. 197 (2006). While positive mentions significantly increase fund inflows, they do not successfully predict returns to investors. Other papers, including Gallaher, Kaniel and Starks (2006) and Kaniel and Parham (2016), also find a significant and positive impact of advertising expenditures and the resulting media prominence of the funds on fund inflows. Steven Gallaher, Ron Kaniel and Laura T. Starks, *Madison Avenue Meets Wall Street: Mutual Fund Families, Competition and Advertising* (SSRN, Jan. 2006); Ron Kaniel and Robert Parham, *WSJ Category Kings—The Impact of Media Attention on Consumer and Mutual Fund Investment Decisions,* 123 J. FIN. ECON. 1 (2016).

[575] 12b–1 fees. A 12b–1 fee is an annual marketing or distribution fee paid by a mutual fund. It is paid by the fund out of fund assets to cover distribution expenses and sometimes shareholder service expenses (see rule 17 CFR 270.12b–1). It is considered to be an operational expense and, as such, is included in a fund's expense ratio. The rule permits a fund to pay distribution fees out of fund assets only if the fund has adopted a plan (12b–1 plan) authorizing their payment. ''Distribution fees'' include fees paid for marketing and selling fund shares, such as compensating brokers and others who sell fund shares, and paying for advertising, the printing and mailing of prospectuses to new investors, and the printing and mailing of sales literature. The SEC does not limit the size of 12b–1 fees that funds may pay, although FINRA rules limit the amount that may be charged by a fund sold by FINRA member broker-dealers. Although some mutual fund managers also pay marketing/service costs out of their own resources, the 12b–1 fee is used as a close approximation for marketing expenses in the finance literature, because both marketing and distribution costs are costs incurred to promote the asset management service. In addition, various shareholder services fees and administrative fees may be paid outside 12b–1 plans (such as revenue sharing) may provide additional compensation to distribution intermediaries. As a consequence, the use of 12b–1 fees as a proxy for marketing costs may understate the total payments made for marketing by funds and their advisers.

[576] Roussanov, Ruan and Wei (2018) study the social welfare (net investor welfare plus asset manager welfare) implications of advertising. They find that marketing expenses are nearly as

Continued

some portion of the costs associated with this costly competitive advertising spending would be absorbed by mutual fund advisers, other portions would be passed on to investors. The authors argue that as fees increase, investors with a high– search cost—usually those with lower financial literacy—are more likely to suffer a (net) loss because they are more likely to match with an asset manager with poor ability, and because higher fees further reduce returns. Investors equipped with financial knowledge or access to resources to fully process the additional information conveyed in advertisements and disclosures may perceive potential benefits of improved information and match efficiency that justify higher fees.[577] These results point to potential inefficiencies that could result from the proposed rule if the antecedents of the ''arms race'' result described in the academic literature that are present between mutual funds and investors are also present between investment advisers and their clients. However, differences between these markets may limit the generalizability of results from studies of mutual fund marketing to the potential impacts of the proposed rule.

The proposed rule defines a ''Non-Retail Advertisement'' as an advertisement for which an investment adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisement is disseminated solely to a ''qualified purchaser'' or a ''knowledgeable employee.'' As with the proposed definition of ''advertisement'' (see section 2.a), we expect the proposed definition of ''Non-Retail Advertisement'' will alter the economic effects of the proposed rule because the obligations of investment advisers differ for Non-Retail Advertisements under certain circumstances. Thus, the programmatic costs and benefits of certain elements of the proposed rule will not only be determined by the scope of entities that are considered non-retail investors, but will also be determined by the extent to which the definition of non-retail investors is calibrated appropriately relative to the proposal's substantive requirements.

Although the staff is not aware of any direct research on the Qualified Purchaser standard and its relationship with financial literacy, multiple studies have found a strong positive correlation between wealth and financial literacy.[578] This evidence suggests that the division of certain programmatic requirements may yield benefits by tailoring the provisions of the proposed rule to the financial literacy of the investors that would receive a respective advertisement. In addition, Qualified Purchasers would likely have access to the resources necessary to gain access to expertise and information.[579] Similarly, the requirements for an employee to be a Knowledgeable Employee strongly suggest that the employee has the experience with investment management necessary to properly interpret the same advertisements that a Qualified Purchaser would; and would furthermore be able to obtain additional information the employee deems necessary to interpret Non-Retail Advertisements.

2. Specific Costs and Benefits of the Advertising Rule

a. Definition of Advertisements

The proposed rule redefines an advertisement, and lists three items that would not be considered an advertisement under the definition. Two significant differences between the new definition and the current rule's definition are (i) the inclusion of ''all communications''; and (ii) the two purpose tests for determining whether a communication is an advertisement—to ''offer or promote'' an investment advisory service for ''the purpose of obtaining or retaining'' one or more clients or investors in pooled investment vehicles.

By determining the scope of communications that would be affected by the proposed rule, the proposed definition of ''advertisement'' determines, in part, the costs and benefits of the regulatory program set forth by the other components of the proposed rule (the programmatic effects). For example if the definition of ''advertisement'' is not sufficiently broad, and excludes communications that could serve as a substitute for advertisements while also raising similar investor protection concerns, investment advisers might use these alternative methods of communication to avoid the costs associated with complying with the proposed rule. This would mitigate the programmatic impact of the proposed substantive provisions that would regulate advertisements. Conversely, if the scope of communications that is captured by the proposed rule is too broad, and captures communications not relevant for an investment adviser's advertisements, the amendments may impose costs on investment advisers while yielding insubstantial benefits.

i. Specific Provisions

The proposed definition of ''advertisement'' would expand the scope of communications subject to the requirements of rule 206(4)–1. In some cases, we anticipate that the proposed rule would broaden the scope of these communications. The proposed rule would cover all communications disseminated by, or on behalf of, an investment adviser to offer or promote the investment adviser's services.

The ''all communications'' provision would bolster investor protections by explicitly applying the substantive provisions of rule 206(4)–1 to communications not within the scope of the current rule. Application of the proposed substantive requirements for advertisements to these communications would yield programmatic costs and benefits that would not accrue under the current definition of ''advertisement'' because the current definition of ''advertisement'' focuses solely on written communications to more than one recipient.

The proposed definition would include communications of any form, with certain exceptions noted below. Broadening the definition of ''advertisement'' could bolster investor protections currently afforded by the Advertising Rule, by updating the definition of ''advertisement'' to reflect the evolving forms of communication used by investment advisers. The benefits that accrue to investors through investor protections would vary depending on the type of communication covered by the proposed rule.

The additional burdens include mandated review and approval of communications to investors to determine whether the communications meet the rest of the definition of

important as price (*i.e.,* expense ratio) or performance for explaining fund size (AUM). Marketing increases funds' size (asset under management) and brings in more revenue for all funds, regardless of their performance. One extra basis point in marketing fees prompted a 1.15 percent increase in AUM for funds with the best returns, but even for those with the lowest returns it boosted a fund's size by 0.97 percent. Nikolai Roussanov, Hongxun Ruan, and Yanhao Wei, *Marketing Mutual Funds* (NBER Working Paper 25056, Sept. 2018).

[577] Some institutional investors will expend resources as part of their own search costs. For example, some institutional investors pay consultants to conduct RFPs for money managers or private funds.

[578] *See e.g.,* Annamaria Lusardi, Pierre-Carl Michaud, and Olivia S. Mitchell, *Optimal Financial Knowledge and Wealth Inequality,* 125 J. POL. ECON. 431 (2017); Jere R. Behrman et al., *How Financial Literacy Affects Household Wealth Accumulation,* 102 AM ECON REV. 300 (2012). These papers found that financial literacy and knowledge were related across the entire range of wealth, not just at higher levels.

[579] See Section I.A *supra.*

"advertisement." Investment advisers may modify their communication strategies in an effort to reduce the amount of communication that could be deemed to fall within the proposed definition of "advertisement," or that would be subject to the rule's review and approval requirement. These strategic responses could, in turn, impose costs on some investors, to the extent that these investors currently rely on communications by investment advisers other than live oral communications to inform their decisions. If investment advisers respond by reducing the amount of such communications, both prospective and existing investors may need to search more intensively for information about investment advisers than they currently do, or alternatively, base their choice of financial professional on less information. This could result, for example, in inefficiencies if an existing client of an investment adviser is unaware of the breadth of services the investment adviser provided and incurs costs to open a new account with another investment adviser to obtain certain services. Similarly, prospective clients with less information from investment advisers might choose an investment adviser that is a poorer quality match for the investor, or may be discouraged from seeking investment advice. To the extent that some investment advisers who already restrict the use of communications newly regulated by the proposed rule due to risk concerns over inability to monitor or document such communications under the current rule, the change in the cost would be diminished.

The proposed definition of "advertisement" would also include advertisements made "by or on behalf of" of an investment adviser. This provision would expand the set of communications that would be considered advertisements and subject those communications to the provisions of the proposed rule. Including communications made "on behalf of" an investment adviser into the set of regulated advertisements would make it more costly for investment advisers to avoid the provisions of the advertising rule by delegating or outsourcing advertising communications to third-parties. In addition, the extension of the rule to communications "on behalf of" investment advisers could also create more costs and delays from reviewing and ensuring the compliance of disclosures in such third-party communications, which would likely provide a disincentive to use such third-party communications. Including advertisements that are considered "on behalf of" an investment adviser in the proposed rule will help reduce the potential occurrence of misleading information disseminated by a third party in certain circumstances. In addition, applying the provisions of the proposed rule to these additional communications could also yield programmatic costs and benefits, such as potential improvement of the efficiency of the market for investment advisers, among other effects.[580]

Under the proposed rule, content created by or attributed to third parties could be considered by or on behalf of an investment adviser, depending on the investment adviser's involvement. Some examples of communications that would be included are: Positive reviews from clients selectively picked by an adviser to be posted or attributed, materials an adviser helps draft to be disseminated by solicitors or other third-party promoters, endorsements organized by an adviser on social media and etc. This proposed inclusion of communications protects investors from being misled or deceived by third-party promotional information from a source that may have conflicts of interest. In addition, because communications "on behalf of" an adviser are intended to reflect the application of the current rule to communications provided by advisers through intermediaries, investment advisers will comply with this element of the proposed rule through policies and procedures they currently use in communicating with prospective clients through intermediaries. Therefore, the additional burden on investment advisers, if any, should be marginal. While we do not anticipate that investors will bear any direct costs as a result of this provision, investors may be directly affected if investment advisers alter their advertising practices in a way that reduces the information available to investors. For example, investment advisers may reduce promotion of third-party reviews to avoid having to bear the associated costs of disclosure and compliance. If this results in a reduction in the amount of information available to investors, then investors may be directly affected by this provision of the rule.

The proposed definition of "advertisement" also includes communications that "offer or promote the investment adviser's investment advisory services," which would help apply the proposed rule not only to communications offering the services of the investment adviser, but also to those promoting its services. Unlike the "offer" clause, the "promote" clause is not included in the current rule. Under the proposed rule, promotional materials are advertisements, even if the content does not explicitly "offer" investment advisory services or participation in a pooled investment vehicle. Promotional materials implicate many of the same investor protection concerns as explicit offers of advice or offers of shares of pooled investment vehicles to the extent that these materials are designed to persuade potential clients to engage an investment adviser or invest in a pooled investment vehicle. This change broadens the scope of advertisements and extends the investor protection benefits of the advertising rule to a larger volume of communications.

However, because of this change, investment advisers would likely incur costs to review and approve their communications with potential and existing clients and investors, in an effort to determine which constitute promotional materials. Depending on the outcome of this assessment, an investment adviser may respond by reducing the amount of information it disseminates to potential and existing clients and investors, in turn reducing the amount of information available to potential and existing clients and investors.

Similarly, the provision "for the purpose of obtaining or retaining clients" would help apply the proposed rule not only to communications aimed at obtaining clients, but also to those aimed at retaining existing clients. This revision is consistent with the Commission's concerns under the current rule that communications to existing clients may be used to mislead or deceive in the same manner as communications to prospective clients. Given that this particular provision mainly adds to the clarity of the regulation, we expect the additional cost or benefit to be marginal. More generally, the provision benefits investors to a different degree depending on whether an investor is a new client or an existing client. An existing client has the chance to observe the skills of an investment adviser directly through their existing relationship. An existing client would thus have more access to information about the investment adviser than a new client, and hence may receive fewer benefits from the investor protections provided by the proposed rule.

ii. Specific Exclusions

Certain elements of the proposed definition of "advertisement"

[580] For more, see *supra* section III.D.1.

potentially narrow its scope and are designed to reduce the likelihood that the proposed rule imposes costs or burdens on communications unrelated to advertising or adds costs or burdens for communications already regulated by the Commission as advertisements. In particular, the rule permits four exceptions to the definition of ''advertisement.'' These exclusions include: (1) Non-broadcast live oral communications; (2) responses to certain unsolicited requests; (3) advertisements, other sales materials, and sales literature that is already regulated under rules specifically applicable to RICs and BDCs; and (4) any statutorily or regulatory required notice, filing, or other communication. The first exclusion eliminates the current rule's ''more than one person'' element and narrows the scope of the rule by excluding all non-broadcast live oral communications, to one or more persons; the second exclusion of responses to unsolicited requests (other than those relating to hypothetical performance or relating to any performance results presented to Retail Persons) is partly consistent with our staff's historical approach when considering whether or not to recommend enforcement action;[581] the third exclusion, for RICs and BDCs, is intended to acknowledge that advertisements, other sales materials, and sales literature that are about RICs and BDCs are regulated under the Securities Act and the Investment Company Act and subject to the specific prescriptions of the rules adopted thereunder; finally, the rule carves out several types of communications that are required to be produced by existing regulatory requirements. These four exclusions narrow the scope of communications that would otherwise be subject to the programmatic costs associated with the proposed rule, and thus avoid imposing costs and burdens on investment advisers.

One exclusion prevents the proposed rule from duplicating rules already in place for RIC and BDC marketing, designed to ameliorate investor protection concerns related to RIC and BDC marketing practices. Therefore, the expected change in costs and benefits from this exclusion under the proposed rule should be minimal, for both investment advisers and investors. The proposed exclusion of all non-broadcast live oral communications does not retain the current rule's ''more than one person'' element. To the extent that live oral communications are addressed to a small audience, the proposed amendment is consistent with the current rule.

To the extent that broadcasting reaches potential clients at a lower cost than direct conversations, the proposed exclusion would probably not cause investment advisers to substitute direct conversations for broadcast advertisements, and hence, there would be no significant change in terms of investor protection either. However, current technologies, such as software that supports live group video and voice chats, may enable investment advisers to reach clients without broadcasting. In addition, investment advisers that choose to avail themselves of the exclusion for responses to unsolicited requests would incur compliance costs associated with determining whether requests for information are unsolicited. However, we note that the proposed exclusion may benefit investors to the extent that investment advisers' responses to unsolicited requests for performance results would have still have to meet the specific performance advertising requirements of the advertising rule, along with its associated costs and benefits.[582]

b. General Prohibitions

The proposed rule prohibits advertisements that contain any untrue statements of a material fact, or that omit a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading.[583] We believe that the scope of this aspect of the proposed rule is substantially the same as its counterpart in the current rule, and thus we do not expect to see any costs or benefits relative to the baseline. Notably, the current rule contains an explicit prohibition on advertisements that contain statements to the effect that a report, analysis, or other service will be furnished free of charge, unless the analysis or service is actually free and without condition, but the proposed rule removes this explicit prohibition.[584] As discussed above, we believe that this practice would be captured by the proposed rule prohibition on untrue statements. Given that the removal of this provision entails no substantive change in prohibitions, we believe that the removal of this provision will likewise generate no new costs or benefits.

In addition, the proposed rule also contains several specific prohibitions for advertisements that are not present in the current rule. The prohibitions would apply to statements or communications that, depending on the facts and circumstances, may already be prohibited under the existing general prohibition in the rule of false or misleading statements as well as other anti-fraud provisions of the Federal securities laws. We anticipate that these changes will generate new questions about the rule's application, which will impose costs on investment advisers for legal advice. Similarly, the proposed rule removes the current rule's prohibition of charts and graphs absent certain disclosures, but the use of charts and graphs is still subject to the general anti-fraud prohibition. While the revised rules may allow certain additional advertising, changes to the rule may subject investment advisers to legal and compliance costs when they comply with the new standard.

The proposed rule also prohibits including or excluding favorable or unfavorable performance results, present performance time periods, or referencing specific investment advice in a manner that is not ''fair and balanced.'' To the extent that investment advisers include additional information to provide context for the performance results in their advertisements because of the selective inclusion of performance results and ''fair and balanced'' provisions, investors may benefit from the additional information, as they may be better able to evaluate the performance of investment advisers. While the additional disclosures and statements necessary to ensure performance results do not unfairly include or exclude performance results, and are fair and balanced may impose costs on investment advisers and may cause them to reduce the amount of information they provide, a ''fair and balanced'' presentation of performance might benefit both investors and investment advisers with higher abilities. Investors will be better able to evaluate investment advisers, and investment advisers who have higher abilities but who could not reveal those abilities to the same extent under the current rule would be better able to advertise their services and performance relative to other investment advisers.

c. Testimonials, Endorsements, and Third-Party Ratings

The proposed rule defines a testimonial as ''any statement of a

[581] We note that the exclusion for hypothetical performance or for any performance results presented to Retail Persons is a substantive change from current practice in reliance on staff positions.

[582] *See* Section III.D.2.d *infra.*

[583] Proposed rule 206(4)–1(a).

[584] *See* current rule 206(4)–1(a)(4); *see also* Dow Theory Forecasts, Inc., SEC Staff No-Action Letter (May 21, 1986) (staff declined to provide no-action recommendation where an offer for ''free'' subscription was subject to conditions).

person's experience, as a client or investor, with the investment adviser,'' and endorsements as ''any statement by a person other than a client or investor indicating approval, support, or recommendation of the investment adviser.'' Because of the similarity between testimonials and endorsements, we will first discuss the costs and benefits of these testimonials and endorsements together, and then later discuss third-party ratings.

Under the baseline, the current rule prohibits, but does not define, the use of testimonials, and does not address endorsements specifically. However, the staff through no-action letters has indicated it would not recommend enforcement action to the Commission when statements by non-clients (defined as endorsements in the proposed rule) were treated as testimonials as defined by the current rule. The proposed rule thus clarifies the distinction between statements made by clients and non-clients, and permits the use of testimonials and endorsements, provided that two disclosures are included with the advertisement.

Advertisements containing testimonials or endorsements must disclose whether the person giving the testimonial or endorsement is a client or a non-client, and whether he or she was compensated for his or her testimonial or endorsement. Testimonials and endorsements can play an important role in investor decisions by giving investors information about an investment adviser's interactions with investors, or the opinions of individuals who are not clients of the investment adviser, but might nevertheless be persuasive to prospective investors. To the extent that the quality of the testimonials and endorsements in investment adviser advertisements is correlated with the ability or potential fit of an investment adviser, investment advisers could benefit more from the proposed rule.

The ability to provide testimonials in advertisements may benefit investment advisers by allowing investment advisers to show satisfied clients or other individuals willing to endorse the investment adviser. Investment advisers with higher ability will likely receive more benefit from this provision, either because they will have to pay less for a testimonial, or will have access to more positive testimonials. However, given that the quality of a testimonial may be uncorrelated with the ability or potential fit of an investment adviser's services, the proposed rule may also create an ''arms race'' of testimonials in advertisements, where investment advisers, regardless of ability, increase spending on testimonials in advertisements to attract and retain clients. In this case, permitting paid testimonials and endorsements could leave both investment advisers and investors worse off.

Although including testimonials or endorsements in an advertisement will entail costs for investment advisers to either identify or compensate clients and non-clients, the Commission believes that investment advisers will only choose to include testimonials and endorsements in their advertisements if the expected benefits to their revenue exceed the expected costs of doing so. However, as noted above, competitive pressures may result in an inefficient level of advertising expenditures.

The proposed rule also includes provisions that require investment advisers to disclose whether the person giving a testimonial or endorsement is a client or former client. This disclosure could provide investors with information about the potential bias of the person offering a testimonial or endorsement, but also information about the knowledge and experience a person might have to form a basis for his statements. Research suggests that when investors receive disclosures about the conflict of interest and the informational basis associated with advisers, they are able to filter out some, but not all, of the bias associated with these disclosures.[585]

Testimonials and endorsements bear similarity in the appearance, but differ in the source, of the promotional information. A testimonial is from a client who has first-hand asset management experiences with the investment adviser. Testimonials may be appealing to the prospective clients since they appear to convey more reliable information. However, an existing client might be incentivized to give a positive review in exchange for better or additional service from the adviser, even without any explicit compensation, which could compromise the credibility of his testimonials, while keeping the conflict of interest hidden. Meanwhile, endorsements are from non-clients, who may not rely as much on the adviser's services as an existing client does. The endorsements are, therefore, more likely to be arranged with certain compensation. The disclosure of such compensation can highlight the conflict of interests for prospective clients.

The Commission estimates that the aggregate internal cost of providing the disclosures associated with testimonials and endorsements will be $337 per adviser per year, assuming each investment adviser would use approximately 5 testimonials or endorsements per year.[586] However, these estimates do not account for potential changes in investment adviser behavior and advertising practices as a result of the proposed rule, which are difficult to quantify. If 50 percent of current registered investment advisers would use testimonials or endorsements in advertisements, the aggregate internal cost of preparing the disclosures is estimated to be $2,268,684 per year.[587] If the proposed approach to testimonials and endorsements induces a marketing ''arms race'' and close to 100 percent of current RIAs invest in advertisements with 5 testimonials and endorsements per year, the estimated cost of preparing the disclosures is nearly $4,537,368 in aggregate. However, if the investment adviser believes that revenue brought in by new testimonials and endorsements under the proposed rule does not justify the cost of compliance with the rule, as related to using these testimonials and endorsements, the increase in cost would be minimal, as there would be no change in advertising practices regarding testimonials and endorsements.

The proposed rule would also permit the use of third-party ratings in advertisements, which are defined as ratings or rankings of an investment adviser provided by a person who is not an affiliated person of the adviser and provides such ratings or rankings in the ordinary course of its business. To the extent that third-party ratings are produced using methodologies that yield useful information for investors, the proposed rules may improve the information available to investors about investment advisers. The proposed rule would also require that advertisements that include third-party ratings disclose: (i) The date on which the rating was given and the period of time upon which the rating was based; (ii) the identity of the third party that created and tabulated the rating; and (iii) if applicable, any compensation or anything of value that has been provided in connection with obtaining or using the third-party rating.

Economic models suggest that selective control of or the ability to

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[585] *See* Daylian M.Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest,* 34 J. L. STUD. 1 (2005); George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101 a.m. ECON. REV. 423 (2011).These papers observed that when disclosure of conflicts of interest was required, an adviser exaggerated the bias in their advice to counteract the fact that their clients would account for their conflict of interest.

[586] *See* section III.F.1 for more details.

[587] *See footnote 625.*

influence an investor's access to information can hamper the investor's ability to process information in an unbiased manner, even if the specific facts or information communicated to an investor are not false.[588] For example, this type of control or influence on information can be as explicit as deletion or removal of unfavorable testimonials,[589] or as implicit as a reordering of the testimonials or a suggestion of which testimonials to read.[590] The additional disclosures in the proposed rule might have two effects on investment adviser advertisements. First, the disclosures might mitigate the likelihood that retail investors will be misled by an investment adviser's ratings. Providing the additional disclosures would provide investors additional information to judge the context of a third-party rating. Second, the fact that advertisements must also include such disclosures may reduce the incentives of investment advisers to include third-party ratings that might be stale or otherwise misleading. Because third-party ratings included in an advertisement would be required to have additional disclosures, investors are less likely to be misled by the ratings, which reduces the incentive for investment advisers to include misleading third-party ratings.

For the purposes of estimating burdens in connection with the Paperwork Reduction Act, we estimate that advisers would incur an initial cost of $505.50 to draft and finalize the required disclosure for each third-party rating they advertise. In addition, as many of these ratings or rankings are done annually, an adviser would incur ongoing, annual costs associated with this burden, which we estimate to be 25 percent of the initial costs. In aggregate, because it is uncertain how many investment advisers would find the benefit of using third-party ratings in their advertisements justify the associated compliance costs, the total cost of these disclosures across all advisers is difficult to quantify.

d. Performance Advertising

The proposed rule permits the inclusion of performance advertising, but includes general requirements for its inclusion in advertisements, and specific disclosures that must be made to investors. The rule also includes specific restrictions that may apply, depending on whether an advertisement is intended for retail or non-retail investors. First, we discuss the several requirements for all advertisements with performance advertising. Then, we discuss the specific restrictions and requirements for Retail Advertisements.

As part of the general prohibitions, the proposed rule would prohibit any investment adviser from including favorable performance results or excluding unfavorable performance results, or presenting time periods for performance, if such selection results in a portrayal of performance that is not fair and balanced, for all advertisements. Although the inclusion of performance advertising may provide valuable information to investors about an investment adviser's ability, absent the current or proposed rule, investment advisers have the ability to disclose positive information about their past performance in a potentially misleading way. The proposed rule's prohibition on including or excluding performance results in a manner that is not fair and balanced, however, does not significantly differ from the baseline prohibition on any untrue statement of a material fact, or which is otherwise false or misleading, and thus will likely not have significant costs or benefits associated with them.

The proposed rule prohibits the use of gross performance in Non-Retail Advertisements unless the advertisement also provides or offers to provide promptly a schedule of fees or expenses to the investor. Although the use of gross performance in advertising is not fraudulent, it may be misleading to investors who are unaware that they should also consider an investment adviser's net performance results when choosing an investment adviser. By offering to provide the necessary schedule of fees and expenses to investors, the provision would: (i) Remind investors that fees and expenses are another important piece of information to consider when choosing an investment adviser; and (ii) give investors access to the fee and expense data to make a direct calculation of the net performance. While we do not expect investors to bear any direct costs from the use of gross performance, we note that investors may bear costs associated with processing the information that is included on the schedule that investment advisers must provide or offer to provide promptly in order to allow the calculation of net performance.

The rule also prohibits the use of hypothetical performance in all advertisements, unless the investment adviser adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the financial situation and investment objectives of the person to whom the advertisement is disseminated; provides sufficient information to enable such person to understand the criteria used and assumptions made in calculating such hypothetical performance; and provides (or, in the case of Non-Retail Persons, provides or offers to provide promptly) sufficient information to enable such person to understand the risks and limitations of using such hypothetical performance in making investment decisions. To the extent that advisers are required to revise their advertisements as a result of the hypothetical performance requirements in rule 206(4)–1, they may incur additional costs. These types of hypothetical performance include representative performance, derived from representative model portfolios that are managed contemporaneously alongside portfolios managed for actual clients; backtested performance, performance that is backtested by the application of a strategy to market data from prior periods when the strategy was not actually used during those periods; and targeted or projected returns with respect to any portfolio or to the investment services offered or promoted in the advertisement. As discussed above, the Commission preliminarily believes that advertisements that contain hypothetical performance are likely to be misleading to investors. However, the Commission also recognizes that some persons may wish to know specific details about an investment adviser's hypothetical performance, and the required policies and procedures are designed to ensure that investment advisers provide enough information for investors to understand and use hypothetical performance in advertisements. Additionally, while investment advisers must provide sufficient information for Retail Person recipients to understand the risks and limitations of using such hypothetical performance in making investment decisions, investment advisers need only offer to provide promptly such information if the recipient is a Non-

[588] Luis Rayo and Ilya Segal, *Optimal Information Disclosure,* 118 J. POL. ECON. 949 (2010); Emir Kamencia and Matthew Gentzkow, *Bayesian Persuasion,* 101 a.m. ECON. REV. 2590 (2011); Pak Hung Au and King King Li, *Bayesian Persuasion and Reciprocity: Theory and Experiment* (SSRN, June 5, 2018), *available at https://ssrn.com/abstract=3191203;* Jacob Glazer and Ariel Rubinstein, *On Optimal Rules of Persuasion,* 72 ECONOMETRICA 1715 (2004).

[589] *See Id.* for Segal and Rayo 2010, Kamenica and Gentzkow 2011, Au li 2018.

[590] *See* Glazer *supra* footnote 590.

Retail Person. This difference in requirements reflects the different of access to resources and expertise between Retail and Non-Retail Persons, which may better equip Non-Retail persons to make appropriate use of potentially confusing or misleading information.

Investors may benefit from the additional information provided by hypothetical performance advertising, if investment advisers provide the required information and context to properly understand it and the investor has the ability to analyze it and its limitations and assumptions. We note that although investors would not any face direct costs from the inclusion of hypothetical performance, they may face indirect costs associated with processing and interpreting this new information. Even if investors are provided with the necessary information to contextualize hypothetical performance, investors would need time and expertise to properly interpret hypothetical performance. Moreover, investors that are unable to interpret the information provided may be misled by hypothetical performance because of a lack of resources or financial expertise. In this case, investors may incur additional costs from the use of hypothetical performance in advertising, associated with poorer matches with investment advisers. Investment advisers may bear costs associated with screening potential investors to determine whether an advertisement with hypothetical performance is appropriate for them. However, we note that investment advisers are unlikely to incur the costs of screening their potential investors if they do not expect the benefits of hypothetical performance advertising to exceed the costs associated with screening.

The proposed rule would condition the presentation of ''related performance'' in all advertisements on the inclusion of all related portfolios. However, the proposed rule would allow related performance to exclude related portfolios as long as the advertised performance results are no higher than if all related portfolios had been included. This allowed exclusion would be subject to the proposed rule's requirement applicable to Retail Advertisements that the presentation of performance results of any portfolio is conditioned on the inclusion of results for 1-, 5-, and 10-year periods. The proposed rule would allow related performance to be presented either on a portfolio-by-portfolio basis or as one or more composites of all related portfolios. Similarly, the proposed rule would condition the presentation of extracted performance in all advertisements on the advertisement's providing or offering to provide the performance results of all investments in the portfolio from which the performance was extracted. This prohibition is designed to prevent investment advisers from ''cherry-picking'' portfolios to provide a selective representation of the investment adviser's performance. Such representations would also be subject to the provisions of proposed rule 206(4)–1(a), including the prohibition on including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced.

The proposed rule contains several provisions specific to Retail Advertisements. These additional provisions generally reflect the lack of access to resources that Retail Persons face, and are designed to mitigate the potential costs that these provisions might impose on Non-Retail persons. The proposed rule would condition the presentation of gross performance results in Retail Advertisements on the advertisement also presenting net performance results, requiring that they be displayed with equal prominence as gross performance, and be calculated over the same time periods. This requirement does not significantly differ from current market practices as shaped by no-action letters, and we preliminarily believe will not generate significant costs and benefits to investment advisers or investors relative to the baseline.

The proposed rule prohibits the presentation of performance results of any portfolio in Retail Advertisements unless the results for one, five, and ten year periods are presented as well. Each of the required time periods must be presented with equal prominence and end on the most recent practicable date. If the portfolio was not in existence in any of these three periods, the lifetime of the portfolio can be substituted. Under the baseline, there is no such requirement relating to performance advertising. Requiring Retail Advertisements to include this information would benefit investors by giving them more standardized information about the performance and limiting the potential that an investor could be unintentionally misled about an investment adviser's performance through the investment adviser's selection of performance periods. This requirement also does not significantly differ from current market practices as shaped by no-action letters, and we preliminarily believe will not generate significant costs and benefits relative to the baseline.

i. Quantitative Estimates of Performance Advertising Costs

In this section, we describe the quantitative estimates of the provisions of the proposed rule associated with performance advertising, and their relation to the economic costs and benefits of the rule described above.

For the purposes of our Paperwork Reduction Act analysis, we estimate that investment advisers would incur an initial burden of 5 hours to comply with the proposed rules associated with gross performance, for three portfolios each, resulting in a total cost of $4,692 per adviser. We also estimate that investment advisers would incur an ongoing internal cost burden of $3454 per adviser per year to update their fee schedules, based on an estimate of an ongoing cost burden of 10.25 hours per year, and an annual external cost of $500 per year for printed materials. However, we note that many investment advisers already make net performance calculations for their clients under the baseline, and so the actual cost burden might be lower.

In addition, the Paperwork Reduction Act analysis estimates that investment advisers that choose to advertise related portfolio performance will bear an initial cost of $8,425 per adviser. These costs are based on an estimate of 25 hours to review portfolios to determine which ones meet the definition of ''related portfolio.'' These advisers would also face an ongoing cost of $5,897 per adviser per year, which reflects an estimated 5 hours of labor to update presentations 3.5 times per year.

Similarly, the Paperwork Reduction Act analysis estimates that investment advisers that choose to advertise extracted performance will bear an initial cost of $3,370 per adviser. These costs are based on an estimate of 10 hours to review portfolios and calculate the performance of the entire portfolio from which an extracted performance is taken. In addition, the Paperwork Reduction Act analysis estimates these advisers would incur an ongoing cost of $2359 per adviser per year, which is based on an estimate of a 2 hour review conducted 3.5 times annually.

The Paperwork Reduction Act analysis estimates that investment advisers that choose to advertise hypothetical performance will bear an initial cost of $2,650 per adviser to develop policies and procedures reasonably designed to ensure that hypothetical performance is relevant to the financial situation and investment objectives of the person to whom the advertisement is disseminated. We estimated these policies and procedures would require 5 hours per adviser to implement. In addition, each adviser that chooses to advertise hypothetical performance would face an ongoing annual cost of $2,650 per year to evaluate the relevance of hypothetical performance to an investor, based on an estimated 20 instances of hypothetical performance advertising per year, with each instance taking .25 hours to evaluate. The Paperwork Reduction Act analysis also estimates that an adviser would also incur an initial cost of $5,392 to preparing the information sufficient to understand the criteria used and assumptions made in calculating, as well as risks and limitations in using, hypothetical performance, based on an initial hour burden of 16 hours. Finally, the Paperwork Reduction Act analysis estimates that an adviser that advertises using hypothetical performance will face an ongoing cost burden of $3,538 per adviser per year to update its hypothetical performance information. This estimate is based on an estimate of 3 hours per update and 3.5 updates annually. Overall, the internal cost burden is estimated to be $8,042 per adviser, initially, and $6188 per adviser per year on an ongoing basis. These costs are estimated on a per adviser basis, and the aggregate costs to investment advisers will be highly dependent on whether they choose to advertise hypothetical performance. However, investment advisers are likely to only incur the costs associated with hypothetical performance if the gains in their expected revenue exceed their expected costs.

e. Compliance and Recordkeeping

The proposed rules expand the set of communications for which records must be kept and require that investment advisers retain the records for advertisements disseminated to one or more individuals. In contrast, current rules require investment advisers to keep records of communications disseminated to more than ten individuals. In addition, the proposed rules require that a designated employee approve in writing each advertisement, and that the investment adviser retain records of these written approvals. These requirements are intended to ensure sufficient oversight of advertising activities by investment advisers.

Requiring a written record of the review and approval of all advertisements, regardless of the size of the intended audience, allows our examination staff to better review adviser compliance with the rule and reduces the likelihood of misleading or otherwise deficient advertisements. We also expect these provisions will impose costs on investment advisers, who will need to expend labor and other resources to create processes for compliance with the written approval requirement and amend processes for retaining records for advertisements distributed to between one and ten individuals. In our Paperwork Reduction Act analysis below, we estimate the hourly cost associated with the review and approval of new advertisements to be about $671.25 and the cost to update an existing advertisement to be about $223.75.[591] For the proposed recordkeeping amendments that correspond to proposed changes to the advertising rule, we estimate that the incremental cost aggregated across all advisers would be approximately $8,530,157.[592] However, the proposed rules could also result in reduced communications and advertisements to investors if investment advisers decide to restrict written and recorded communications to reduce the costs associated with creating processes for review and approval. Restricting the amount of communication could, in turn, impose costs on existing clients and investors to the extent that existing clients would not receive valuable information about investment advisers' services. Similarly, prospective investors might receive less information that would be useful in searching for an investment adviser, which could lead to lower quality matches with investment advisers, or which could discourage investors from seeking investment advice altogether. This effect is impossible to quantify, as it depends on the reactions of market participants to the proposed rule, and there are no similar rules to compare how investment advisers adjusted their behavior. The requirement to retain a written record and approval of advertisements may impose additional costs on investment advisers who use third parties for advertisements, given the costs of ensuring that third parties' communications comply with the rule, and the potential liability to the investment adviser. Alternatively, investment advisers may reduce their use of third parties for advertisements and communications, to reduce the cost and risk associated with the recordkeeping and compliance provisions of the proposed rule.

Additionally, we note that dual registrants, with dually licensed personnel, will have to bear costs associated with determining which communications were made in a broker-dealer or investment adviser capacity. Not only do these processes impose costs on investment advisers, these processes also delay communication between investment advisers and their investors, which can impose additional costs on each of them. Alternatively, dual registrants with dually licensed personnel may instead implement a single review and approval process for all communications of dually licensed personnel, to avoid the burden of determining which communications are made in a broker-dealer or investment adviser capacity. This alternative review and approval might incur lower costs than the proposed rules to the extent that dual registrants have already implemented elements of the review and approval process.

3. Costs and Benefits of the Proposed Amendments to the Solicitation Rule

The proposed rule expands the current rule to cover solicitation arrangements involving all forms of compensation as well as to solicitors for private funds; eliminates certain duplicative disclosure requirements for solicitors and broadens the scope of the rule's disqualification of certain persons as solicitors while adding a conditional carve-out. In this section, we discuss the costs and benefits of each provision of the proposed amendments to the solicitation rule.

a. Scope of Covered Compensation

Rule 206(4)–3 currently prohibits an adviser from paying a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless the adviser complies with the terms of the rule. The proposed rule's more expansive scope would include the many forms of non-cash compensation that solicitors might receive from advisers or their funds for solicitation, which generate nearly identical conflicts of interest as cash compensation. For example, advisers

[591] *See* section IV.B.5. for details.

[592] In PRA we estimate a 10-hour per advertisement incremental burden for investment advisers associated to recordkeeping amendments that correspond to proposed changes to the advertising rule, including the expanded definition of "advertisement". Further we assume that 100 percent of 13,643 investment advisers would be subject to the proposed amendments, and each of them would disseminate 1 new advertisement per year. 17 percent of the compliance to the proposed rule is assumed to be performed by compliance clerks, whose hourly cost is $70, and 83 percent by general clerks, whose hourly cost is $62 (data is from the Securities Industry and Financial Markets Association's Office Salaries Data 2013 Report, modified to account for an 1,800-hour work-year, inflation, bonuses, firm size, employee benefits and overhead). The annual incremental cost is therefore (17% × $70 + 83% × $62) * 10 * 13,643 = $8,530,157.

use brokerage—a form of non-cash compensation—to reward brokers that refer them to investors. This presents advisers with conflicts of interest as the brokers' interest may not be aligned with investors' interest.

Under the proposed rule, the programmatic costs and benefits of the proposed solicitation rule amendments—the disclosure requirements, the requirements to enter into a written agreement, the adviser's supervision requirement, and the statutory disqualification of certain persons—would apply to solicitors that receive non-cash compensation. Also, the programmatic costs and benefits of these rules would flow to investors that these non-cash compensated solicitors refer. The solicitation rule's extension to non-cash compensated solicitors would extend the benefits of investor protection through the disclosure requirements, the written agreement requirements, the adviser supervision requirement, and the statutory disqualification to investors that are solicited by noncash compensated solicitors. In addition, to the extent that the rule improves investor confidence in the recommendations of non-cash compensated solicitors, another programmatic benefit of the rule is that it may improve the efficiency of matches between investment advisers and investors.

The expansion of the solicitation rule to non-cash compensated solicitors would also impose programmatic costs on additional solicitors, investment advisers, and investors. The expanded scope of the solicitation rule would impose the disclosure requirements and its associated costs onto non-cash compensated solicitors, as well as investment advisers who hire them. Investment advisers and solicitors may pass of some portion of the cost to investors.

b. Private Funds

The proposed rule would also broaden the scope of the current solicitation rule to cover solicitors who solicit on behalf of private funds. Under the baseline, solicitors that solicit on behalf of private funds are primarily subject to the anti-fraud provisions of the Federal securities laws and rules applicable to private fund offerings made in reliance on Regulation D. However, private funds also make offerings under section 4(a)(2) of the Securities Act, which does not have Federal disqualification provisions, and solicitors for such funds would only be subject to state disqualification provisions. While we currently do not have data to directly observe the number and size of private funds that rely on section 4(a)(2), the Commission's recently published Concept Release on the Harmonization of Exempt Offerings and a recent white paper by Commission staff suggest that the overall amount of capital raised outside of Regulation D, including by private funds, is relatively small.[593] We request additional data or other information from commenters that would help estimate the number and size of private funds that could be affected by the proposed amendment to the solicitation rule.

Extending the scope of the current solicitor rule to solicitors that target investors or prospective investors in private funds that are not otherwise covered by the disqualification requirements in Regulation D would extend both the benefits of the disclosure and disqualification requirements of the solicitation rule, to the extent such requirements differ from state requirements, to private fund investors. Specifically, these requirements could enhance investor protection for private fund investors by providing them with the solicitor's compensation and conflict of interest disclosures, which would provide private fund investors additional information when considering a solicitor's recommendation. In addition, the disqualification requirements would protect private fund investors from disqualified solicitors, to the extent that the proposed rule's disqualification requirements differ from ''bad actor'' disqualification and applicable state requirements. Likewise, extending this scope would extend the costs of such disclosure and disqualification requirements to advisers, solicitors, and affected private fund investors. The costs of disclosure would stem from compliance and recordkeeping procedures, and advisers would need policies and procedures to establish a reasonable basis to believe that solicitors are not disqualified. While we believe that advisers and solicitors will directly bear the costs of these provisions, we expect that some portion of these costs will be passed along to investors in private funds.

c. Disclosure

In addition to changing the scope of application of the solicitation rule, the proposed amendments would change elements of the Commission's program for regulation of solicitation arrangements. The proposed rule would eliminate the current rule's written agreement requirement that the solicitor deliver the adviser's Form ADV brochure to a prospective client, as this represents a duplicative requirement because the adviser is also required to deliver its brochure to clients under rule 204–3. As noted above, however, the Commission stated in the solicitation rule's 1979 adopting release that the solicitor's delivery of the adviser's brochure could satisfy the investment adviser's obligation to deliver it under rule 204–3. To the extent that both advisers and solicitors currently deliver the adviser's Form ADV brochure, this proposed rule's elimination of the requirement that the solicitor deliver the adviser's Form ADV brochure would reduce the compliance burden for advisers and solicitors. Currently, rule 204–3 does not require delivery of Form ADV by investment advisers for private funds, although some choose to do so. Additionally, we note that by eliminating the obligation to deliver the adviser's Form ADV brochure, the information contained in the delivery may not have as much of an impact on an investor's decision to begin a relationship with an investment adviser.

The proposed rule would permit the solicitor or the adviser to deliver the solicitor's disclosure at the time of any solicitation activities (or in the case of a mass communication, as soon as reasonably practicable thereafter). Permitting additional flexibility in the timing of the solicitor's disclosure might reduce the costs associated with these disclosures, and improve the quality of communications that solicitors have with potential investors. However, allowing the adviser rather than the solicitor to deliver the solicitor disclosure might reduce the effectiveness of the disclosure if simultaneously paired with other disclosures provided by the adviser.

The proposed rule would generally maintain the current rule's solicitor disclosure requirement, with some modifications to clarify the requirement and to accommodate disclosure of non-cash compensation, which can be difficult to quantify. The proposed rule would also remove the requirement that the solicitor's disclosure be written, permitting the use of electronic and

[593] Concept Release on the Harmonization of Exempt Offerings (Table 2) shows the total number of other exempt offerings, which includes the amount raised under section 4(a)(2), Rule 144A and Regulation S, *available at https://www.sec.gov/rules/concept/2019/33-10649.pdf;* Vladimir Ivanov and Scott Bauguess, Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009–2012 (August 2018) (Figure 1) shows the total amount raised under Regulation S, section 4(a)(2), regulation crowdfunding offerings and Regulation A offerings, *available at https://www.sec.gov/files/DERA%20white%20paper_Regulation%20D_082018.pdf.*

recorded media to disclose details of the solicitation arrangements. To the extent that presentation of these disclosures in different formats changes their salience to investors, they might support or erode the benefits of the solicitor disclosure requirement. The ability to permit the use of electronic and recorded media may lower the cost of delivery of solicitation arrangements, and may improve the ability of investors to read and understand these disclosures. However, if these disclosures are bundled with a variety of other disclosures and information provided through the same medium, it may reduce the salience of this particular disclosure, and thus might reduce the benefits associated with the disclosure.

The proposed rule would require the solicitor to provide, contemporaneously with the solicitation, separate disclosures related to the terms of compensation and any material conflicts of interest, as well as the amount of any additional cost to the investor as a result of solicitation. This disclosure would draw the client's attention to the solicitor's inherent bias in recommending an adviser that is compensating it for the referral. However, conflict of interest disclosures may not necessarily lead to optimal decisions by investors. The Commission's Financial Literacy Study surveyed investors and found ''many of the online survey respondents indicated that they understand existing fee and compensation information, for example, as disclosed in a typical Brochure, but the quantitative research data suggest otherwise. Many of the online survey respondents on the Brochure panel who claimed to understand fee and compensation disclosure in the Brochure, in fact, did not.'' [594]

In addition, the Financial Literacy Study also found that respondents had difficulty interpreting disclosures related to conflicts of interest.[595] These findings are consistent with academic literature that describes the difficulties of financial disclosure. For example, one study shows that, in an experimental setting, even when subjects were told of the bias of their advisers, they did not fully discount their advice.[596] In addition, these papers and others [597] find that mandating disclosure from biased advisers may have the unintended consequence of making the biased adviser appear honest and increasing an investor's trust in them.

The proposed rule also increases the flexibility of the delivery of solicitor disclosures. The proposed rule would permit a solicitor's disclosures to be delivered by either the investment adviser or the solicitor, and would eliminate the requirement that investors acknowledge receipt of the solicitor's disclosures. Allowing solicitor disclosures to be delivered by either the investment adviser or the solicitor would give the investment adviser additional flexibility in determining the best method for delivery of the disclosure. In addition, eliminating the requirement to acknowledge the receipt of a disclosure would reduce the costs imposed on investors and solicitors by those disclosures, especially if the solicitor's disclosures are delivered by the investment adviser itself. However, these acknowledgements can be a useful tool for an investment adviser to monitor solicitors' compliance with disclosure requirements. Specifically, acknowledgements help to ensure that a solicitor that is soliciting clients on and adviser's behalf is making the correct disclosures. Therefore, an investment adviser might still require investors to acknowledge receipt of a solicitor's disclosure, even if not required by the proposed rule to do so.

d. Exemptions

The proposed solicitation rule includes exemptions from the written agreement and adviser oversight and compliance requirements when a solicitor is one of the investment adviser's partners, officers, directors, or employees, or is a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person, so long as the affiliation between the solicitor and the adviser is readily apparent or disclosed to the client or private fund investor at the time of solicitation and the adviser documents the solicitor's status at the time that both parties enter into a solicitation arrangement. This proposed approach to in-house solicitors may reduce compliance costs associated with the use of in-house solicitors. At the same time, we do not expect this approach to erode investor protections to the extent that advisers already have a responsibility to oversee in-house personnel. Moreover, the proposed rule would remove the written agreement requirement for solicitation of impersonal investment advice. This change is unlikely to reduce the benefits of the solicitation rule because even under the current rule, the adviser and solicitor are exempt from the rule's disclosure requirements, the specific requirements of the written agreements and the supervision provisions.[598]

The proposed rule also includes a *de minimis* compensation exemption if the investment adviser's compensation payable to the solicitor is $100 or less during the preceding twelve months. This would streamline compliance for certain solicitation arrangements, and could particularly ease compliance burdens for smaller advisers that provide *de minimis* compensation to multiple solicitors. Although this exemption could result in a higher likelihood that investors are solicited by persons who would be ineligible solicitors, we do not anticipate substantial erosion of investor protection benefits, because we believe that *de minimis* compensation likely implies little incentive to defraud potential clients or private fund investors. The proposed approach would also exempt certain types of nonprofit programs from the substantive requirements of the solicitation rule. To the extent that the conditions of the nonprofit exemption mitigate compensation-related conflicts and the incentive of a solicitor to favor one adviser over another, we do not anticipate the exemption to erode investor protection benefits of the solicitation rule.

e. Ineligible Solicitors

The proposed amendments define ''ineligible solicitor'' to mean a person, who at the time of the solicitation, is subject to a disqualifying Commission action or has any disqualifying event, both terms defined by the proposal. The definition further encompasses

[594] *See* Financial Literacy Study, *supra* footnote 524.

[595] ''For instance, they had difficulty calculating hourly fees and fees based on the value of their assets under management. They also had difficulty answering comprehension questions about investment adviser compensation involving the purchase of a mutual fund and identifying and computing different layers of fees based on the amount of assets under management. Moreover, many of the online survey respondents on the point-of-sale panel had similar difficulties identifying and understanding fee and compensation information described in a hypothetical point-of-sale disclosure and account statement that would be provided to them by broker-dealers.'' *See* Financial Literacy Study, *supra* footnote 524.

[596] *See* Daylian M.Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest,* 34 J. L. STUD. 1 (2005); George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101 a.m. ECON. REV. 423 (2011).

[597] *See e.g.,* Steven Pearson et al., *A Trial of Disclosing Physicians' Financial Incentives to Patients,* 166 ARCHIVES OF INTERNAL MEDICINE 623 (2006); Sunita Sah, George Loewenstein & Daylian M. Cain, *The Burden of Disclosure: Increased Compliance With Distrusted Advice,* 104 J. PERSONALITY & SOC. PSYCHOL. 289 (2013).

[598] *See supra* footnote 425.

employees, officers, or directors of an ineligible solicitor, any person directly or indirectly controlling or controlled by an ineligible solicitor, and, as appropriate, all general partners or all elected managers of an ineligible solicitor. That ineligibility under the proposed amendments, which attaches at the time of solicitation should support investor protection because the time of the solicitation is likely when investors are most vulnerable to fraud. The breadth of the definition of ineligible solicitor may protect investors from solicitation by persons that share economic incentives to defraud investors with solicitors that are subject to a disqualifying Commission action or has any disqualifying event. The definition of ineligible solicitor could impose compliance costs on investment advisers to the extent that they must inquire potential solicitor's history to form a reasonable belief that the potential solicitor does not have any disqualifying Commission actions, disqualifying events, and affiliations in their history.

The provisions of the carve-out from disqualification are similar to conditions in staff no-action letters in which the staff stated that it would not recommend enforcement action to the Commission under section 206(4) and rule 206(4)–3 if the solicitor's practices were consistent with those conditions. While broadening the scope of solicitors subject to disqualification would reduce the number of personnel available to advisers to serve as solicitors, and potentially the cost of obtaining referrals, these disqualified persons are arguably the most likely to engage in fraudulent or misleading behavior.[599] This change in scope might reduce the likelihood of investors being harmed by disqualified persons serving as solicitors.

The proposed rule also contains provisions that would change the definition of ineligible solicitors, and add a limited conditional carve-out from disqualification. Currently, the rule flatly bars advisers from making payments to certain disqualified solicitors. The proposal would change this flat bar to a requirement that the adviser cannot compensate a solicitor, directly or indirectly, for any solicitation activity if the adviser knows, or, in the exercise of reasonable care, should have known, that the solicitor is an ineligible solicitor. This change likely would have the effect of reducing burdens on advisers in making this disqualification determination to the extent that they reduce their efforts to not make payments to ineligible solicitors, but instead can rely on exercising reasonable care to conclude that they are not doing so. Nonetheless, we believe that advisers will generally use many of the same mechanisms that they use today to determine whether disqualified person is an ineligible solicitor under the proposed rule, and thus do not expect that they would incur significant additional costs or realize significant savings in complying with this proposed requirement.

f. Compliance and Oversight

As a result of changes to both the advertising and solicitation rules, an investment adviser may face additional costs associated with compliance and oversight when determining the extent to which a person's activities constitute solicitation rather than a compensated testimonial or endorsement (or both). As a result of the proposed solicitation rule's expansion to cover non-cash compensation, and the proposed advertising rule's changes to permit endorsements and testimonials in advertisements with certain disclosures, an investment adviser might incur costs associated with determining whether persons that are compensated for testimonials or endorsements do or do not engage in activities that would fall within the scope of the solicitation rule, and vice versa.

Currently, it is reported that about 27 percent of investment advisers registered with the Commission (3,655 RIAs) compensate persons other than employees to obtain one or more clients.[600] This number includes advisers that use cash as well as non-cash compensation. In addition, of the 976 RIAs that report that they only compensate their employees to obtain clients, some might still be subject to the requirement to disclose the affiliation at the time of solicitation if the affiliation is not readily apparent. Moreover, currently some advisers might not consider directed brokerage as a type of non-cash compensation, which would further increase the number of investment advisers and solicitors affected by the proposed rule. In addition to the investment advisers that comply with the current rule, approximately 1,590 registered investment advisers to private funds would likely be newly subject to the proposed rule (about 210 of such advisers report that they solely use solicitors that are ''related persons'' of the firm, and would be eligible to use the proposed rule's partial exemption for affiliated solicitors if the affiliation is readily apparent). Finally, advisers that use nonprofit programs for solicitation would be exempt from the rule, but would be subject to collection of information only with respect to limited disclosures. Overall, we estimate that 6,432 registered investment adviser would be subject to the proposed collection of information for the purposes of the Paperwork Reduction Act;[601] 5,704 investment advisers and their solicitors would experience the full programmatic costs of the proposed rule, and 728 RIAs and their solicitors would bear a partial programmatic cost due to the partial exemptions.

The proposed amendments to rule 206(4)–3 would apply to the solicitation of current and prospective investors in any private fund, rather than only to ''clients'' of the investment adviser. We do not have the data on the number of solicitors an average investment adviser currently use, but advisers to private funds report using 2.9 ''marketers'' on average, with a median of one and a maximum of 79.[602] Therefore, we estimate that the number of solicitors affected by the proposed rule would be in the range of 17,517[603] to 21,075[604] per year, assuming that each adviser would use three solicitors, on average, five percent of all RIAs would use directed brokerage as a type of non-cash compensation, and one percent of RIAs would use nonprofit programs for solicitation. The number of clients or investors each solicitor approaches per year varies, therefore the total cost to investment advisers and solicitors would be hard to quantify. In section

[599] Egan, M., G. Matvos and A. Seru, study the misconduct among broker-dealer representatives in their paper ''The Market for Financial Adviser Misconduct'' and find that representatives with misconduct are more likely to be reemployed by the firms that have higher rates of misconduct in general. The Commission is not aware of any data on misconduct in the solicitation market. *See supra* footnote 532.

[600] *See* details in footnote 696.

[601] *See* details in section IV.C, and footnote703.

[602] The numbers are based on responses to Section 7.B.(1) 28(a) as of December 31, 2018.

[603] The number is calculated as: 3 × [3,655 (number of advisers that compensate non-employees) + 673 (5 percent of RIAs that would use directed brokerage as a type of compensation) − 4 (advisers provide only impersonal investment advisory services) + 1590 (advisers to private funds) − 210 (advisers to private funds that only use solicitors that are ''related persons'') + 135 (1 percent of RIAs that use nonprofit programs for solicitation)].

[604] The number is calculated as: 3 × [3,655 (number of advisers that compensate non-employees) + 976 (number of advisers that compensate only employees to obtain more clients, but might be subject to disclosures) + 673 (5 percent of RIAs that would use directed brokerage as a type of compensation) − 4 (advisers provide only impersonal investment advisory services) + 1590 (advisers to private funds) + 135 (1 percent of RIAs that use nonprofit programs for solicitation)].

IV.C, assuming that each solicitor would have ten referrals subject to the proposed rule, we estimate the total ongoing burden to be approximately \$22,654,596.[605] However, according to the data from investment advisers to private funds, investment advisers do not necessarily engage new solicitors every year, and many solicitors work for multiple advisers at the same time. Therefore, the total ongoing cost could be more or less than the number estimated. For the proposed recordkeeping amendments that correspond to proposed changes to the solicitation rule, we estimate that the proposed amendments would increase the burden of each investment adviser that would be subject to the solicitation rule by \$95.[606] As discussed above, approximately 6,432 investment advisers would be subject to the proposed rule, and therefore we estimate a total annual cost of \$611,297 across the market to comply with the recordkeeping requirements of the proposed solicitation rule.

E. Efficiency, Competition, Capital Formation

1. Advertising

a. Efficiency

By generally altering and updating the set of permissible advertisement types, the proposed rules have the potential to improve the information in investment adviser advertisements. Improving the information available in investment adviser advertisements could improve the efficiency of the market for investment advice in two ways. First, the proposed rule could increase the overall amount of information in investment adviser advertisements. This could either be directly through the provisions of the proposed rule, or indirectly, through competition between investment advisers through advertisements. Second, the proposed rule could increase the overall quality of information about investment advisers. To the extent that the proposed rules mitigate misleading or fraudulent advertising practices, investors may be more likely to believe the claims of investment adviser advertisements. Investment advisers, as a result, may include more relevant or useful information in their advertisements, in lieu of misleading or irrelevant statements.

The information from testimonials, performance data, and third-party ratings can potentially provide valuable information for investors. Better informed investors could improve the efficiency of the market for investment advice, as they may be better able to evaluate investment advisers based on the information in their advertisements.[607]

Although the proposed rule requires additional disclosures when investment advisers include certain elements in their advertisements, the value of these disclosures to investors depends critically on whether they are able to utilize the disclosures to fully understand the proper context of an adviser's claims. By providing enough information to investors in the required disclosures to enable them to evaluate an adviser's advertisements, these disclosures would effectively mitigate the potential that advertisements mislead investors, and improve their ability to find the right investment adviser for their needs. But, to the extent that the proposed rule does not provide investors with the context necessary to make sound financial decisions, then the proposed rule might lead to a reduction in the efficiency of advertisements.

In addition to considering the role that advertisements may play in reducing information asymmetries and the role that information asymmetries play in the risks associated with advertising, we also consider the efficiency of advertisements in reducing these information asymmetries. In particular, one potential consequence of the proposed rule is that investment advisers increase the amount of resources they allocate to advertising their services. While additional spending on advertisements may facilitate matching between investment advisers and investors, under some circumstances, this additional spending may be inefficient if the benefits of better matches fall short of the resources required to facilitate better matches. Although there is not much data on the efficiency of investment adviser advertising practices, academic literature provides us with evidence of potential inefficiencies related to advertising in a neighboring market: Mutual funds. We recognize that investment advisers to mutual funds are subject to some legal requirements and may operate in distribution channels that are different from those applicable to investment advisers offering direct advisory services and pooled investment vehicles such as those covered by the proposed rule, but we think it is nevertheless useful to understand how advertising by mutual funds affects mutual fund investors, while keeping in mind how similarities and differences between these settings impact the generalizability of results drawn from mutual fund advertising.

The literature on marketing for mutual funds documents a positive correlation between funds' marketing efforts and investor flows (cash investment from investors). Researchers find that marketing expenses are nearly as important as price (*i.e.,* expense ratio) or performance for explaining fund size (AUM), and the effect is larger among top performers than funds with lower returns. However, mutual funds also charge more fees to cover marketing costs as they engage in an ''arms race'' to attract assets from the same pool of investors.[608] As fees increase, investors with a higher search cost who are less likely to search for lower-fee funds—usually investors with lower financial literacy—are more likely to end up paying higher fees for funds. Further, less sophisticated investors might be matched with a lower quality asset manager to begin with, and a higher fee further reduces their realized returns. While some portion of the costs associated with this costly competitive advertising spending would be absorbed by mutual fund management or advisers, other portions would be passed on to investors.[609]

Although the study's authors examine mutual funds and not investment advisers, both mutual funds and investment advisers target similar groups of clients, have similar fee structures, and exhibit similar information asymmetry problems between investors and financial service or product providers. However, mutual funds differ from investment adviser services in ways that might limit the conclusions we could make about investment adviser advertisements. First, mutual funds operate under specific advertising rules that do not apply to investment advisers marketing direct advisory services or to the

[605] *See* table in section IV. C. for details.

[606] 17 percent of the compliance to the proposed rule is assumed to be performed by compliance clerks, whose hourly cost is \$70, and 83 percent by general clerks, whose hourly cost is \$62 (data is from the Securities Industry and Financial Markets Association's Office Salaries Data 2013 Report, modified to account for an 1,800-hour work-year, inflation, bonuses, firm size, employee benefits and overhead). In PRA, it is also estimated that all advisers that would use the proposed solicitation rule would incur an estimated 1.5 hour in complying with the recordkeeping requirements related to the solicitation rule. The total incremental cost is calculated as $1.5 \times (\$70 \times 17\% + \$62 \times 83\%) = \$95.04$, per adviser.

[607] For more, *see* Section III.B.

[608] *See* Roussanov, Ruan and Wei (2018), *supra* footnote 576.

[609] *Id.* The authors observe that in aggregate, although the additional flexibility in advertisement improved information and match efficiency, the costs associated with this advertising ''arms race'' exceeded those benefits.

marketing of pooled investment vehicles, and the content of mutual fund advertisements may substantively differ from those of investment advisers and pooled investment vehicles. Second, mutual funds sell both financial products and services, while investment advisers primarily sell services, and investors may have different considerations and objectives when evaluating mutual funds compared to investment advisers, or their respective advertisements. Finally, advertising may be a less important determinant of client AUM for investment advisers in the context of the proposed rules, because investors that work with investment advisers may have different financial knowledge and resources, making an ''arms race'' less likely.

b. Competition

As discussed earlier, the proposed rule might result in an increase in the efficiency of investment adviser advertisements, providing more useful information to investors about the abilities of an investment adviser than advertisements under the baseline, which would allow them to make better decisions about which investment advisers to choose. In this case, investment advisers might have a stronger incentive to invest in the quality of their services, as the proposed rule would permit them more flexibility to communicate the higher quality of their services by providing additional information about their services. This would promote competition among investment advisers based on the quality of their services, and result in a benefit for investors.

However, the proposed rule might instead provide investment advisers with a stronger incentive to invest in the quality of their advertisements rather than the quality of their services. This would promote inefficient competition among investment advisers based on the quality of their advertisements rather than the quality of their services, which would waste the resources of investment advisers. In addition, to the extent that higher quality advertisements generated by this ''arms race'' are uncorrelated with the services of an investment adviser's services, investors may be harmed if they enter relationships with investment advisers based on the quality of their advertisements, rather than their services. Although the direct costs of advertisements would be borne by the investment adviser, it is possible that some portion of the costs of advertisement will be borne by investors.[610]

c. Capital Formation

To the extent that the proposed rules result in improved matches in the market for investment advice, potential investors may be drawn to invest additional capital, which would promote capital formation. However, if as a result of the proposed rule, investment advisers may compete with each other based on their advertisements, rather than the quality of their services, advertisements overall would become less efficient in their ability to allow investment advisers to effectively advertise their ability. If the service matches between investors and investment advisers decline as a result of the proposed rule, investors may divert capital from investment to other uses, thus hindering capital formation.

2. Solicitation

a. Efficiency

The proposed solicitation rule expands the scope of provisions for solicitors, by covering all forms of compensation. The rule also scopes in solicitors for private funds, applying the disclosure and disqualification requirements of the solicitation rule to broker-dealers that currently are only subject to bad actor provisions from Regulation D. In addition, the rule would continue to require disclosures to make salient the nature of the relationship between a solicitor and the investment advisers. These provisions could improve the efficiency of the market for investment advisers by ensuring that the provisions of the solicitation rule apply to all forms of conflicts of interest for solicitors. If investors are aware of these conflicts of interest through disclosures, they may be better able to interpret their interactions with solicitors and choose an investment adviser that is of higher quality, or a better match. The proposed rule also removes the acknowledgement requirement for solicitor disclosures, and permits either investment advisers or solicitors to deliver the solicitor disclosure, as well as the timing of that delivery. These provisions will lower the cost of making these disclosures for solicitors and investors, and improve the efficiency of the solicitation process.

b. Competition

The proposed solicitation rule expands the scope of solicitor relationships that are covered by the provisions of the rule. By scoping non-cash compensation into the scope of the rule, the proposed rule could improve competition among investment advisers and solicitors by ensuring that all forms of compensation for solicitors are subject to the same requirements. Under the proposed rule, solicitors that prefer cash compensation for their activities would not be unfairly burdened with the requirements of the rule relative to solicitors that prefer or accept non-cash compensation.

c. Capital Formation

Although there are no provisions in the proposed solicitation rule that directly affect capital formation, the proposed rule could still indirectly affect capital formation through its effect on the efficiency of investors' choice of investment advisers, and investor confidence in the quality of solicitors. The proposed rule's expansion of the scope of compensation might improve the efficiency of the ultimate choice of investment adviser that investors make. In addition, the proposed rule expands the set of disqualifying events that would bar an individual from becoming a solicitor, which may improve an investor's confidence in a solicitor's recommendation of an investment adviser. In addition, the proposed rule also specifies a set of events that are not disqualifying, such as orders that impose sanctions with respect to acts or omissions but do not bar, suspend, or prohibit the person from acting in any capacity under the Federal securities laws. These effects could improve investor confidence in the quality of solicitors, and lead investors to allocate more of their resources towards investment, thus promoting capital formation.

F. Reasonable Alternatives Considered

1. Reduce Specific Limitations on Investment Adviser Advertisements

One alternative to the proposed advertising rule would be to reduce the specific limitations on investment adviser advertising, and rely on the general prohibitions to achieve the programmatic costs and benefits of the rule. For example, this might include reducing the specific limitations on the different types of hypothetical performance or testimonials and

[610] Firms that face a change in costs will bear some portion of these costs directly, but will also pass a portion of the cost to their consumers through the price. In a competitive market, the portion of these costs that firms are able to pass on to consumers depends on the relative elasticities of supply and demand. For example, if demand for investment adviser services is elastic relative to supply of investment adviser services, investment advisers will be limited in their ability to pass through costs. For more, see Mankiw, Gregory, *Principles of Economics,* 2017.

endorsements. We note that the specific prohibitions of the proposed rule are prophylactic in nature, and that many of the advertising practices described in the specific prohibitions would also be prohibited under the general prohibitions on fraud and deceit. However, we note that the removal of the specific prohibitions may create uncertainty about what types of advertisements would fall under the general prohibition of false or misleading advertisements.

2. Not Have an Advertising Rule and Rely on Section 206

Under our proposed approach, as a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, and courses of business, we would amend rule 206(4)–1 generally to prohibit certain conduct and restrict certain specific identified advertising practices. Alternatively, we could not restrict any specific practices, and instead rely solely on the general prohibitions against fraud or deceit in section 206 of the Advisers Act and certain rules thereunder. Under such an approach, a rule specifically targeting adviser advertising practices might be unnecessary. In the absence of an advertising rule, however, an adviser might have not sufficient clarity and guidance on whether certain advertising practices would likely be fraudulent and deceptive. As a consequence, advisers may bear costs in obtaining such guidance or may otherwise restrict their advertising activities unnecessarily in the absence of such clarity and guidance that would be provided through a rule, and may reduce their advertising as a result. In addition, under such an approach, investors may also not obtain some of the benefits associated with the proposed rule. For example, in the absence of a specific advertising rule, investors would not obtain the benefits associated with the comparability of performance presentations provided in the proposed rule, or the requirement to provide performance over a variety of periods so that a client or investor may sufficiently evaluate the adviser's performance. Investors and clients would also not benefit from the specific protections against the potential for misleading hypothetical performance contained in the proposed rule, such as the requirement to have policies and procedures designed to ensure that such performance is relevant to the financial situation and investment objectives of the client or investor and includes sufficient disclosures to enable persons receiving it to understand how it is calculated and the risks and limitations of relying on it. Though some advisers might provide such information even in the absence of the proposed specific requirements to help ensure that they do not violate section 206 of the Act, others may not. As a consequence, this approach may benefit certain advisers by allowing them to avoid the costs of the specific requirements of the proposed rule, but may come at the cost of ensuring adequate disclosure to some investors, and may result in them not gaining the benefit of the other protections of the rule.

3. Define Non-Retail Investors as Accredited Investors or Qualified Clients

Another alternative to the proposed rule would be to include in the definition of Non-Retail Persons ''accredited investors,'' as defined in rule 501(a) of Regulation D under the Securities Act of 1933 (''Securities Act''), or ''qualified clients.'' Both of these alternative standards would expand the set of investors that would be considered non-retail investors, and would expand the set of investors subject to the programmatic costs and benefits of the rule that affect non-retail advertisements, while reducing the set of investors subject to the programmatic costs and benefits of the rule that affect retail advertisements. Although these alternatives would expand the set of advertisements and information available to investors who are accredited investors (or qualified clients) but are not qualified purchasers or knowledgeable employees, these alternatives would also deny investors the protections associated with the additional limitations for performance advertisements for retail investors. As we described earlier, we believe that the qualified purchaser and knowledgeable employee standards provide a more appropriate standard for determining whether an investor has sufficient access to analytical and other resources, and bargaining power to receive different treatment under the proposed rule.[611]

4. Further Bifurcate Additional Requirements

Some of the proposed rule's substantive provisions vary depending on the type of investor that the investment adviser reasonably expects to receive the advertisement.[612] One alternative to the proposed rule would be to further bifurcate requirements of the proposed rule that currently apply to all advertisements. For example, one alternative considered prohibiting hypothetical performance in Retail Advertisements, but not in Non-Retail Advertisements, provided that certain disclosures were made.

Evidence from academic research suggests that that the investors in the market for broker-dealer services are highly segmented in their financial literacy and access to resources. One paper finds that less sophisticated investors are served by broker-dealers that are likely to engage in misconduct, while more sophisticated investors have the financial knowledge and resources to avoid such firms.[613] Although misconduct by investment advisers is not directly addressed by the proposed rule, the fact that certain market segments are susceptible to misconduct suggests that the lack of financial knowledge or access to resources may also leave them susceptible to false or misleading statements in advertisements or solicitations.

Tailoring additional requirements to suit the segmented nature of the market for financial advice may yield benefits to investor protection for investors with lower financial literacy or access to resources, as advertisements directed towards these specific market segments vulnerable to misleading statements would face additional requirements. Similarly, advertisements not directed towards those segments would benefit from additional flexibility and information contained in these advertisements. However, increasing the bifurcation of requirements in the proposed rule might also impose additional costs on investment advisers, who may need to expend additional resources to create advertisements that complied with two increasingly different sets of requirements.

5. No Bifurcation

Another alternative to the proposed rule would be to have no bifurcation in the requirements for Retail Advertisements and Non-Retail Advertisements. In this alternative, all

[611] *See supra* section III.D.

[612] *See supra* footnote 3.

[613] *See* The Market for Financial Adviser Misconduct, *supra* footnote 532. The paper uses the term ''financial advisors,'' to refer to broker-dealer representatives. The authors argue that broker-dealer representatives target different groups of investors and that this segmentation permits firms with high tolerance for misconduct on the part of their associated persons to coexist with firms maintaining clean records in the current market. They find that misconduct is more common among firms that advise retail investors, and in counties with low education, elderly populations and high incomes (when controlling for other characteristics). Although the paper does not divide the studied population by the Qualified Purchaser or Knowledgeable Employee standards, the relationship between client base and adviser misconduct nonetheless provides relevant information about the potential effects of the rule.

advertisements would be subject to a single set of requirements, regardless of the intended audience. A lack of bifurcation in requirements for advertisements may mean that a single set of requirements for investment adviser advertisements may be unable to meet the needs of investors with high and low levels of financial sophistication simultaneously. Investors with high levels of financial sophistication might face unnecessarily strict requirements for advertisements, or investors with low levels of financial sophistication might not be sufficiently protected from fraudulent or misleading advertisements. To the extent that a bifurcated set of requirements in the proposed rule is able to correctly distinguish the financial sophistication of investors, each set of advertisement requirements in the proposed rule will be more appropriately tailored to their respective type of investor.

6. Hypothetical Performance Alternatives

One alternative to the proposed rule's treatment of hypothetical performance would be to prohibit all forms of hypothetical performance in all advertisements. This alternative would eliminate the possibility that investors are misled by hypothetical performance, but also eliminates the possibility that investors might gain useful information from some types of hypothetical information. While a prohibition on hypothetical performance might improve the efficiency of investment adviser advertising by reducing the chance that investors are misled by advertisements, efficiency can also be reduced if investors are unable to receive relevant information about the investment adviser.

Conversely, another alternative would be to permit all hypothetical performance in all advertisements, without any conditions or requirements. This may permit relevant hypothetical performance to reach investors, and although hypothetical performance poses a high risk of misleading investors, such statements would still be subject to the general prohibitions.

7. Alternatives to Proposed Amendments to Rule 206(4)–3

We are proposing an exemption wherein the amended solicitation rule would not apply if the solicitor has performed solicitation activities for the investment adviser during the preceding twelve months and the investment adviser's compensation payable to the solicitor for those solicitation activities is $100 or less (or the equivalent value in non-cash compensation). We considered the alternative of not having any *de minimis* exemption. Although this alternative would expand the scope of compensation covered by the solicitation rule, potentially extending the costs and benefits of the proposed solicitation rule to these solicitation activities, we believe the solicitor's incentives to defraud an investor are significantly reduced when receiving *de minimis* compensation, and that the need for heightened safeguards is likewise reduced.

Conversely, we considered the alternative of proposing a higher threshold for a *de minimis* exemption. However, we drew from other rules applicable to certain dual registrants and broker-dealers, and chose a $100 threshold (or the equivalent value in non-cash compensation) over a trailing one-year period. We believe that proposing an aggregate $100 *de minimis* amount over a trailing year period is consistent with our goal of providing an exception for small or nominal payments. Regarding the trailing period, we understand that a very engaged solicitor who is paid even a small amount per referral could potentially receive a significant amount of compensation from an adviser over time even if the solicitor receives less than $100 per each individual referral. In such a case we believe that investors should be informed of the conflict of interest and gain the benefit of the other provisions of the rule.

We also considered the alternative of not applying the proposed amended solicitation rule to the solicitation of existing and prospective private fund investors. Under this alternative, the rule would apply only to the adviser's clients (including prospective clients), which are generally the private funds themselves, and would not apply to investors in private funds. However, while investors in private funds may often be financially sophisticated, they may not be aware that the person engaging in the solicitation activity may be compensated by the adviser, and we believe investors in such funds should be informed of that fact and the related conflicts. In addition, we believe that our proposal to apply the solicitation rule to investors in private funds would be consistent with the proposed advertising rule. We believe that harmonizing the scope of the solicitation rule with the advertising rule to the extent possible should ease compliance burdens.

IV. Paperwork Reduction Act Analysis

A. Introduction

Certain provisions of our proposal would result in new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[614] The proposed amendments would have an impact on the current collection of information burdens of rules 206(4)–3 and 204–2 under the Investment Advisers Act (''the Act'') and Form ADV. The title of the new collection of information we are proposing is ''Rule 206(4)–1 under the Investment Advisers Act.'' OMB has not yet assigned a control number for ''Rule 206(4)–1 under the Investment Advisers Act.'' The titles for the existing collections of information that we are proposing to amend are: (i) ''Rule 206(4)–3 under the Investment Advisers Act of 1940 (17 CFR 275.206(4)–3)'' (OMB number 3235–0242); (ii) ''Rule 204–2 under the Investment Advisers Act of 1940'' (OMB control number 3235–0278); and (iii) ''Form ADV'' (OMB control number 3235–0049). The Commission is submitting these collections of information to the Office of Management and Budget (''OMB'') for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We discuss below the new collection of information burdens associated with the proposed amendments to rule 206(4)–1, as well as the revised existing collection of information burdens associated with the proposed amendments to rules 206(4)–3 and 204–2, and Form ADV. Responses provided to the Commission in the context of its examination and oversight program concerning the proposed amendments to rule 206(4)–1, rule 206(4)–3, and rule 204–2 would be kept confidential subject to the provisions of applicable law. Responses to the disclosure requirements of the proposed amendments to Form ADV, which are filed with the Commission, are not kept confidential. In addition, because the information collected pursuant to rule 206(4)–3 requires solicitor disclosures to investors, these disclosures would not be kept confidential. The Commission also intends to use a Feedback Flier to obtain information from investors about the proposed rule.[615] The Feedback

[614] 44 U.S.C. 3501 *et seq.*

[615] The Commission has determined that this usage is in the public interest and will protect

Continued

Flier is included in this proposal as Appendix B hereto.

B. Rule 206(4)–1

Proposed rule 206(4)–1 states that, as a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Act, it is unlawful for any investment adviser registered or required to be registered under section 203 of the of the Act, directly or indirectly, to disseminate any advertisement that violates any of paragraphs (a) through (d) of the proposed rule, which include the proposed rule's general prohibitions. For example, an adviser could not refer in an advertisement to its specific investment advice if the presentation is not ''fair and balanced,'' [616] and an adviser cannot make a material claim or statement that is unsubstantiated.[617] The proposed rule also contains conditions on testimonials, endorsements and third-party ratings.[618] Those conditions would require that advertisements containing testimonials, endorsements, or third-party ratings contain certain disclosures and, for third-party ratings, comply with other conditions. Our proposal would recognize that while consumers and businesses often look to the experiences and recommendations of others in making informed decisions, there may be times when these tools are less credible or less valuable than they appear to be. We believe that with tailored disclosures and other safeguards discussed herein, advisers could use testimonials, endorsements and third-party ratings in advertisements to promote their accomplishments with less risk of misleading investors. The proposed rule contains additional tailored conditions and restrictions that advertisements using performance results include certain disclosures or that the adviser provide additional information, in certain cases upon request, and in certain circumstances adopt and implement appropriate policies and procedures.[619] Certain conditions related to performance are only applicable to Retail Advertisements. Finally, the proposed rule would contain a requirement that advertisements be reviewed and approved by a designated employee prior to dissemination, with certain exceptions.[620]

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a ''collection of information'' requirement under the PRA. The respondents to these collections of information requirements would be investment advisers that are registered or required to be registered with the Commission. As of September 30, 2019, there were 13,463 investment advisers registered with the Commission.[621] The use of advertisements is not mandatory, but given that: (i) Advertising is an essential part of retaining and attracting clients; (ii) advertising may be disseminated easily through the internet and social media; and (iii) the proposed definition of ''advertisement'' expands the scope of the current rule, such as including communications that are disseminated to obtain or retain investors in pooled investment vehicles; we estimate that all investment advisers will disseminate at least one communication meeting the proposed rule's definition of ''advertisement'' and therefore be subject to the requirements of the proposed rule. Because the use of testimonials, endorsements, third-party ratings, and performance results in advertisements is voluntary, the percentage of investment advisers that would include these items in an advertisement is uncertain. However, we have made certain estimates of this data, as discussed below, solely for the purpose of this PRA analysis.

1. Testimonials and Endorsements in Advertisements

Under the proposed rule investment advisers are prohibited from including in any advertisement any testimonial or endorsement unless the adviser clearly and prominently discloses, or the investment adviser reasonably believes that the testimonial or endorsement clearly and prominently discloses, that the testimonial was given by a client or investor, or the endorsement was given by a non-client or non-investor and, if applicable, that cash or non-cash compensation has been provided by or on behalf of the adviser in connection with obtaining or using the testimonial or endorsement.[622] We estimate that approximately 50 percent of registered investment advisers would use testimonials or endorsements in advertisements (because we estimate that 100 percent of registered investment advisers would advertise under the proposed rule, we estimate that the number of advisers that would use testimonials or endorsements in their advertisements would be 6,732 advisers (50 percent of 13,463 advisers)). We estimate that an investment adviser that includes testimonials or endorsements in advertisements would use approximately 5 testimonials or endorsements per year, and would create new advertisements with new or updated testimonials and endorsements approximately once per year. We estimate that an investment adviser that includes testimonials or endorsements in its advertisement would incur an internal burden of 1 hour to prepare the required disclosure for its testimonials and/or endorsements (approximately 0.2 hours per each testimonial and/or endorsement). Since each testimonial and/or endorsement used would likely be different, we believe this burden would remain the same each year. There would therefore be an annual cost to each respondent of this hour burden of $337.00 to draft and finalize the required disclosure for the advisers' advertisements that contain testimonials or endorsements.[623] We are not proposing an initial burden because we estimate that advisers would create new advertisements with new or updated testimonials and endorsements each year, and because we believe the disclosures would be brief and straightforward.

The length and content of the disclosure should not vary much across investment advisers. Once these disclosures are created they will require little, if any modification, until the adviser creates advertisements with new or updated testimonials and endorsements (which we estimate as approximately once per year, as noted above). Therefore, we estimate that the yearly total internal burden of preparing the disclosure would be 6,732 hours.[624] Thus, the aggregate internal cost of the

investors, and therefore is not subject to the requirements of the Paperwork Reduction Act of 1995. *See* section 19(e) and (f) of the Securities Act. Additionally, for the purpose of developing and considering any potential rules relating to this rulemaking, the agency may gather from and communicate with investors or other members from the public. *See* section 19(e)(1) and (f) of the Securities Act.

[616] Proposed rule 206(4)–1(a)(5).

[617] Proposed rule 206(4)–1(a)(2).

[618] Proposed rule 206(4)–1(b).

[619] Proposed rule 206(4)–1(c).

[620] Proposed rule 206(4)–1(d).

[621] *See supra* footnote 553.

[622] Proposed rule 206(4)–1(b)(1).

[623] This estimate is based on the following calculation: 1 hour (for preparation and review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)). The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[624] This estimate is based on the following calculation: 1 hour per adviser × 6,732 advisers.

hour burden for investment advisers is estimated to be $2,268,684 per year.[625]

2. Third-Party Ratings in Advertisements

Proposed rule 206(4)–1(b)(2) would allow an investment adviser to include third-party ratings in advertisements if the adviser reasonably believes that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result. In addition, the adviser would have to clearly and prominently disclose (or reasonably believe that the third-party rating clearly and prominently discloses): (i) The date on which the rating was given and the period of time upon which the rating was based, (ii) the identity of the third-party that created and tabulated the rating, and (iii) if applicable, that cash or non-cash compensation has been provided by or on behalf of the adviser in connection with obtaining or using the third-party rating. In many cases, third-party ratings are developed by relying significantly on questionnaires or client surveys. Investment advisers may compensate the third-party to obtain or use the ratings or rankings that are calculated as a result of the survey. Due to the costs associated with third-party ratings, we estimate that approximately 50 percent, or 6,732 advisers, will use third-party ratings in advertisements, and that they will typically use one third-party rating on an annual basis.

We estimate that advisers would incur an initial internal burden of 1.5 hours to draft and finalize the required disclosure for third-party ratings. Accordingly, we estimate the initial cost to each respondent of this hour burden to be $505.50.[626] The third-party rating provision requires investment advisers to disclose up to four pieces of information. We estimate that the total burden for drafting and reviewing initial third-party rating disclosures for all investment advisers that we believe use third-party ratings in advertisements would be 10,098 hours,[627] with a total initial internal cost of the hour burden of approximately $3,403,026.[628]

In addition, since many of these ratings or rankings are done yearly *(e.g.,* 2018 Top Wealth Adviser), an adviser that continues to use a third-party rating in a retail advertisement would incur ongoing, annual costs associated with this burden. We estimate that these ongoing annual costs would be approximately 25 percent of the investment adviser's initial costs per year, since the adviser would typically only need to update its disclosures related to the date on which the rating was given and the period of time upon which the rating was based. Therefore, we estimate that an investment adviser would spend 0.375 burden hours annually associated with drafting the required third-party rating disclosure updates.[629] Accordingly, we estimate the annual ongoing cost to each respondent of this hour burden to be $126.38.[630] The aggregated ongoing burden for investment advisers updating initial third-party rating disclosures for all investment advisers that we estimate would use third-party ratings in advertisements would be 2,524.5 hours,[631] at a total ongoing annual cost of the hour burden of approximately $850,756.50.[632]

3. Performance Advertising

The proposed rule would impose certain conditions on the presentation of performance results in advertisements. Specifically, the proposed rule would require that advertisements that present gross performance provide or offer to provide promptly a schedule of fees and expenses deducted to calculate the net performance.[633] In addition, the proposed rule would require that advertisements that present any related performance must include all related portfolios, except that related performance may exclude any related portfolio if (a) the advertised performance results are no higher than if all related portfolios had been included and (b) the exclusion of any related portfolio does not alter the presentation of the time periods prescribed by paragraph (c)(2)(ii) of the proposed rule.[634] The proposed rule also would require that advertisements that present any extracted performance must provide or offer to provide promptly the performance results of all investments in the portfolio from which the performance was extracted.[635] Finally, the proposed rule would require, for advertisements that present hypothetical performance, that the adviser: (i) Adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the financial situation and investment objectives of the person to whom the advertisement is disseminated; (ii) provide sufficient information to enable such person to understand the criteria used and assumptions made in calculating such hypothetical performance; and (iii) provide (or in the case of Non-Retail Persons, provides or offers to provide promptly) sufficient information to enable such person to understand the risks and limitations of using such hypothetical performance in making investment decisions.[636] As a result of these conditions, the proposed rule would include ''collection of information'' requirements within the meaning of the PRA for investment advisers presenting performance results in advertisements.

We estimate that almost all advisers provide, or seek to provide, performance information to their clients. Based on staff experience, we estimate that 95 percent, or 12,790 advisers, provide performance information in their advertisements. The estimated numbers of burden hours and costs regarding performance results in advertisements may vary depending on, among other things, the complexity of the calculations and whether preparation of the disclosures is performed by internal staff or outside counsel.

a. Gross Performance: Provide or Offer To Provide Promptly a Schedule of Fees and Expenses Deducted To Calculate Net Performance

We estimate that an investment adviser that elects to present gross performance in an advertisement will incur an initial burden of 5 hours in preparing a schedule of the fees and expenses deducted to calculate net performance, in order to provide such a schedule, which may be upon request.[637] We further estimate each adviser electing to present gross performance will include gross performance for 3 different portfolios.

Advisers' staff generally would have to conduct diligence to determine which fees and expenses were applied and how to categorize them for purposes of

[625] This estimate is based on the following calculation: 6,732 hours per advisers in the aggregate per year × $337 per hour.

[626] $337 per hour × 1.5 hours. *See supra* footnote 623 for a discussion of the blended hourly rate for a compliance manager and a compliance attorney.

[627] This estimate is based on the following calculation: 1.5 hours per adviser × 6,732 advisers.

[628] This estimate is based on the following calculation: 10,098 hours per advisers in the aggregate × $337 per hour.

[629] This estimate is based in the following calculation: 25 percent of 1.5 hours.

[630] This estimate is based in the following calculation: 0.375 hours per adviser × $337.

[631] This estimate is based in the following calculation: 0.375 hours × 6,732 advisers

[632] This estimate is based in the following calculation: 2,524.5 hours × $337.

[633] Proposed rule 206(4)–1(c)(1)(i).

[634] Proposed rule 206(4)–1(c)(1)(iii).

[635] Proposed rule 206(4)–1(c)(1)(iv).

[636] Proposed rule 206(4)–1(c)(1)(v).

[637] This estimate includes only the time spent by an adviser in preparing the schedule initially.

the schedule. We believe many advisers that currently advertise performance will have this information already, but will use compliance staff to confirm and categorize the relevant fees and expenses. We expect that an accountant or financial personnel at the adviser will extract the relevant data needed to prepare the schedule. There would therefore be an initial burden cost of 5 hours, with an estimated cost of $1,564, for each adviser to prepare its schedule with respect to each initial presentation of net performance of each portfolio.[638] We estimate that the initial burden, on a per-adviser basis, will be $4,692.[639]

For purposes of this analysis, we estimate that advisers will update their schedules 3.5 times each year.[640] We estimate that after initially preparing a schedule of fees and expenses, an adviser will incur a burden of 0.5 hours to update the schedule. Accordingly, we estimate that the amortized average annual burden with respect to preparation of schedules would be 10.25 hours per year.[641] The estimated amortized aggregate annual burden with respect to schedules is 131,098 hours per year for each of the first three years,[642] and the aggregate internal cost burden is estimated to be $44,180,026 per year.[643]

We estimate that registered investment advisers may incur external costs in connection with the requirement to provide a schedule of fees and expenses. We estimate that the average annual costs associated with printing and mailing these documents upon request would be collectively $500 for all documents associated with a single registered investment adviser.[644] Accordingly, we estimate that the aggregate annual external costs associated with printing and mailing these documents in connection with Non-Retail Advertisements would be $6,395,000.[645]

b. Related Performance

We estimate that an investment adviser that elects to present related performance in an advertisement will incur an initial burden of 25 hours, with respect to each advertised portfolio, in preparing the relevant performance of all related portfolios. This time burden would include the adviser's time spent classifying which portfolios meet the proposed rule's definition of "related portfolio"—*i.e.,* which portfolios have "substantially similar investment policies, objectives, and strategies as those of the services being offered or promoted." [646] This burden also would include time spent determining whether to exclude any related portfolios in accordance with the proposed rule's provision allowing exclusion of one or more related portfolios if "the advertised performance results are no higher than if all related portfolios had been included" and "the exclusion of any related portfolio does not alter the presentation of the time periods prescribed by rule 206(4)–1(c)(2)(ii)." [647] For purposes of making this determination, we assume that an adviser generally would have to run at least two sets of calculations—one with, and one without, a related portfolio, that will allow the adviser to consider whether the exclusion of the portfolio would result in performance that is inappropriately higher or performance that would not satisfy the time period requirement.[648] Finally, this time burden would include the adviser's time calculating and presenting the net performance of any related performance presented. There would therefore be an initial cost of $8,425 for each adviser to comply with this proposed requirement to present all related portfolios in connection with any related performance.[649]

Today, advisers may advertise related performance using their own definition, which may vary between advisers. For purposes of this analysis, we estimate 80 percent of advisers will have other portfolios with substantially similar investment policies, objectives, and strategies as those being offered or promoted in the advertisement and choose to include related performance, as defined under the proposal. We estimate that after initially preparing related performance for each portfolio, investment advisers will incur a burden of 5 hours to update the performance for each subsequent presentation. For purposes of this analysis, we estimate that advisers will update the relevant related performance 3.5 times each year.

Accordingly, we estimate that the amortized average annual burden would be 25.8 hours for each of the first three years for each investment adviser to prepare related performance in connection with this requirement.[650] The estimated amortized aggregate annual burden with respect to Retail Advertisements is 277,866 hours per

[638] This estimate is based on the following calculation: 4.0 hours (for review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)) + 1.0 hour (for extraction of relevant fees and expenses) × $216 (senior accountant) = $1,564. *See supra* footnote 623 for a discussion of the blended rate.

[639] This estimate is based on the following calculation: $1,564 for each schedule per initial presentation per portfolio × 3 portfolios per adviser.

[640] This estimate takes into account the Commission's experience with the hour and cost burden estimates we have adopted for rule 482 under the Securities Act, which requires in part that advertisements with respect to RICs and BDCs to be filed with the Commission or with FINRA. In our most recent hour and cost burden estimate for rule 482, we estimated that approximately 3.5 responses are filed each year per portfolio. We believe that estimate fairly represents the number of times an advertisement is filed for purposes of rule 482, and so use that same estimate in establishing how often an advertisement's performance is updated for purposes of this analysis.

[641] We estimate that the average investment adviser will have an amortized average annual burden of 10.25 hours ((1 initial schedule × 5 hours + 3.5 subsequent updates to schedule × 0.5 hours) (year 1) + (3.5 subsequent updates to schedule × 0.5 hours) (year 2) + (3.5 subsequent updates to schedule × 0.5 hours) (year 3) = 10.25 over 3 years. 10.25 hours × 3 portfolios = 30.75 hours per adviser; and 30.75 hours ÷ 3 years = 10.25 hours).

[642] We estimate that 10.25 burden hours on average per year × 12,790 advisers presenting performance results (*i.e.,* 95% of 13,463 total advisers).

[643] This estimate is based on the following calculation: 131,098 hours per advisers in the aggregate per year × $337 per hour.

[644] We do not have specific data regarding how the cost of printing and mailing the schedule would differ, nor are we able to specifically identify how the cost of printing and mailing the schedule might be affected by the proposed rule. For these reasons, we estimate $500 per year to collectively print and mail upon request the schedule associated with an investment adviser for purposes of our analysis. This estimate assumes only 25% of clients who receive the relevant advertisement request the schedule from the adviser and assumes that marketing personnel at the adviser would respond to each such request. However, we are requesting comment on this estimate. In addition, investors may also request to receive a schedule electronically. We estimate that there would be negligible external costs associated with emailing electronic copies of the schedules.

[645] This estimate is based upon the following calculations: $500 per adviser × 12,790 advisers that provide performance information (*i.e.,* 95% of the 13,463 total advisers) = $6,395,000. For purposes of this Paperwork Reduction Act analysis, based upon our experience, we assume that the burden of emailing these documents would be outsourced to third-party service providers and therefore would be included within these external cost estimates.

[646] *See* proposed rule 206(4)–1(e)(12). Our estimate accounts for advisers that may already be familiar with any composites that meet the definition of "related portfolio."

[647] *See* proposed rule 206(4)–1(c)(1)(iii).

[648] Our estimate also accounts for firms that exclude accounts subject to investment restrictions that materially affect account holdings regardless of whether the exclusion increases or decreases overall performance, such as is required under GIPS.

[649] This estimate is based on the following calculation: 25.0 hours (for review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)) = $8,425. *See supra* footnote 623 for a discussion of the blended hourly rate for a compliance manager and a compliance attorney.

[650] We estimate that the average investment adviser will make 4.5 presentations of related performance to meet this requirement in three years, for an amortized average annual burden of 14.2 hours ((1 initial presentation × 25 hours + 3.5 subsequent updates to presentations × 5 hours) (year 1) + (3.5 subsequent updates to presentations × 5 hours) (year 2) + (3.5 subsequent updates to presentations × 5 hours) (year 3) = 77.5 hours per adviser; and 77.5 hours ÷ 3 years = 25.8 hours).

year for each of the first three years,[651] and the aggregate internal cost burden is estimated to be $93,640,842 per year.[652]

c. Extracted Performance

We estimate that an investment adviser that elects to present extracted performance in an advertisement will incur an initial burden of 10 hours in preparing the performance results of the entire portfolio from which the performance is extracted in order to provide such performance results to investors, which may be promptly upon request. There would therefore be an initial cost of $3,370 for each adviser to prepare such performance.[653]

For purposes of this analysis, we assume 5 percent of advisers will include extracted performance. We estimate that after initially preparing the performance of the entire portfolio from which extracted performance is extracted, investment advisers will incur a burden of 2 hours to update the performance for each subsequent presentation. For purposes of this analysis, we estimate that advisers will update the relevant ''entire portfolio'' performance 3.5 times each year.

Accordingly, we estimate that the amortized average annual burden would be 10.3 hours for each of the first three years for each investment adviser to prepare the performance of the entire portfolio from which the presentation of extracted performance is extracted.[654] The estimated amortized aggregate annual burden with respect to the ''entire portfolio'' requirement is 6,932 hours per year for each of the first three years,[655] and the aggregate internal cost burden is estimated to be $2,336,084 per year.[656]

We estimate that registered investment advisers may incur external costs in connection with the requirement to provide performance results of an entire portfolio from which extracted hypothetical performance is extracted. We estimate that the average annual costs associated with printing and mailing this information upon request would be collectively $500 for all documents associated with a single registered investment adviser. Accordingly, we estimate that the aggregate annual external costs associated with printing and mailing these documents in connection with extracted performance presented would be $336,500.[657]

d. Hypothetical Performance

We estimate that an investment adviser that elects to present hypothetical performance in an advertisement will incur an initial burden of 5 hours in preparing and adopting policies and procedures reasonably designed to ensure that hypothetical performance is relevant to the financial situation and investment objectives of the person to whom the advertisement is disseminated. For purposes of this analysis, we assume 50 percent of advisers will include hypothetical performance in advertisements.

Advisers' compliance personnel typically would draft policies and procedures to evaluate whether hypothetical performance is relevant to each recipient. There would therefore be an initial burden cost of 5 hours related to the adoption of such policies and procedures, with an estimated cost of $2,650, for each adviser to prepare its policies and procedures.[658]

For purposes of this analysis, we estimate that advisers that use hypothetical performance will disseminate advertisements containing hypothetical performance 20 times each year. We estimate that after adopting appropriate policies and procedures, an adviser will incur a burden of 0.25 hours to categorize each investor based on its policies and procedures. Accordingly, we estimate that the average annual burden with respect to preparation of schedules would be 10 hours per year.[659] The estimated aggregate annual burden is 67,320 hours per year,[660] and the aggregate internal cost burden is estimated to be $35,679,600 per year.[661]

Additionally, we estimate that an investment adviser that elects to present hypothetical performance in an advertisement will incur an initial burden of 16 hours in preparing the information sufficient to understand the criteria used and assumptions made in calculating, as well as risks and limitations in using, the hypothetical performance (the ''underlying information''), in order to provide such information, which may in certain circumstances be upon request.[662] There would therefore be an initial cost of $5,384 for each adviser to prepare such information.[663]

We estimate that after initially preparing the underlying information, investment advisers will incur a burden of 3 hours to update the information for each subsequent presentation. For purposes of this analysis, we estimate that advisers will update their hypothetical performance, and thus the underlying information, 3.5 times each year.

Accordingly, we estimate that the amortized average annual burden would be 8.5 hours for each of the first three years for each investment adviser to prepare the underlying information.[664]

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[651] We estimate that 25.8 burden hours on average per year × 10,770 advisers presenting related performance (*i.e.,* 80% of 13,463 advisers).

[652] This estimate is based on the following calculation: 277,866 hours per advisers in the aggregate per year × $337 per hour.

[653] This estimate is based on the following calculation: 10.0 hours (for review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)) = $3,370. *See supra* footnote 623 for a discussion of the blended hourly rate for a compliance manager and a compliance attorney.

[654] We estimate that the average investment adviser will make 4.5 presentations of ''entire portfolio'' performance to meet this requirement in three years, for an amortized average annual burden of 5.7 hours ((1 initial presentation × 10 hours + 3.5 subsequent presentations × 2 hours) (year 1) + (3.5 subsequent presentations × 2 hours) (year 2) + (3.5 subsequent presentations × 2 hours) (year 3) = 31 hours; and 31 hours ÷ 3 years = 10.3 hours).

[655] We estimate that 10.3 burden hours on average per year × approximately 673 advisers presenting extracted performance (*i.e.,* 5% of 13,463 advisers).

[656] This estimate is based on the following calculation: 6,932 hours per advisers in the aggregate per year × $337 per hour.

[657] This estimate is based upon the following calculations: $500 per adviser × approximately 673 advisers presenting extracted performance (*i.e.,* 5% of 13,463 advisers) = $336,500. For purposes of this Paperwork Reduction Act analysis, based upon our experience, we assume that the burden of emailing these documents would be outsourced to third-party service providers and therefore would be included within these external cost estimates.

[658] This estimate is based on the following calculation: 5 hours (for adoption of policies and procedures) × $530 (rate for a chief compliance officer). The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[659] We estimate that the average investment adviser will have an average annual burden of 3.3 hours (5 hours for adoption of policies and procedures + 20 advertisements × 0.25 hours = 10 hours).

[660] We estimate that 10 burden hours on average per year × 6,732 advisers presenting performance results (*i.e.,* 50% of 13,463 total advisers).

[661] This estimate is based on the following calculation: 67,320 hours per advisers in the aggregate per year × $530 per hour.

[662] This estimate includes the time spent by an adviser in preparing the information. The time spent calculating the hypothetical performance that is based on such information is not accounted for in this estimate, as the proposed rule has no requirement that an advertisement present hypothetical performance.

[663] This estimate is based on the following calculation: 15.0 hours (for review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)) + 1 hour (to explain the assumptions used in creating the hypothetical performance) × $329 (senior portfolio manager) = $5,384. The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[664] We estimate that the average investment adviser will make 4.5 presentations of hypothetical

Continued

The estimated amortized aggregate annual burden with respect to the ''underlying information'' requirement is 57,222 hours per year for each of the first three years,[665] and the aggregate internal cost burden is estimated to be $19,283,814 per year.[666]

We estimate that registered investment advisers may incur external costs in connection with the requirement to provide this underlying information upon the request of a client or prospective client. We estimate that the average annual costs associated with printing and mailing this underlying information upon request would be collectively $500 for all documents associated with a single registered investment adviser.[667] Accordingly, we estimate that the aggregate annual external costs associated with printing and mailing these documents in connection with hypothetical performance presented in advertisements would be $3,366,000.[668]

4. Additional Conditions Related to Performance Results in Retail Advertisements

The proposed rule would impose certain additional conditions on the presentation of performance results in Retail Advertisements. The proposed rule requires that Retail Advertisements that present gross performance must also present net performance: (a) With at least equal prominence to, and in a format designed to facilitate comparison with, gross performance, and (b) calculated over the same time period, and using the same type of return and methodology as, the gross performance.[669] In addition, the proposed rule requires that Retail Advertisements that present performance results of any portfolio or any composite aggregation of related portfolios must include performance results of the same portfolio or composite aggregation for 1-, 5-, and 10-year periods, each presented with equal prominence and ending on the most recent practicable date; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.[670] As a result of these conditions, the proposed rule would include additional ''collection of information'' requirements within the meaning of the PRA for investment advisers presenting performance results in any Retail Advertisements.

Based on Form ADV data, approximately 62 percent, or 8,396 investment advisers registered with the Commission have some portion of their business dedicated to retail clients, including either individual high net worth clients or individual non-high net worth clients.[671] Estimating the number of advisers servicing retail investors based on a review of individual clients reported on Form ADV entails certain limitations, and this estimate is only being used for purposes of this PRA analysis.

a. Presentation of Net Performance in Retail Advertisements

We estimate that an investment adviser that elects to present gross performance in a Retail Advertisement will incur an initial burden of 10 hours in preparing net performance for each portfolio, including the time spent determining and deducting the relevant fees and expenses to apply in calculating the net performance and then actually running the calculations. Based on staff experience, we estimate that the average investment adviser will present performance for three portfolios over the course of a year. Accordingly, we estimate that the initial burden, on a per-adviser basis, will be 30 hours. There would therefore be an initial estimated cost of $10,110 for the average adviser to comply with this proposed requirement to present net performance in a Retail Advertisement.[672]

We expect that the calculation of net performance may be modified every time an adviser chooses to update the advertised performance. We estimate that after initially preparing net performance for each portfolio, investment advisers will incur a burden of 2 hours to update the net performance for each subsequent presentation. Accordingly, for each presentation of net performance after the initial presentation, we estimate that the burden, on a per-portfolio basis, will entail an estimated cost of $674.[673]

For purposes of this analysis, we estimate that advisers will update the relevant performance of each portfolio 3.5 times each year.[674] Accordingly, we estimate that the amortized average annual burden would be 17 hours for each of the first three years for each investment adviser to prepare net performance.[675] The estimated

performance, and thus underlying information to meet this requirement, in three years, for an amortized average annual burden of 8.5 hours (1 initial presentation × 15 hours + 3.5 subsequent presentations × 3 hours = 25.5 hours; and 25.5 hours ÷ 3 years = 8.5 hours).

[665] We estimate that 8.5 burden hours on average per year × 6,732 advisers presenting hypothetical performance (*i.e.,* 50% of 13,463 advisers).

[666] This estimate is based on the following calculation: 57,222 hours per advisers in the aggregate per year × $337 per hour.

[667] We do not have specific data regarding how the cost of printing and mailing the underlying information would differ, nor are we able to specifically identify how the cost of printing and mailing the underlying information might be affected by the proposed rule. For these reasons, we estimate $500 per year to collectively print and mail upon request the underlying information associated with hypothetical performance for purposes of our analysis. However, we are requesting comment on this estimate. In addition, investors may also request to receive the underlying information electronically. We estimate that there would be negligible external costs associated with emailing electronic copies of the underlying information.

[668] This estimate is based upon the following calculations: $500 per adviser × 6,732 advisers presenting hypothetical performance = $3,366,000. For purposes of this Paperwork Reduction Act analysis, based upon our experience, we assume that the burden of printing and mailing the underlying information would be outsourced to third-party service providers rather than handled internally, and therefore would be included within these external cost estimates.

[669] Proposed rule 206(4)–1(c)(2)(i).

[670] Proposed rule 206(4)–1(c)(2)(ii).

[671] *See supra* Economic Analysis discussion note 556. The number of advisers that have retail investors as clients is based on the number of advisers that report high net worth and non-high net worth clients, determined by responses to Item 5.D.(1)(a or b), or advisers who do not report individual clients per Item 5.D.(1)(a or b), but do report regulatory assets under management attributable to retail clients as per Item 5.D.(3)(a or b). If at least one of these responses was filled out as greater than 0, the firm is considered as providing business to a client that would be a ''retail investor'' for purposes of the proposed rule. The data on individual clients obtained from Form ADV may not be exactly the same as who would be a ''retail investor'' for purposes of the proposed rule because Form ADV allows advisers to treat as a ''high net worth individual'' an individual who is a ''qualified client'' for purposes of rule 205–3 or a ''qualified purchaser'' as defined in section 2(a)(51)(A) of the Investment Company Act. In contrast, the proposed rule would treat any individual client who meets the definition of ''qualified purchaser'' or ''knowledge employee'' as a non-retail investor. *See also* 2018 Investment Management Compliance Testing Survey, Investment Adviser Association and ACA Compliance Group, at 67 (Jun. 14, 2018) (indicating that 60% of 454 survey respondents ''provide services to individual clients (*e.g.* retail, high net worth, trusts)''), *available at: https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

The figure representing advisers with non-retail clients or investors is the number of advisers that have advisory clients that are retail clients subtracted from the total number of registered investment advisers. These figures do not reflect investors in pooled investment vehicles.

[672] This estimate is based on the following calculation: 30.0 hours (for review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)) = $10,110. *See supra* footnote 623 for a discussion of the blended rate.

[673] This estimate is based on the following calculation: 2 hours (for review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)) = 674. *See supra* footnote 623 for a discussion of the blended rate.

[674] *See supra* footnote 640.

[675] We estimate that the average investment adviser will make 13.5 presentations of net performance in three years, for an amortized average annual burden of 17 hours (1 initial

amortized aggregate annual internal burden with respect to Retail Advertisements is 135,592 hours per year for each of the first three years,[676] and the aggregate internal cost burden is estimated to be $45,694,504 per year.[677]

b. Time Period Requirement in Retail Advertisements

We estimate that an investment adviser that elects to present performance results in a Retail Advertisement will incur an initial burden of 35 hours in preparing performance results of the same portfolio for 1-, 5-, and 10-year periods, taking into account that these results must be prepared on a net basis (and may also be prepared and presented on a gross basis). This estimate reflects that many advisers currently prepare and present GIPS-compliant performance information, and also that many advisers, particularly private fund advisers, currently prepare annual performance for investors. There would therefore be an initial cost of $11,795 for each adviser to comply with this proposed time period requirement in a Retail Advertisement.[678]

Advisers may vary in the frequency with which they calculate performance in order to satisfy this proposed time period requirement, though presumably advisers will do so every time they choose to update the advertised performance. We estimate that after initially preparing 1-, 5-, and 10-year performance for each portfolio, investment advisers will incur a burden of 8 hours to update the performance for these time periods for each subsequent presentation. For purposes of this analysis, we estimate that advisers will update the relevant performance 3.5 times each year.

Accordingly, we estimate that the amortized average annual burden would be 21 hours for each of the first three years for each investment adviser to prepare performance in compliance with this time period requirement.[679] The estimated amortized aggregate annual burden with respect to Retail Advertisements is 167,496 hours per year for each of the first three years,[680] and the aggregate internal cost burden is estimated to be $56,446,152 per year.[681]

5. Review and Approval of Advertisements

The proposed rule would require that any advertisement be reviewed and approved in writing by a designated employee.[682] As noted above, the use of advertisements is not mandatory, but given that advertising is an essential part of retaining and attracting clients, and that advertising may be disseminated easily through the internet and social media, we estimate that all investment advisers will disseminate at least one communication meeting the proposed rule's definition of ''advertisement''.[683]

Based on staff experience, we expect 80% of investment advisers, or 10,770, are light advertisers and 20%, or 2,693, are heavy advertisers.[684] We estimate that investment advisers that are light advertisers and heavy advertisers would create new advertisements approximately 10 and 50 times, respectively, per year. We also estimate that investment advisers that are light advertisers and heavy advertisers would update existing advertisements approximately 50 and 250 times, respectively, per year. These estimates account for the proposed rule's expanded definition of ''advertisement'' relative to the current rule. We further estimate that an investment adviser would incur an average burden of 1.5 and 0.5 hours to review each new advertisement and review each update of an existing advertisement, respectively. Since each advertisement requiring employee review would likely be different, we believe this burden would remain the same each year. Although the proposed rule permits advisers to designate any employee to review and approve advertisements, we would anticipate many investment advisers to designate their chief compliance officers with this task. In addition, a compliance attorney would review any revisions that occur during the course of review. There would therefore be an annual cost to each respondent of this hour burden of $671.25 and $223.75 to review and approve each new or updated advertisement, respectively, that is subject to the review requirement.[685] Therefore, we estimate that the yearly total burden of reviewing and approving advertisements would be 430,800 hours and 538,600 hours for advisers that are light and heavy advertisers, respectively, or 969,400 hours across all advisers.[686] Thus, the aggregate internal cost of the hour burden for all investment advisers is estimated to be $448,347,500 per year.[687]

We estimate that light advertisers and heavy advertisers would utilize 10 and 50 hours, respectively, of external legal services per year to review advertisements. Therefore, we estimate that the average annual costs associated with external legal review of advertisements would be $4,000 for a light advertiser and $20,000 for a heavy

presentation × 10 hours + 3.5 subsequent presentations × 2 hours = 17 hours × 3 portfolios = 51 hours per adviser; and 51 hours ÷ 3 years = 17 hours).

[676] We estimate that 17 burden hours on average per year × 7,976 ''retail advisers'' presenting performance results (*i.e.,* 95% of 8,396 ''retail advisers'').

[677] This estimate is based on the following calculation: 135,592 hours per advisers in the aggregate per year × $337 per hour.

[678] This estimate is based on the following calculation: 35 hours (for review of disclosures) × $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)) = $11,795. *See supra* footnote 623 for a discussion of the blended hourly rate for a compliance manager and a compliance attorney.

[679] We estimate that the average investment adviser will make 4.5 presentations of performance to meet this time period requirement (*i.e.,* 1-, 5-, and 10-year performance calculations) in three years, for an amortized average annual burden of 22.7 hours (1 initial presentation × 35 hours + 3.5 subsequent presentations × 8 hours = 63 hours per adviser; and 63 hours ÷ 3 years = 21 hours).

[680] We estimate that 21 burden hours on average per year × 7,976 ''retail advisers'' presenting performance results in a Retail Advertisement (*i.e.,* 95% of all 8,396 advisers that have retail clients).

[681] This estimate is based on the following calculation: 167,496 hours per advisers in the aggregate per year × $337 per hour.

[682] Proposed rule 206(4)–1(d).

[683] Additionally, if an adviser includes in any legal or regulatory document information beyond what is required under applicable law, and such additional information ''offers or promotes'' the adviser's services, then that information would be considered an ''advertisement'' for purposes of the proposed rule, and therefore would be subject to the employee review and approval requirement. *See supra* footnote 104 and accompanying text.

[684] 0.80 × 13,463 (total investment advisers) = 10,770 light advertisers. 0.20 × 13,463 (total investment advisers) = 2,693 heavy advertisers.

[685] This estimate for new advertisements is based on the following calculation: 0.75 hour (for review and approval) × $530 (hourly rate for a chief compliance officer) + 0.75 hour (for revisions) × $365 (hourly rate for a compliance attorney) = $671.25. This estimate for updates to existing advertisements is based on the following calculation: 0.25 hour (for review and approval) × $530 (hourly rate for a chief compliance officer) + 0.25 hour (for revisions) × $365 (hourly rate for a compliance attorney) = $223.75. The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[686] This estimate for light advertisers is based on the following calculation: [1.5 hours per adviser × 10 new advertisements per year + 0.5 hours per adviser × 50 updated advertisements per year] × 10,770 light advertisers = 430,800 hours. This estimate for heavy advertisers is based on the following calculation: [1.5 hours per adviser × 50 new advertisements per year + 0.5 hours per adviser × 250 updated advertisements per year] × 2,693 heavy advertisers = 538,600 hours. 430,800 + 538,600 = 969,400.

[687] This estimate is based on the following calculation: 969,400 hours for advisers in the aggregate per year × $462.5 per hour (blended rate of a chief compliance officer and a compliance attorney).

advertiser, or $24,000 across all advisers.[688]

6. Total Hour Burden Associated With Proposed Rule 206(4)–1

Accordingly, we estimate the total annual hour burden for investment advisers registered or required to be registered with the Commission under proposed rule 206(4)–1 to prepare testimonials and endorsements, third-party ratings, and performance results disclosures, as well as review and approve advertisements, would be 1,832,281 hours,[689] at a time cost of $736,001,832.[690] The total external burden costs would be $27,000.[691]

A chart summarizing the various components of the total annual burden for investment advisers is below.

Rule 206(4)–1 description of requirements	Number of responses	Internal burden hours	External burden costs
Ongoing annual burden for testimonials and endorsements*. * This is not broken up into initial and ongoing burden because the annual burden is estimated to be the same each year, as discussed above..	33,660 (5 per adviser)	6,732 (1 per response).	
Initial burden for third-party rating	6,732 (1 per adviser)	10,098 (1.5 per response).	
Ongoing annual burden for third-party rating	6,732 (1 per adviser)	2,525 (0.375 per response).	
Initial burden for advertisements presenting gross performance and providing a schedule of fees and expenses.	38,370 (3 per adviser)	63,950 (5 per response)	$500 per adviser.
Ongoing annual burden for advertisements presenting gross performance and providing a schedule of fees and expenses.	134,295 (10.5 per adviser)	6,395 (0.5 per response)	$500 per adviser.
Initial burden for advertisements presenting related performance.	10,770 (1 per adviser presenting related performance).	269,250 (25 per response).	
Ongoing annual burden for advertisements presenting related performance.	32,310 (3.5 per adviser presenting related performance).	64,620 (5 per response).	
Initial burden for advertisements presenting extracted performance.	673 (1 per adviser presenting extracted performance).	6,730 (10 per response)	$500 per adviser.
Ongoing annual burden for advertisements presenting extracted performance.	2,356 (3.5 per adviser presenting extracted performance).	1,346 (2 per response)	$500 per adviser.
Initial burden for policies and procedures for hypothetical performance.	6,732 (1 per adviser presenting hypothetical performance).	33,660 (5 per response).	
Ongoing annual burden for policies and procedures for hypothetical performance.	134,640 (20 per adviser presenting hypothetical performance).	1,683 (0.25 per response).	
Initial burden for advertisements presenting underlying information for hypothetical performance.	6,732 (1 per adviser presenting hypothetical performance).	107,712 (16 hours per response).	$500 per adviser.
Ongoing annual burden for advertisements presenting underlying information for hypothetical performance.	23,562 (3.5 per adviser presenting hypothetical performance).	20,196 (3 hours per response).	$500 per adviser.
Initial burden for Retail Advertisements presenting gross performance.	7,976 (1 per adviser presenting gross performance).	79,760 (10 hours per response).	
Ongoing burden for Retail Advertisements presenting gross performance.	27,916 (3.5 per adviser presenting gross performance).	55,832 (2 hours per response).	
Initial burden for Retail Advertisements meeting "time period" requirement.	7,976 (1 per retail adviser)	279,160 (35 per response).	
Ongoing annual burden for Retail Advertisements meeting "time period" requirement.	27,916 (3.5 per retail adviser).	223,328 (8 per response)..	
Annual burden for review of advertisements for light advertisers*. * This is not broken up into initial and ongoing burden because the annual burden is estimated to be the same each year..	107,770 and 538,500 (10 new and 50 updated per each adviser).	161,655 and 269,250 (1.5 hours per response for new advertisements, 0.5 hours per response for updated advertisements).	$4,000 per adviser.

[688] The estimated $4,000 figure for light advertisers has been calculated as follows: $400 per hour cost for outside legal services × 10 hours = $4,000. The estimated $4,000 figure for heavy advertisers has been calculated as follows: $400 per hour cost for outside legal services × 50 hours = $20,000.

These estimates are based on an estimated $400 per hour cost for external legal services. We do not have specific data regarding these external legal costs. However, we are requesting comment on this estimate.

[689] This estimate is based upon the following calculations: 6,732 + 10,098 + 2,524.5 + 131,098+ 277,866 + 6,932 + 67,320 + 57,222 + 135,592 + 167,496 + 969,400 hours = 1,832,281 hours.

[690] This estimate is based upon the following calculations: $2,268,684 + $3,403,026 + $850,756.50 + $29,094,221 + $93,640,842 + $1,292,732 + $35,679,600 + $19,283,814 + $45,694,504 + $56,446,152 + $448,347,500 = $736,001,832.

[691] This estimate is based upon the following calculations: $500 + $500 +$500 + $500 + $500 + $500 + $24,000 = $27,000.

Rule 206(4)–1 description of requirements	Number of responses	Internal burden hours	External burden costs
Annual burden for review of advertisements for heavy advertisers*. * This is not broken up into initial and ongoing burden because the annual burden is estimated to be the same each year..	134,650 and 673,250 (50 new and 250 updated per each adviser).	201,975 and 336,625 (1.5 hours per response for new advertisements, 0.5 hours per response for updated advertisements).	$20,000 per adviser.

C. Rule 206(4)–3

Rule 206(4)–3 (the ''cash solicitation rule'') (OMB number 3235–0242) currently prohibits investment advisers from paying cash fees to solicitors for client referrals unless certain conditions are met. These conditions include a written agreement, disclosures and receipt and retention of signed and dated acknowledgements, subject to certain exemptions.

We are proposing to amend the existing collection of information to reflect the changes we are proposing to the rule. As discussed above, we are proposing amendments to rule 206(4)–3 to expand the rule to cover solicitation arrangements involving all forms of compensation, rather than only cash compensation, and to apply to the solicitation of current and prospective investors in any private fund, rather than only to ''clients'' (including prospective clients) of the investment adviser.[692] The proposed rule would generally continue to require that an adviser compensate a solicitor pursuant to a written agreement that the adviser is required to retain, and would continue to require as part of the written agreement the preparation of a solicitor disclosure containing specified information about the solicitation arrangement.[693] The proposed rule would add flexibility to the solicitor disclosure requirement by permitting the parties to designate in the written agreement either the adviser or the solicitor as the party required to deliver the disclosure to investors at the time of solicitation (or, for mass communications, as soon as reasonably practicable thereafter). The proposed rule would no longer require the written agreement to require that the solicitor provide the prospective client with a copy of the adviser's brochure, or that the adviser obtain and retain a signed and dated acknowledgment from the client that the client has received the brochure and the solicitor's disclosure. The proposed rule would retain the current rule's partial exemptions for: (i) Solicitors of clients for impersonal investment advice; and (ii) certain solicitors that are affiliated with the adviser, but it would eliminate the written agreement requirement and the detailed solicitor disclosure for such solicitors. In order to avail itself of the proposed rule's partial exemption for affiliated solicitors: (i) The affiliation between the investment adviser and the solicitor must be readily apparent or be disclosed to the investor at the time of the solicitation; and (ii) and the adviser must document the solicitor's status at the time the adviser enters into the solicitation arrangement. The proposed rule also would add new exemptions for *de minimis* compensation and certain nonprofit referral programs.

The proposed rule's requirements of a written agreement, the solicitor disclosure (preparation and delivery) and the adviser's oversight of the solicitor relationship would all be collections of information.[694] The rule's collections of information are necessary to provide investors with information about the solicitation relationship. The information that rule 206(4)–3 would require to be disclosed is necessary to inform investors about the nature of the solicitor's financial interest in the solicitation. With this information, investors can evaluate the solicitor's potential bias in referring them to the adviser. Solicitors would use the information required by proposed rule's written agreement requirement to understand their solicitation responsibilities. These include the solicitor disclosure requirement and the requirement to perform solicitation activities in accordance with sections 206(1), (2), and (4) of the Act. Finally, the adviser's oversight of the solicitor relationship (overseeing compliance with the terms of the written agreement) is designed to help ensure that complete and accurate information about the solicitor relationship is delivered to investors.

The likely respondents to this information collection would be each investment adviser registered with the Commission that would compensate a solicitor for solicitation under the proposed rule. Respondents would in each case typically not include investment advisers that compensate solicitors eligible for the rule's proposed new and amended exemptions (*i.e.,* affiliated solicitors whose affiliation with the adviser is ''readily apparent'', solicitors for impersonal investment advice, and solicitors for specified *de minimis* compensation).[695] We estimate that approximately 47.8 percent of the investment advisers registered with the Commission, or 6,432 advisers, would be subject to this collection of information. This estimate is based on a number of inputs, as follows:

- Currently, it is reported that about 27 percent of investment advisers registered with the Commission (3,655 RIAs) compensate persons other than employees to obtain one or more *clients*.[696]
- In addition, approximately 7.2 percent investment advisers registered with the Commission (976 RIAs) report that they compensate only *employees* to obtain one or more *clients*.[697] These advisers would be exempt from this proposed collection of information if the affiliation between the adviser and the

[692] As discussed above, we are proposing to apply the rule to compensation by investment advisers to solicitors to obtain clients and prospective clients as well as investors and prospective investors in private funds that those advisers manage. For purposes of this release, we refer to any of these persons as ''investors,'' unless we specify otherwise.

[693] Current rule 204–2 requires advisers to keep records of documents required by rule 206(4)–3.

[694] These requirements are collections of information under the current rule. *See* our most recent Paperwork Reduction Act submission for rule 206(4)–3.

[695] The solicitors subject to some of the proposed rule's partial exemptions would still be subject to the disqualification provision of the proposed rule. However, the proposed rule's disqualification provision is not a collection of information hereunder.

[696] Estimate based on IARD data from Form ADV, Part 1, Item 8.H.1 as of September 30, 2019. This Item relates to compensation for *client* referrals. This number represents Firms that responded ''Yes'' to Item 8.H.1 (indicating that they or any related person, directly or indirectly, compensate any person that is not an employee for client referrals).

[697] 976 advisers responded ''yes'' to Item 8.H.2 (indicating that they or any related person, directly or indirectly, provide any *employee* compensation that is specifically related to obtaining clients for the firm)—and responded ''No'' to Item 8.H.1. Under the proposed rule, an adviser that compensates only its employees for solicitation would be exempt from the written agreement and solicitor disclosure obligations of the proposed rule, except when the affiliation is not readily apparent. If the affiliation is not readily apparent, the adviser would be required to disclose the affiliation to the investor and would therefore be subject to this collection of information only with respect to such disclosure.

solicitor is ''readily apparent'' (if the affiliation is not readily apparent, they would be subject to the requirement to disclose the affiliation at the time of solicitation, which would be a collection of information hereunder). For purposes of this PRA we estimate that approximately half of these advisers (488 RIAS, or approximately 3.6 percent of all RIAs) would be exempt from this collection of information because their affiliation would be readily apparent. The other 50 percent (488 RIAS, or approximately 3.6 percent of all RIAs) would be subject to only part of this collection of information, which would be an abbreviated disclosure.

• The number of advisers that currently report that they compensate persons for client referrals includes advisers that use cash as well as non-cash compensation, but we estimate that even more investment advisers would be subject to this proposed collection of information. This is because advisers might not currently view directed brokerage as a type of non-cash compensation, and consequently might not be reporting on Form ADV that they compensate any person for client referrals when they use directed brokerage as a form of compensation.[698] We therefore estimate that another 5 percent of all RIAs (673 RIAs) would use proposed rule 206(4)–3 to compensate any person for *client* referrals and be subject to this collection of information.

• Approximately 4 of the advisers that currently report that they compensate persons for referrals also report that they provide only impersonal investment advisory services, and would therefore be exempt from proposed rule's requirements that are collections of information, and would not be subject to this collection of information.[699]

• In addition, approximately 1,590 registered investment advisers to private funds currently report that they use at least one marketer to obtain investors in private funds, and would likely be newly subject to the proposed rule with respect to such fund marketing arrangements.[700] Of the 1,590 registered investment advisers to private funds that use at least one solicitor, approximately 210 advisers use *only* solicitors that are ''related persons'' of the firm, and would be eligible to use the proposed rule's partial exemption for affiliated solicitors if the affiliation is readily apparent.[701] For purposes of this PRA, we estimate that half of these advisers, or 105 advisers, would be exempt from this collection of information because their affiliation would be readily apparent, and the other half, or 105 advisers, would be subject to only part of this collection of information, which would be an abbreviated disclosure stating the affiliation.[702]

• In addition, advisers that use nonprofit programs for solicitation would be exempt from the rule, but would be subject to the collection of information only with respect to limited disclosures. We estimate that very few advisers would use the nonprofit solicitation exemption. For purposes of this PRA, we believe that one percent of registered investment advisers—or approximately 135 advisers—would use the nonprofit exemption.

• Therefore, we estimate that the total number of RIAs that would be subject to this collection of information are approximately 6,432 registered investment advisers (3,655 + 488 + 673 − 4 + 1,590 − 210 + 105 +135 registered investment advisers), or 46.7% of RIAs, would be subject to the proposed collection of information.[703] Of these advisers, (i) 5,704 advisers, or approximately 42.4 percent of all RIAs, would be subject to the complete collection of information, and (ii) 728 advisers, or approximately 5.4 percent of all RIAs, would be subject to a limited subset of this collection of information.

We are estimating that each registered investment adviser subject to the proposed solicitation rule would enter into 3 solicitation relationships each year. Even though our data shows that registered investment advisers to private funds report a median of one ''marketer'',[704] which would be a solicitor under the proposed rule, we are aware that many firms act as solicitors or marketers for multiple advisers and private funds.[705] In addition, we estimate that the median number of solicitors per adviser would be greater than 1 when taking into account all advisers that use solicitors (for private funds and/or other advisory services), even though solicitors for *de minimis* compensation would be exempt from this collection of information under our proposed rule. We therefore recognize that while some advisers may use only one or a few solicitors to solicit a few targeted investors, other advisers may use numerous solicitors to solicit investors. In addition, we believe that many advisers that use solicitors enter into long-term multi-year solicitation relationships with their solicitors, and do not necessarily engage new solicitors each year. Therefore, we are estimating that advisers would enter into approximately three contracts with new solicitors per year (advisers that engage solicitors on a long-term basis would enter fewer contracts each year, and advisers that routinely use new solicitors would enter more contracts each year). The estimated number of contracts and disclosures per adviser and solicitor per year reflects an

[698] The Instruction to Form ADV Item 8.H and 8.I reads: ''In responding to Items 8.H. and 8.I., consider all cash and non-cash compensation that you or a related person gave to (in answering Item 8.H.) or received from (in answering Item 8.I.) any person in exchange for client referrals, including any bonus that is based, at least in part, on the number or amount of client referrals.''

[699] Estimate based on IARD data from Form ADV. This number includes firms that responded ''Yes'' to Item 8.H.1 or 8.H.2, and responded in Item 5.G., that they only provide any of the following advisory services, which likely would be ''impersonal investment advice'' under the proposed rule: (8) Publication of periodicals or newsletters; (9) Security ratings or pricing services; (10) Market timing services; and/or (11) Educational seminars/ workshops.

[700] Estimate based on IARD data from Form ADV Part 1A, Section 7.A.(1) (Private Fund Reporting) of Schedule D, as of September 30, 2019. Firms that responded ''Yes'' to Question 28.(a), indicated that they use the services of someone other than the firm or the firm's employees for marketing purposes (firms must answer ''yes'' if they use a placement agent, consultant, finder, introducer, municipal advisor or other solicitor, or similar person). We believe that marketers reported in this Item would generally be solicitors under the proposed rule.

[701] Estimate based on IARD data from Form ADV Part 1A, Section 7.A.(1) (Private Fund Reporting) of Schedule D, as of September 30, 2019.

[702] Our proposed rule would partially exempt a solicitor that is one of the investment adviser's partners, officers, directors, or employees, or is a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person: Provided that (A) the affiliation between the investment adviser and such person is readily apparent or is disclosed to the client or private fund investor at the time of the solicitation, and (B) and the adviser documents such solicitor's status at the time the adviser enters into the solicitation arrangement.

[703] We estimate that this number would both increase and decrease to account for: (i) Advisers that would newly be subject to the solicitation rule with respect to compensating persons for endorsements under the proposed amendments to the advertising rule 206(4), and therefore, depending on the facts and circumstances, they would be subject to the solicitation rule for such activity (we also estimate that some of these advisers would already be subject to the solicitation rule for conducting other paid solicitations); and (ii) advisers that would newly be exempted from the solicitation rule because of the proposed *de minimis* exemption. We estimate that the addition and subtraction of these advisers would net to zero change to the total estimate of the number of registered investment advisers that would be subject to the proposed amendments to the solicitation rule.

[704] For registered investment advisers to private funds that report using at least one marketer, the average number of marketers reported is 2.9, while the median reported is 1 and the maximum is 79. Based on responses to Section 7.B.(1) 28(a) as of September 30, 2019.

[705] *See id.*

estimate in this variable range. We estimate for PRA purposes, and request comment below, that for each registered investment adviser that would use the proposed rule, there would be approximately 30 referrals annually. We have seen changes in solicitation practices over the years due to changes in technology and the use of social media, making it easier for advisers to use multiple solicitors to solicit multiple clients.

This collection of information consists of three components: (i) The requirement to enter into a written agreement; (ii) the requirement to prepare and deliver the solicitor disclosure (as part of the written agreement requirement), and (iii) the requirement to oversee the solicitor relationship. In addition, as discussed above, certain advisers that would use the proposed rule's exemptions for affiliated solicitors and for nonprofit programs would be subject to this collection of information only with respect to a limited subset of required disclosures, as follows: (i) Advisers that use affiliated solicitors for whom the affiliation is not readily apparent would be required to disclose the affiliation at the time of solicitation; and (ii) advisers that use nonprofit programs that would be eligible for the rule's exemption would be required make certain disclosures about the nonprofit program.

Because a written agreement would be required for each solicitation relationship subject to this collection of information (other than the relationships with affiliated advisers and nonprofit programs that would be subject to a limited subset of disclosures but not subject to the written agreement requirement), we estimate that each such adviser would be subject to this proposed collection of information regarding entering into the written agreement 17,112 times (5,704 registered investment advisers × 3 written agreements each).

For PRA purposes, we estimate that compliance with the proposed rule's solicitor disclosure preparation and delivery requirement would result in 171,120 total responses (5,704 advisers × 30 solicitor disclosures). Finally, we estimate that compliance with the proposed rule's requirements regarding oversight of the solicitor relationship would result in 17,112 total annual responses (5,704 advisers × 3 solicitor relationships per adviser).

Based on Commission staff experiencer, we believe that the proposed rule would lengthen the solicitor disclosures, particularly with respect to the proposed requirements to describe non-cash compensation and any potential material conflicts of interest on the part of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement. The estimated average internal burden hours each year per adviser to comply with the rule's requirement to enter into a written agreement with each solicitor would be 3 hours, or a total of 17,112 aggregate average burden hours each year.[706] We estimate that this burden would be ongoing, since we estimate that advisers would enter into approximately 3 new solicitation agreements each year. An adviser's in-house compliance managers and compliance attorneys are likely to prepare the written agreements. We estimate the blended hourly wage rate for compliance managers and compliance attorneys to be $337.[707] Accordingly, the annual cost of the burden hours to each adviser regarding the requirement to enter into a written agreement would be $1,011 per adviser ($337 × 3 hours), or $5,766,744 for advisers in the aggregate ($337 × 17,112 hours).

We estimate that the average internal burden for the adviser to prepare and deliver each solicitor disclosure would be 0.10 hours per solicitor disclosure. We therefore propose that the estimated average internal burden hours each year per adviser to prepare and deliver the solicitor disclosures would be 3 hours (0.10 hours × 30 solicitor disclosures), for a total of 17,112 hours for advisers (3 hours × 5,704 advisers). An investment adviser's in-house compliance managers and compliance attorneys would likely prepare solicitor disclosures, and in-house marketing personnel would likely deliver the solicitor disclosures. The blended rate of these professionals is $307.50.[708] Accordingly, the annual cost of the burden to each adviser to prepare the solicitor disclosure would be $5,261,940 (17,112 hours × $307.50). We estimate that 20 percent of the solicitor disclosures would be delivered by the U.S. Postal Service, with the remaining 80 percent delivered electronically or as part of another delivery of documents. We therefore estimate that respondents will incur aggregate incremental postage costs of $18,823.20 ($0.55 × 30 disclosures × 1,141 RIAs).

We estimate the average burden hours each year per adviser to oversee the solicitation relationship would be two hours for each solicitor relationship, or six hours for each adviser that is subject to this collection of information.[709] In-house compliance managers and compliance attorneys are likely to provide oversight of the written agreement (including the solicitor disclosure) under the rule. We estimate the blended hourly wage rate for compliance managers and compliance attorneys to be $337.[710] Accordingly, the annual cost to each respondent regarding oversight of the solicitor disclosure and written agreement would be $2,022 ($674 per solicitor relationship × 3 solicitor relationships). Accordingly, the annual cost to all advisers subject to this collection of information regarding the oversight of the solicitor disclosure and written agreement would be $11,533,488 ($337 per hour × 17,112 hours).

As discussed above, advisers that use the following types of solicitors would be reflected in this collection of information only with respect to abbreviated disclosures: (i) Affiliated solicitors (whose affiliation is not ''readily apparent'') and (ii) nonprofit solicitors. We anticipate that these advisers would incur an ongoing annual burden of 0.3 hours per year to make the abbreviated disclosures (0.01 hours per disclosure × 30 disclosures = 0.3 hours per year). This burden includes the

[706] 1 hour per written agreement (1 × 3 = 3 hours). 3 hours × 5,704 RIAs = 18,015 hours.

[707] This estimate is based on the following calculation: $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)). The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[708] We estimate the hourly wage for in-house marketing personnel to be $278, which is the hourly wage used in SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. We estimate the blended hourly wage rate for compliance managers and compliance attorneys to be $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)). The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. Therefore, the blended rate for both of these professionals is $307.50 (($278 + $337)/2).

[709] This estimate is based on the following calculation: 2 hours per each solicitor relationship × 3 solicitor relationships.

[710] This estimate is based on the following calculation: $337 (blended rate for a compliance manager ($309) and a compliance attorney ($365)). The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

preparation and delivery of the disclosures. Because the disclosures would be very brief, we believe that all such advisers would deliver the required disclosures either electronically or as part of another delivery of documents, and therefore would not incur any additional postage costs. Accordingly, we estimate the total annual cost of the hour burden to be approximately $22,654,596, which is the sum of: $5,766,744 (ongoing cost of the hour burden for entering into written agreements), $5,261,940 (ongoing cost of the hour burden for preparation and delivery of the solicitor disclosures), $18,823.20 (postage costs for delivery), $11,533,488 (ongoing cost of the hourly burden for oversight of the solicitor relationships), and $73,600.80 (ongoing cost of the hour burden for solicitation relationships with (i) affiliated solicitors (whose affiliation is not ''readily apparent'') and (ii) nonprofit solicitors).

Rule 206(4)–3 description of requirements	No. of responses	Internal burden hours	Burden costs
Ongoing burden for entering into written agreements.	17,112 responses (5,704 RIAs × 3 written agreements per each adviser).	1 hour per each response.	1 hour × $337 blended rate for compliance manager and compliance attorney = $337 per response (total = $5,766,744).
Ongoing burden for preparation and delivery of the solicitor disclosures..	(30 solicitor disclosures × 5,704 RIAs) = 171,120 responses.	0.10 hours per response.	0.10 hours × $307.50 blended rate for compliance manager and compliance attorney, and in-house marketing personnel = $30.75 per response (total = $5,261,940) + $18,823.20 postage costs for delivery.
Ongoing burden for oversight of the solicitor relationships (disclosure and written agreement requirements)..	5,704 RIAs × 3 solicitor relationships per each adviser) = 17,112 responses.	2 hours per response	2 hours × $337 blended rate for compliance manager and compliance attorney = $674 per response (total = $11,533,488).
Ongoing burden for solicitation relationships with (i) affiliated solicitors (whose affiliation is not ''readily apparent'') and (ii) nonprofit solicitors..	728 RIAs × 30 disclosures.	0.01 hours per response.	0.3 hours × $337 blended rate for compliance manager and compliance attorney = $101.10 per adviser, or $73,600.80.
Ongoing Burden for All SEC-Regulated Entities and solicitors that would be expected to use the proposed amended solicitation rule.	....	....	$22,654,596.

On a per adviser basis, the ongoing burden for each adviser that would be subject to this collection of information would be: (i) 12 hours per year for each adviser other than those that would use only affiliated solicitors whose affiliation is not ''readily apparent'' or nonprofit solicitors, and (ii) 0.3 hours per year per each adviser that enters into solicitation relationships with affiliated solicitors whose affiliation is not ''readily apparent'' or nonprofit solicitors. The estimated burden hours per year for advisers subject to this proposed collection of information would therefore be: 10.7 hours per year per adviser subject to this collection of information per year per adviser ((12 hours × 89 percent)[711] + (0.3 hours × 11 percent)[712] = 10.713 hours).

The following chart shows the changes from the approved annual hourly burden for the current cash solicitation rule.

Requirement	Estimated burden increase or decrease	Brief explanation
Internal burden hours	3.66 hours increase per adviser for advisers that are currently subject to the rule). The burden would be new for advisers that would newly be subject to the rule. The overall hour burden per adviser would increase from 7.04 hours to 10.7 hours.. The overall annual responses per adviser would increase from *11* (total responses for referrals), to: (i) 36 (3 written agreements; preparation and delivery of 30 solicitor disclosures, and oversight of 3 solicitor relationships) for advisers other than those that would use only affiliated solicitors whose affiliation is not ''readily apparent'' or nonprofit solicitors); and (ii) preparation and delivery of 30 abbreviated disclosures for advisers that would use only affiliated solicitors whose affiliation is not ''readily apparent'' or nonprofit solicitors.	The currently approved burden presents the burden in terms of the aggregate number of *referrals.* We are proposing to treat as three separate burdens the requirement to enter into a contract, the preparation and delivery of the solicitor disclosure; and the oversight of the solicitor relationship. In addition, we are proposing to add a separate burden for advisers that would be partially exempt from the rule but would be subject to the collection of information with respect to only abbreviated disclosures.

[711] 89 percent is the percentage of RIAs we estimate would be subject to all aspects of this collection of information (5,704 RIAs) out of all RIAs subject to this collection of information (6,432 RIAs).

[712] 11 percent is the percentage of RIAs we estimate would be subject to only part of this collection of information, because they would use nonprofit solicitors or are affiliated with the adviser (where the affiliation is not readily apparent) (728 RIAs) out of all RIAs subject to this collection of information (6,432 RIAs).

Requirement	Estimated burden increase or decrease	Brief explanation
Burden costs	Increase from $5,538,403 to $22,654,596. This is an increase of $17,116,193.	This increase is due primarily to: (i) Our estimate of increases in salary for compliance managers, and our belief that advisers would utilize compliance attorneys instead of general clerks (the current burden reflects that general clerks would perform 50% of the work), which would result in increased hourly wages; (ii) our estimate of 2,158 advisers that would be newly subject to this collection of information;[713] and (iii) the additional burden hours that would correspond to additional disclosures that the proposed rule would require for advisers that compensate solicitors with non-cash compensation.

D. Rule 204–2

Under section 204 of the Advisers Act, investment advisers registered or required to register with the Commission under section 203 of the Advisers Act must make and keep for prescribed periods such records (as defined in section 3(a)(37) of the Exchange Act), furnish copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204–2 sets forth the requirements for maintaining and preserving specified books and records. This collection of information is found at 17 CFR 275.204–2 and is mandatory. The Commission staff uses the collection of information in its examination and oversight program. As noted above, responses provided to the Commission in the context of its examination and oversight program concerning the proposed amendments to rule 204–2 would be kept confidential subject to the provisions of applicable law.

We are proposing amendments to rule 204–2 that would require investment advisers to retain copies of advertisements to one or more persons.[714] The current rule requires investment advisers to retain copies of advertisements to 10 or more persons.[715] We are also proposing to require investment advisers to retain: (i) For investment advisers that use a third-party rating in any advertisement, a copy of any questionnaire or survey used in preparation of the third-party rating; and, (ii) a copy of all written approvals of advertisements required under proposed rule 206(4)–1(d).[716]

We would continue to require registered investment advisers to maintain copies of the solicitor disclosure delivered to clients pursuant to the solicitation rule. However, to correspond to changes we are proposing to make to rule 206(4)–3, we are proposing to amend the current books and records rule to replace the rule's requirement that investment advisers keep a record of all written acknowledgments of receipt obtained from clients pursuant to rule 206(4)–3(a)(2)(iii)(B) with the proposed requirement that an investment adviser retain any communication or other document related to the investment adviser's determination that it has a reasonable basis for believing that any solicitor it compensates under the solicitation rule has complied with the written agreement required by the solicitation rule. Additionally, to correspond to other proposed changes to the solicitation rule, we would amend the books and records rule to require investment advisers to make and keep records of: (i) If the adviser participates in any nonprofit program pursuant to the solicitation rule, copies of all receipts of reimbursements of payments or other compensation the adviser provides relating to its inclusion in the program; (ii) any communication or other document related to the investment adviser's determination that it has a reasonable basis for believing that any solicitor it compensates under rule 206(4)–3 is not an ineligible solicitor, and that any nonprofit program it participates in pursuant to the solicitation rule meets the requirements of the solicitation rule; and (iii) the names of all solicitors who are an adviser's partners, officers, directors or employees or other affiliates, pursuant to the solicitation rule. Each of these records would be required to be maintained in the same manner, and for the same period of time, as other books and records required to be maintained under rule 204–2(a). Specifically, investment advisers would be required to maintain and preserve these records in an easily accessible place for not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser. Requiring maintenance of these records would facilitate the Commission's ability to inspect and enforce compliance with proposed rules 206(4)–1 and 206(4)–3.[717] The information generally is kept confidential.[718]

The respondents to this collection of information are investment advisers registered or required to be registered with the Commission. The use of advertisements is not mandatory, but as discussed above, we estimate that 100 percent of investment advisers will disseminate at least one communication meeting the proposed rule's definition of ''advertisement'' and therefore be subject to the requirements of the proposed rule. The Commission therefore estimates that, based on Form ADV filings as of September 30, 2019, approximately 13,463 investment advisers would be subject to the proposed amendments to rule 204–2 under the Advisers Act (*i.e.,* the proposed requirements to retain copies of advertisements to one or more persons, all written approvals of advertisements, and all written approvals of advertisements as required

[713] 2,158 RIAs = sum of (i) 5% of all RIAs (673 RIAs), which is our estimate of advisers that might not currently view directed brokerage as a type of non-cash compensation, and consequently might not be reporting on Form ADV that they compensate any person for client referrals when they use directed brokerage as a form of compensation, *plus* (ii) approximately 1,590 registered investment advisers to private funds that currently report that they use at least one marketer to obtain investors in private funds, and would likely be newly subject to the proposed rule with respect to such fund marketing arrangements, minus (iii) 105 of such advisers that report that their private fund marketers are affiliated, and for which we estimate their affiliation would be readily apparent and they would therefore not be subject to the proposed collection of information.

[714] *See* proposed rule 204–2(a)(11); *see also supra* section II.C (discussing the proposed amendments to the books and records rule).

[715] Rule 204–2(a)(11).

[716] *See supra* section II.C (discussing the proposed amendments to the books and records rule).

[717] *Id.*

[718] *See* section 210(b) of the Advisers Act (15 U.S.C. 80b–10(b)).

by the proposed amendment to the advertising rule). In addition, we estimate that approximately 50 percent of these 13,463 investment advisers, or 6,732 advisers, would use third-party ratings in advertisements, and would therefore also be subject to the proposed recordkeeping amendments corresponding to the proposed amendments to the advertising rule relating to the use of third-party ratings (*i.e.,* to retain a copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement).[719]

The approved annual aggregate burden for rule 204–2 is currently 2,435,364 hours, with a total annual aggregate monetized cost burden of approximately $154,304,663, based on an estimate of 13,299 registered advisers, or 183 hours per registered adviser.[720] Based on Form ADV filings, as of September 30, 2019, 13,463 investment advisers were registered with the Commission. For the proposed recordkeeping amendments that correspond to proposed changes to the advertising rule, including the expanded definition of ''advertisement,'' we estimate that the proposed amendments would result in an increase in the collection of information burden estimate by 10 hours for each of the estimated 13,463 registered advisers (inclusive of the additional hours required for half of these advisers to also retain a copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement).

For the proposed recordkeeping amendments that correspond to proposed changes to the solicitation rule, we estimate that the proposed amendments would result in a collection of information burden estimate of 1.5 hours[721] for each of the estimated 6,432 registered investment advisers that we estimate would be subject to the solicitation rule.[722] We therefore estimate that the proposed amendments to both rules would result in an aggregate increase in the collection of information burden estimate by 10.7 hours for each of the estimated 13,463 registered advisers, resulting in a total of 193.7 hours per adviser.[723] This would yield an annual estimated aggregate burden of 2,607,783 hours under amended rule 204–2 for all registered advisers,[724] for a monetized cost of $165,229,131.[725]

As noted above, the approved annual aggregate burden for rule 204–2 is currently 2,435,364 hours, based on an estimate of 13,299 registered advisers, or 183 hours per registered adviser.[726] The revised annual aggregate hourly burden for rule 204–2 would be 2,607,783 hours, represented by a monetized cost of $165,229,131, based on an estimate of 13,463 registered advisers. This represents in an increase of 172,419[727] annual aggregate hours in the hour burden and an annual increase of $23,988,551 from the currently approved total aggregate monetized cost for rule 204–2.[728] These increases are attributable to a larger registered investment adviser population since the most recent approval and adjustments for inflation, as well as the proposed rule 204–2 amendments relating to advertising and solicitation as discussed in this proposing release.

A chart summarizing the various components of the total annual burden for investment advisers is below.

Rule 204–2 Description of proposed new requirements	Number of responses	Internal burden hours	External burden costs
Retain a copy of advertisements to one or more persons, a copy of all written approvals of advertisements required under proposed rule 206(4)–1(d), and for investment advisers that use a third-party rating in any advertisement, a copy of the questionnaire or survey used to create the third-party rating.	13,463 (all advisers) ...	134,630 (10 hours per response).	
Retention of (i) copies of the solicitor disclosure delivered to clients and private fund investors pursuant to § 275.206(4)–3(a)(1)(iii), and, if the adviser participates in any nonprofit program pursuant to § 275.206(4)–3(b)(4), copies of all receipts of reimbursements of payments or other compensation the adviser provides relating to its inclusion in the program; (ii) any communication or other document related to the investment adviser's determination that it has a reasonable basis for believing that (a) any solicitor it compensates under § 275.206(4)–3 has complied with the written agreement required by § 275.206(4)–3(a)(1), and that such solicitor is not an ineligible solicitor, and (b) any nonprofit program it participates in pursuant to § 275.206(4)–3(b)(4) meets the requirements of § 275.206(4)–3(b)(4); and (iii) a record of the names of all solicitors who are an adviser's partners, officers, directors or employees or other affiliates, pursuant to § 275.206(4)–3(b)(2).	6,432 (47.8% of advisers).	4,502 (0.7 hours per response).	

[719] *See supra* section III.B.2.

[720] *See* Form ADV and Investment Advisers Act Rules, Final Rule, Release No. IA–4509 (Aug. 25, 2016) [81 FR 60418 (Sept. 1, 2016)], at 81 FR 60454–55 (''2016 Form ADV Paperwork Reduction Analysis''). There were recent revisions to the collection of information for rule 204–2 and Form ADV as a result of the following rulemakings: Form CRS Relationship Summary; Amendments to Form ADV, Release No. IA–5247 (June 5, 2019) [84 FR 33492 (Jul. 12, 2019)]; and Regulation Best Interest, Release No. 34–86031 (June 5, 2019) [84 FR 39178 (Aug. 9, 2019)].

[721] This would be for advisers that would be subject to the solicitation rule, as proposed to be amended, and the corresponding amended recordkeeping requirements. We recognize that not all advisers that would be subject to the solicitation rule would be subject to all of the recordkeeping requirements related to the solicitation rule. For example, we estimate that only a few advisers would use nonprofit programs under the proposed solicitation rule and be subject to the corresponding books and records rule related to nonprofit programs. However, for purposes of the PRA, we are estimating that all advisers that would use the proposed solicitation rule would incur an estimated 1.5 hours in complying with the recordkeeping requirements related to the solicitation rule.

[722] *See* discussion above regarding the number of respondents that we estimate would be subject to proposed amended solicitation rule.

[723] 10 hours (advertising rule for all advisers) + 0.7 hours (solicitation rule for 6,432 advisers [1.5 hours × 47.8%]) = 10.7 hours.

[724] 13,463 registered investment advisers × 193.7 hours = 2,607,783 hours.

[725] As with our estimates relating to the previous amendments to rule 204–2 (*see* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 720, at 81 FR at 60454–55), we expect that performance of this function will most likely be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function and general clerks performing 83% of the function. Data from the Securities Industry and Financial Markets Association's Office Salaries Data 2013 Report, modified to account for an 1,800-hour work-year and inflation and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $70 and $62, respectively. (17% × 2,607,783 hours × $70) + (83% × 2,607,783 hours × $62) = $165,229,131.

[726] 2,435,364 hours / 13,299 registered advisers = 183 hours per adviser.

[727] 2,607,783 hours − 2,435,364 hours = 172,419 hours.

[728] $154,304,663 − $130,316,112 = $23,988,551.

The following chart shows the differences from the approved annual hourly burden for the current books and records rule.

Requirement	Estimated burden increase or decrease	Brief explanation
All collections of information under proposed rule 204–2 (including new requirements).	10.7 hour increase. The overall hour burden per adviser would increase from 183 hours to 193.7 hours.	The currently approved burden reflects the current rule's requirement that investment advisers retain copies of advertisements to 10 or more persons. We have proposed that they retain copies of advertisements to one or more persons, as well as copies of questionnaires or surveys used to create third-party ratings in advertisements, written approvals of advertisements, and copies of the solicitor disclosure delivered to clients and private fund investors, along with additional records corresponding to proposed new requirements under the solicitation rule.

E. Form ADV

Form ADV (OMB Control No. 3235–0049) is the investment adviser registration form under the Advisers Act. Part 1 of Form ADV contains information used primarily by Commission staff, and Part 2A is the client brochure. Part 2B requires advisers to create brochure supplements containing information about certain supervised persons. On June 5, 2019, the Commission adopted amendments to Form ADV and related rules under the Act to add new Form ADV Part 3: Form CRS (relationship summary) requiring certain registered investment advisers to prepare and file a relationship summary for retail investors.[729] We use the information on Form ADV to determine eligibility for registration with us and to manage our regulatory and examination programs. Clients and investors use certain of the information to determine whether to hire or retain an investment adviser, as well as what types of accounts and services are appropriate for their needs. The collection of information is necessary to provide advisory clients, prospective clients, and the Commission with information about the investment adviser and its business, conflicts of interest and personnel. Rule 203–1 under the Advisers Act requires every person applying for investment adviser registration with the Commission to file Form ADV. Rule 204–4 under the Advisers Act requires certain investment advisers exempt from registration with the Commission (''exempt reporting advisers'') to file reports with the Commission by completing a limited number of items on Form ADV. Rule 204–1 under the Advisers Act requires each registered and exempt reporting adviser to file amendments to Form ADV at least annually, and requires advisers to submit electronic filings through IARD. The paperwork burdens associated with rules 203–1, 204–1, and 204–4 are included in the approved annual burden associated with Form ADV and thus do not entail separate collections of information. These collections of information are found at 17 CFR 275.203–1, 275.204–1, 275.204–4 and 279.1 (Form ADV itself) and are mandatory. Responses are not kept confidential.

We are proposing amendments to Form ADV to add a subsection L to Item 5 of Part 1A (''Advertising Activities'') to require information about an adviser's use in its advertisements of performance results, testimonials, endorsements, third-party ratings and its previous investment advice. Specifically, we would require an adviser to state whether any of its advertisements contain performance results, and if so, whether all of the performance results were verified or reviewed by a person who is not a related person. We would also require an adviser to state whether any of its advertisements includes testimonials or endorsements, or includes a third-party rating, and if so, whether the adviser pays or otherwise provides cash or non-cash compensation, directly or indirectly, in connection with their use. Finally, we would require an adviser to state whether any of its advertisements includes a reference to specific investment advice provided by the adviser.

The collection of information is necessary to improve information available to us and to the general public about advisers' advertising practices. Our staff would use this information to help prepare for examinations of investment advisers. This information would be particularly useful for staff in reviewing an adviser's compliance with the proposed amendments to the advertising rule, including the proposed restrictions and conditions on advisers' use in advertisements of performance presentations and third-party statements. We are not proposing amendments to Parts 2 or 3 of Form ADV.

1. Respondents

The respondents to current Form ADV are investment advisers registered with the Commission or applying for registration with the Commission and exempt reporting advisers.[730] Based on the IARD system data as of September 30, 2019, approximately 13,463 investment advisers were registered with the Commission, and 4,206 exempt reporting advisers file reports with the Commission. As discussed above, we are proposing amendments to Form ADV to add a subsection L to Item 5 of Part 1A (''Advertising Activities'') to require information about an adviser's use in its advertisements of performance results, testimonials, endorsements, third-party ratings and its previous investment advice. The amendments we are proposing would increase the information requested in Part 1A of Form ADV for registered investment advisers. Because exempt reporting advisers are required to complete a limited number of items in Part 1A of Form ADV, which exclude Item 5, they would not be subject to the proposed amendments to Form ADV Part 1A and would therefore not be subject to this collection of information.[731] However, these exempt reporting advisers are included in the PRA for purposes of updating the overall Form ADV

[729] OMB approved, and subsequently extended, this collection under this control number (expiring on August 31, 2020).

[730] An exempt reporting adviser is an investment adviser that relies on the exemption from investment adviser registration provided in either section 203(l) of the Advisers Act because it is an adviser solely to one or more venture capital funds or 203(m) of the Advisers Act because it is an adviser solely to private funds and has assets under management in the United States of less than $150 million.

[731] An exempt reporting adviser is not a registered investment adviser and therefore would not be subject to the proposed amendments to Item 5 of Form ADV Part 1A. Exempt reporting advisers are required to complete a limited number of items in Part 1A of Form ADV (consisting of Items 1, 2.B., 3, 6, 7, 10, 11 and corresponding schedules), and are not required to complete Part 2.

information collection. In addition, as noted above, the Commission recently adopted amendments to Form ADV to add a new Part 3, requiring registered investment advisers that offer services to retail investors to prepare and file with the Commission, post to the adviser's website (if it has one), and deliver to retail investors a relationship summary.[732] The burdens associated with completing Part 3 are included in the PRA for purposes of updating the overall Form ADV information collection.[733]

The currently approved burdens for Form ADV are set forth below: [734]

	RIAs not obligated to prepare and file relationship summaries	RIAs obligated to prepare and file relationship summaries	Exempt reporting advisers	All advisers
Number of advisers included in the currently approved burden.	5,064 + 571 expected newly registered RIAs annually.	8,235 + 656 expected newly registered RIAs annually.	4,280 + 441 expected new ERAs annually.	17,597 advisers + 1,740 expected new RIAs and ERAs annually.
Currently approved total annual hour estimate per adviser.	29.22 hours	37.47 hours	3.60 hours	29.28 annual blended average hours per adviser.
Currently approved aggregate annual hour burden.	164,655 hours	333,146 hours	16,996 hours	514,797 hours.
Currently approved aggregate monetized cost.	$44,950,816	$90,978,858	$4,639,908	$140,569,582.

Based on updated IARD system data as of September 30, 2019, we estimate that the number of registered investment advisers that are required to complete, amend, and file Form ADV (Part 1 and Part 2) with the Commission, but who are not obligated to prepare and file relationship summaries as of the applicable compliance date for Form ADV Part 3, has increased by 3 RIAs, to 5,067, and we also continue to believe, based on IARD system data, that that 1,227 new advisers will register with us annually, 571 of which will not be required to prepare a relationship summary.[735] Based on updated IARD system data as of September 30, 2019, we estimate that the number of registered investment advisers that are required to complete, amend, and file Form ADV (Part 1 and Part 2) *and* prepare and file relationship summaries as of the applicable compliance date for Form ADV Part 3, has increased by 161 RIAs, to 8,396, and we continue to believe, based on IARD system data, that that 1,227 new advisers will register with us annually, 656 of which will be required to prepare a relationship summary.[736] Based on updated IARD system data as of September 30, 2019, we estimate that the number of exempt reporting advisers has decreased by 76, to 4,206; however, we continue to believe that, based on IARD system data, there would be 441 new exempt reporting advisers annually.[737]

2. Estimated New Annual Hour Burden for Advisers

As a result of the proposed amendments to Form ADV Part 1A discussed above, we estimate that the average total annual collection of information burden for registered investment advisers that are not obligated to prepare and file relationship summaries will increase 0.5 hours to 29.72 hours per registered investment adviser per year for Form ADV. We estimate that the average total annual collection of information burden for registered investment advisers who *are* obligated to prepare and file relationship summaries will increase 0.5 hour to 38.97 hours per registered investment adviser per year for Form ADV. We do not expect that the proposed amendments would increase or decrease the currently approved total burden estimate of 3.60 per exempt reporting adviser completing Form ADV.

The currently approved annual aggregate burden for Form ADV for all registered advisers and exempt reporting advisers is 514,797, for a monetized cost of $140,569,582.[738] This is an annual blended average per adviser burden for Form ADV of 29.28 hours, and $7,996 per adviser.[739] Factoring in the proposed new questions on Part 1 of Form ADV that would be required for all registered investment advisers (but not for exempt reporting advisers), and increases due to increased number in RIAs since the burden estimate was last approved (but a decreased number in ERAs), the revised annual aggregate burden hours for Form ADV (Parts 1, 2 and 3) for all registered advisers and exempt reporting advisers would be 537,047 hours per year, with a monetized value of $146,613,831.[740] This would be an aggregate increase of 22,250 hours, or $6,044,249 in the monetized value of the hour burden, form the currently approved annual aggregate burden estimates, increases which are attributed to the factors described above.

Estimated new annual hour burden for advisers:

[732] *See* Form CRS Release, *supra* footnote 227.

[733] *See* Updated Supporting Statement for PRA Submission for Amendments to Form ADV Under the Investment Advisers Act of 1940 (the ''Approved Form ADV PRA'').

[734] The information in the following table is from the Approved Form ADV PRA, *id.*

[735] As of September 30, 2019, there are 13,463 RIAs, 8,396 of which offer services to retail investors. *See also* Approved Form ADV PRA, *id.*, at text accompanying footnotes 55–56 (''[W]e estimate that 1,227 new advisers will register with us annually, 656 of which will be required to prepare a relationship summary.'')

[736] *See id.*

[737] *Id.*, at footnote 42.

[738] *Id.*, at footnotes 44–45 and accompanying text,

[739] *Id.*, at footnotes 46–47 and accompanying text.

[740] 537,047 aggregate annual hour burden is the sum of: ((i) 29.72 hours × (5,067 RIAs + 571 expected newly registered RIAs annually) = 167,561 total aggregate annual hour burden for RIAs not obligated to prepare and file relationship summaries; (ii) 38.97 hours × (8,396 + 656 expected newly registered RIAs annually) = 352,756 total aggregate annual hour burden for RIAs not obligated to prepare and file relationship summaries; (iii) 3.60 hours × (4,206 + 441 expected new ERAs annually) = 16,729.2 total aggregate annual hour burden for ERAs). We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively, with a blended rate of $273. Therefore: 537,047 hours × $273 = $146,613,831.

	RIAs not obligated to prepare and file relationship summaries	RIAs obligated to prepare and file relationship summaries	Exempt reporting advisers	All advisers
Number of advisers to be included in the proposed burden.	5,067 + 571 expected newly registered RIAs annually.	8,396 + 656 expected newly registered RIAs annually.	4,206 + 441 expected new ERAs annually.	
Proposed total annual hour estimate per advise.	29.72	38.97	3.60 hours.	
Proposed aggregate burden hours.	167,561	352,756 hours	16,729.2	537,047.
Proposed aggregate monetized cost.	$45,744,251	$96,302,508	$4,567,072	$146,613,831.

F. Request for Comments

We request comment on whether our estimates for burden hours and any external costs as described above are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

In addition to these general requests for comment, we also request comment specifically on the following issues:

• Our analysis relies upon certain assumptions, such as that 100 percent of advisers employ advertisements to attract clients, while approximately half of advisers would use testimonials, endorsements and third-party ratings in advertisements under the proposed rule. Additionally, we assume 95 percent of advisers advertise performance figures, 80 percent of advisers advertise related performance, 50 percent of advisers advertise extracted performance, and 5 percent of advisers advertise extracted performance. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?

• Our analysis also relies on the assumptions that an adviser that uses testimonials or endorsements in advertisements uses approximately five testimonials or endorsements per year, and that an adviser that uses third-party ratings in advertisements will typically use one third-party rating at a time, and often will renew the rating for successive years. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?

• Our analysis also relies on the assumption that an investment adviser that includes testimonials or endorsements in its advertisement would incur a burden of one hour to prepare the required disclosure for its testimonials and/or endorsements (0.2 hours per each response, for a total of one hour per each adviser, since we estimate that each adviser would have five responses). We also estimate that an adviser that uses a third-party rating would incur an initial burden of 1.5 hours to draft and finalize the required disclosure for the third-party rating, and would incur additional ongoing annual hourly costs of approximately 0.375 hours corresponding to the annual renewal of the third-party rating and related updating of disclosures. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose? We assume that compliance managers and compliance attorneys are likely to prepare the disclosures for testimonials, endorsements, and third-party ratings. Do commenters agree with this assumption? Do most advisers have in-house lawyers who could be tasked with preparing these disclosures, or would they use outside attorneys or other persons? What positions within or outside the adviser's organization would perform these functions?

• Our analysis relies on the assumptions that 80 percent of investment advisers are light advertisers (creating 10 new advertisements per year and updating 50 existing advertisements times per year) and 20 percent are heavy advertisers (creating 50 new advertisements per year and updating 250 existing advertisements times per year). Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?

• Out analysis also relies on the assumptions that light advertisers and heavy advertisers would utilize 10 and 50 hours, respectively, of external legal services per year to review advertisements. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?

• Our analysis for certain advertisements is based on an estimated $400 per hour cost for external legal services. We do not have specific data regarding these external legal costs. Do commenters agree with this estimate? If not, why not, and what estimate would commenters propose?

• We understand that a number of investment advisers currently review and approve advertisements for compliance with current rule 206(4)–1. Should our analysis be revised to account for this customary industry practice? If so, how much should the total annual burden hours and total annual costs for the review and approval requirement be adjusted?

• Our analysis for the proposed advertising rule PRA assumes that investment advisers would designate their chief compliance officers and compliance attorneys with the task of reviewing and approving advertisements and making appropriate revisions. Would advisers use other personnel for this task?

• We generally assume that in-house personnel deliver various disclosures to investors under the proposed advertising and solicitation rules, but that printing and mailing underlying information related to hypothetical performance may incur external costs. Do commenters agree with these assumptions? Would advisers use broker-dealers or consultants with respect to these disclosures?

• We also assume that advisers that use solicitors to attract clients use approximately three different solicitors in the course of a year, and that the solicitors make approximately 30 solicitation referrals per year (in the aggregate). Do commenters agree with these assumptions? Does this sufficiently account for advisers that employ long-term solicitors, and therefore do not enter into new solicitor contracts each year? Does this sufficiently account for advisers that frequently use new solicitors?

- Our analysis for the proposed solicitation rule PRA also relies on the assumption that an investment adviser that uses a solicitor pursuant to the rule (and is not exempt) would incur a burden of three hours to prepare the required written agreements (1 hour × 3 written agreements), a burden of 3 hours to prepare and deliver the solicitor disclosures (0.10 hours × 30 solicitor disclosures), and six hours to oversee the solicitor relationships (2 hours × 3 solicitor relationships). Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- In addition, our analysis for the proposed solicitation rule PRA relies on the assumption that advisers that would use solicitors who are employees, affiliates and nonprofit programs would incur a burden of 0.3 hours to prepare and deliver the brief disclosures that would be required under the rule (*i.e.,* the disclosure that the employee or affiliate is an affiliate of the adviser, if such affiliation is not ''readily apparent'' to the investor, and the required disclosure about the nonprofit program, as applicable). Do commenters agree with these assumptions? If not, why not, and what data would commenters propose? Do commenters agree that for advisers who use employees or other affiliated solicitors, the affiliation would be ''readily apparent'' to investors about 50 percent of the time? If not, what percentage do commenters propose?
- We assume that, for the proposed solicitation rule PRA, compliance managers and compliance attorneys are likely to prepare the written solicitor agreement and the solicitor disclosure and oversee the solicitor relationship. We assume that advisers' in-house marketing personnel are likely to deliver the solicitor disclosures. Do commenters agree with these assumptions? If not, what positions within or outside the adviser's organization would perform these functions? We also assume that advisers would deliver the solicitor disclosure by U.S. postal service approximately 20 percent of the time (in the other instances, they would either deliver the disclosures electronically or as part of other mailings). Do commenters agree? If not, why not?

The agency is submitting the proposed collections of information to OMB for approval. Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549 1090, with reference to File No. S7–21–19. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release; therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–21–19, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

V. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis (''IRFA'') in accordance with section 3(a) of the Regulatory Flexibility Act (''RFA'').[741] It relates to: (i) Proposed amendments to rule 206(4)–1 under the Investment Advisers Act; (ii) proposed amendments to rule 206(4)–3; (iii) proposed amendments to rule 204–2, and (iv) proposed amendments to Form ADV Part 1A.

A. Reason for and Objectives of the Proposed Action

1. Proposed Rule 206(4)–1

We are proposing amendments to rule 206(4)–1 (the ''advertising rule''), which we adopted in 1961 to target advertising practices that the Commission believed were likely to be misleading. The current rule imposes four *per se* prohibitions, which are described above in section II.A. In addition to the four *per se* prohibitions, the current rule prohibits any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading.

As discussed above, we are proposing amendments to rule 206(4)–1 to impose: (i) General prohibitions of certain advertising practices applicable to all advertisements; (ii) tailored restrictions or conditions on specific practices applicable to all advertisements; (iii) tailored requirements for the presentation of performance results, based on the intended audience; and (iv) a compliance requirement that advertisements be reviewed and approved in writing by a designated employee before dissemination. The proposed rule is designed to restrict or place conditions on specific practices we believe may cause investors to be misled without appropriate conditions or limitations. The proposed new rule would also include a new definition of ''advertisement'' that is intended to be flexible enough to remain relevant and effective in the face of advances in technology and evolving industry practices. The reasons for, and objectives of, the proposed amendments are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections III and IV, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in section IV.

2. Proposed Amendments to Rule 206(4)–3

We are proposing amendments to rule 206(4)–3 (currently referred to as the ''cash solicitation rule''), which we adopted in 1979 to help ensure clients are aware that paid solicitors who refer them to advisers have a conflict of interest.[742] The current rule prohibits investment advisers from paying cash fees to solicitors for client referrals unless certain conditions are met. These conditions include a written agreement, disclosures, and receipt and retention of a signed and dated acknowledgement of the required disclosures, subject to certain exemptions. The current rule also prohibits advisers from making cash payments to solicitors that have previously been found to have violated the Federal securities laws or have been convicted of a crime.[743]

As discussed above, we are proposing amendments to rule 206(4)–3 to expand the rule to cover solicitation arrangements involving all forms of compensation, rather than only cash compensation. We are also proposing to expand the rule to apply to the solicitation of current and prospective investors in any private fund, rather than only to clients (including prospective clients) of the investment adviser.[744] The proposed rule would

[741] 5 U.S.C. 603(a).

[742] *See supra* section I.B.

[743] *See* rule 206(4)–3(a)(1)(ii).

[744] As discussed above, we are proposing to apply the rule to compensation by investment advisers to solicitors to obtain clients and prospective clients as well as investors and prospective investors in private funds that those advisers manage. For purposes of this analysis, we refer to any of these persons as ''investors,'' unless we specify otherwise.

generally continue to require that an adviser compensate a solicitor pursuant to a written agreement, and would continue to require as part of the written agreement that the investor receive a solicitor disclosure containing specified information and that the solicitor comply with certain provisions of the Act.[745] However, the proposed rule would no longer require that the solicitor provide the investor with a copy of the adviser's brochure, or that the adviser obtain and retain a signed and dated acknowledgment from the investor that the investor has received the disclosure documents. The proposed rule would generally maintain the current rule's exceptions for solicitors for impersonal investment advice, and solicitors that are affiliated with the adviser, provided that such solicitors disclose their affiliation to clients at the time of solicitation. It would also add two new exemptions, for *de minimis* compensation and for certain nonprofit programs. Finally, we are proposing to refine the rule's solicitor disqualification provision to expand the types of disciplinary events that would trigger the rule's disqualification provision, and also provide a conditional carve-out for enumerated events for which the Commission has brought an enforcement action but has neither barred or suspended the person or prohibited the person from acting in any capacity under the Federal securities laws, nor has issued certain types of cease and desist orders. All of these requirements are discussed in detail above in sections II.B.1 through II.B.8. The burdens of these requirements on small advisers are discussed below as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discuss the burdens on all advisers.[746] The professional skills required to meet these specific burdens are also discussed in Section IV.

We believe that our proposed amendments are appropriate and in the public interest and will improve investor protection. We are proposing amendments to the current rule because while we believe that the concerns that motivated the Commission to adopt rule 206(4)–3 still exist today, we also believe that we can achieve our regulatory goals in a more tailored manner. We believe that our proposed amendments would update the rule's coverage to reflect regulatory changes and evolution of industry practices, improve the quality of disclosures to investors, and streamline elements of the rule our 40 years of experience has suggested may no longer be necessary for investor protection.

3. Proposed Rule 204–2

We are also proposing related amendments to rule 204–2, the books and records rule, which sets forth requirements for maintaining, making, and retaining advertisements. We are proposing to amend the current rule to require investment advisers to make and keep records of advertisements distributed to one or more person. The current rule requires investment advisers to keep a record of advertisements sent to 10 or more persons. In addition, we are proposing to add provisions to the books and records rule that would explicitly require investment advisers: (i) That use third-party ratings in an advertisement to record and keep a record of the questionnaire or survey used to create the third-party rating; (ii) to record and keep a copy of all written approvals of advertisements required by the proposed rule. We are also proposing to add recordkeeping requirements that correspond to the proposed amendments to the solicitation rule, as follows: Replace the rule's requirement that investment advisers keep a record of all written acknowledgments of receipt obtained from clients pursuant to the current cash solicitation rule with the proposed requirement that an investment adviser retain any communication related to the investment adviser's determination that it has a reasonable basis for believing that any solicitor it compensates under the solicitation rule has complied with the written agreement required by the solicitation rule. Additionally, to correspond to other proposed changes to the solicitation rule, we would amend the books and records rule to require investment advisers to make and keep records of: (i) Copies of the solicitor disclosure delivered to investors pursuant to rule 206(4)–3(a)(1)(iii) (this is also a requirement of the current recordkeeping rule); (ii) if the adviser participates in any nonprofit program pursuant to the solicitation rule, copies of all receipts of reimbursements of payments or other compensation the adviser provides relating to its inclusion in the program; (iii) any communication related to the investment adviser's determination that it has a reasonable basis for believing that any solicitor it compensates under rule 206(4)–3 is not an ineligible solicitor, and any nonprofit program it participates in pursuant to the solicitation rule meets the requirements of the solicitation rule; and (iv) the names of all solicitors who are an adviser's partners, officers, directors or employees or other affiliates, pursuant to the solicitation rule.

As discussed above, we are proposing these amendments to rule 204–2 to: (i) Conform the books and records rule to the proposed advertising rule and proposed amendments to the solicitation rule; (ii) help ensure that an investment adviser retains records of all its advertisements and solicitations; and (iii) facilitate the Commission's inspection and enforcement capabilities. The reasons for and objectives of, the proposed amendments to the books and records rule are discussed in more detail in section II.C above. The burdens of these requirements on small advisers are discussed below as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in Section IV.

4. Proposed Amendments to Form ADV

We are also proposing to amend Item 5 of Part 1A of Form ADV to improve information available to us and to the general public about advisers' advertising practices. Item 5 currently requires an adviser to provide information about its advisory business. We propose to add a subsection L (''Advertising Activities'') to require information about an adviser's use in its advertisements of performance results, testimonials, endorsements, third-party ratings and its previous investment advice.

Specifically, we would require an adviser to state whether any of its advertisements contain performance results, and if so, whether all of the performance results were verified or reviewed by a person who is not a related person. We would also require an adviser to state whether any of its advertisements includes testimonials or endorsements, or includes a third-party rating, and if so, whether the adviser pays cash or non-cash compensation, directly or indirectly, in connection with their use. Finally, we would require an adviser to state whether any of its advertisements includes a reference to specific investment advice

[745] The proposed rule would eliminate the written agreement requirement (and the written agreement's solicitor disclosure requirement) for certain exempt solicitations. In addition, the proposed rule's written agreement would specify that the solicitor would be required to comply with certain provisions of the Act (rather than, generally, the provisions of the Act and the rules thereunder), and would remove the existing rule's written agreement requirement that the solicitor undertake to perform his duties under the agreement in a manner consistent with the instructions of the investment adviser.

[746] *See supra* sections III and IV.

provided by the adviser. Our staff would use this information to help prepare for examinations of investment advisers. This information would be particularly useful for staff in reviewing an adviser's compliance with the proposed amendments to the advertising rule, including the proposed restrictions and conditions on advisers' use in advertisements of performance presentations and third-party statements. The reasons for and objectives of, the proposed amendments to Form ADV are discussed in more detail in section II.A.8 above. The burdens of these requirements on small advisers are discussed below as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in Section IV.

B. Legal Basis

The Commission is proposing amendments to rule 206(4)–1 under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a) and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(d), 10b–6(4) and 80b–11(a) and (h)]. The Commission is proposing amendments to rule 206–4(3) under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a) and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–2(d), 80b–6(4), and 80b–11(a) and (h)]. The Commission is proposing amendments to rule 204–2 under the Advisers Act under the authority set forth in sections 204 and 211 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–4 and 80b–11]. The Commission is proposing amendments to Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 7sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 80a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

C. Small Entities Subject to the Rule and Rule Amendments

In developing these proposals, we have considered their potential impact on small entities that would be subject to the proposed amendments. The proposed amendments would affect many, but not all, investment advisers registered with the Commission, including some small entities.

Under Commission rules, for the purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if it: (1) Has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[747] Our proposed new rules and amendments would not affect most investment advisers that are small entities (''small advisers'') because they are generally registered with one or more state securities authorities and not with the Commission. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by state regulators. Based on IARD data, we estimate that as of September 30, 2019, approximately 575 SEC-registered advisers are small entities under the RFA.[748]

1. Small Entities Subject to Amendments to Advertising Rule

As discussed above in section III.C (the Economic Analysis), the Commission estimates that based on IARD data as of September 30, 2019, approximately 13,463 investment advisers would be subject to the proposed amendments to rule 206(4)–1 under the Advisers Act and the related proposed amendments to rule 204–2 under the Advisers Act.[749]

All of the approximately 575 SEC-registered advisers that are small entities under the RFA would be subject to the amended rule 206(4)–1 and corresponding amendments to rule 204–2. This is because, as discussed above in the PRA, we estimate that all investment advisers will disseminate at least one communication meeting the proposed rule's definition of ''advertisement'' and therefore be subject to the requirements of the proposed rule.[750] Furthermore, the rule's additional conditions and restrictions on testimonials, endorsements and third-party ratings, as well as certain presentations of performance, would apply to many advertisements under the rule.[751] Approximately 172 [752] SEC-registered advisers that are small entities are advisers to retail clients, and therefore could be subject to the rule's additional conditions for certain presentations of performance in advertisements.[753] Approximately 403 SEC-registered advisers that are small entities are advisers to non-retail clients,[754] and therefore could be subject to the rule's additional limited conditions related to the presentation of hypothetical performance.

2. Small Entities Subject to Amendments to Solicitation Rule

As discussed in section I.C, above, the Commission estimates that based on IARD data as of September 30, 2019, approximately 6,432 investment advisers would be subject to the proposed amendments to rule 206(4)–3 under the Advisers Act.

We estimate that, of the approximately 575 SEC-registered advisers that are small entities under the RFA, 115 of these advisers would be subject to rule 206(4)–3.[755]

3. Small Entities Subject to amendments to the Books and Records Rule 206(4)–2

As discussed above, there are approximately 575 small advisers currently registered with us, and we estimate that 100 percent of advisers registered with us would be subject to amendments to the books and records rule.

[747] Advisers Act rule 0–7(a).

[748] Based on SEC-registered investment adviser responses to Items 5.F. and 12 of Form ADV.

[749] *See supra* footnote 553 and accompanying text.

[750] *See* PRA discussion, above, at sections IV.A and B.

[751] As discussed above, the use of testimonials, endorsements, third-party ratings in advertisements is voluntary but we estimate that approximately 50% of registered investment advisers would use testimonials or endorsements in advertisements, and approximately 50% of registered investment advisers would use third-party ratings in advertisements. *See* PRA discussion, above, at sections IV.A and B.

[752] Based on SEC-registered investment adviser responses, as of September 30, 2019, to, Items 5.D.(a), 5.D.(b), 5.F. and 12 of Form ADV, which indicate that the adviser has clients that are high net worth individuals and/or individuals (other than high net worth individuals) and that the adviser is a small entity.

[753] *See supra* section II.A.5.

[754] This number is equal to the total number of small entities (575) minus the total number of small entities that are advisers to individual high net worth and individual non-high net worth clients (172).

[755] 101 small entity firms responded ''Yes'' to Item 8.H.1. or 8.H.2, based on SEC-registered investment adviser responses, as of September 30, 2019, and to Items 5.F. and 12 of Form ADV. However, as discussed above, we anticipate that approximately 47% of registered investment advisers would be subject to the proposed amended solicitation rule. Because we estimate that small entity advisers would be more likely than larger advisers to provide *de minimis* compensation for solicitation, we expect that the percentage of small entity advisers subject to the proposed amended solicitation rule would be 20%, or 115 advisers.

4. Small Entities Subject to Amendments to Form ADV

As discussed above, there are approximately 575 small advisers currently registered with us, and we estimate that 100 percent of advisers registered with us would be subject to amendments to Form ADV.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

1. Proposed Rule 206(4)–1

Proposed rule 206(4)–1 would impose certain reporting and compliance requirements on certain investment advisers, including those that are small entities. All registered investment advisers that distribute advertisements under the rule, which we estimate to be all advisers, would be required to comply with the proposed rule's general prohibition of fraudulent or misleading advertisements and review requirement. In addition, all advisers that include testimonials, endorsements and third-party ratings in advertisements would be required to include disclosures and comply with other conditions. Small entity advisers that have retail clients would be required to comply with restrictions and other conditions related to the presentation of certain performance results in advertisements. Finally, small entity advisers that include certain performance in any Retail Advertisement would be required to offer to provide promptly certain additional information. The proposed requirements and rule amendments, including compliance and recordkeeping requirements, are summarized in this IRFA (section V.C, above). All of these proposed requirements are also discussed in detail, above, in sections I and II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections III and IV (the Economic Analysis and Paperwork Reduction Act Analysis, respectively) and below. The professional skills required to meet these specific burdens are also discussed in section IV.

As discussed above, there are approximately 575 small advisers currently registered with us, and we estimate that 100 percent of advisers registered with us would be subject to amendments to the advertising rule. As discussed above in our Paperwork Reduction Act Analysis in section III above, the proposed amendments to rule 206(4)–1 under the Advisers Act, which would require advisers to prepare disclosures for testimonials and endorsements, third-party ratings, and performance results, as well as review and approve advertisements, would create a new annual burden of approximately 115.7 hours per adviser, or 66,528 hours in aggregate for small advisers.[756] We therefore expect the annual monetized aggregate cost to small advisers associated with our proposed amendments would be $27,789,932.[757]

2. Proposed Amendments to Rule 206(4)–3

Proposed amendments to rule 206(4)–3 would impose certain reporting and compliance requirements on certain investment advisers, including those that are small entities, requiring them to enter into written agreements containing specified information, to prepare disclosures and deliver them to investors (unless the written agreement designates the solicitor as responsible for delivery), and to conduct ongoing oversight and compliance. The proposed requirements and rule amendments, including recordkeeping requirements, are summarized in this IRFA (section V.A.2 above). All of these proposed requirements are also discussed in detail, above, in sections II.B and II.C (Proposed Amendments to the Solicitation Rule, and Recordkeeping), and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections III and IV (the Economic Analysis and Paperwork Reduction Act Analysis) and below. The professional skills required to meet these specific burdens are also discussed in section IV.

Our Economic Analysis, discussed in section III, above, discusses these costs and burdens for respondents, which include small advisers. All advisers that use solicitors under the current rule are required to prepare a written agreement that, among other requirements, requires the solicitor to deliver the solicitor disclosure. The proposed rule would continue to require the written agreement and its solicitor disclosure requirement, but would permit either the adviser or the solicitor to deliver the solicitor disclosure, provided that the written agreement specifies the responsible party. In addition, similar to the current rule, the proposed rule would require that the adviser must have a reasonable basis for believing that the solicitor has complied with the proposed rule's required written agreement. Such requirement would also replace the current rule's requirement that each adviser obtain a signed and dated acknowledgment from the client that the client has received the solicitor's disclosure.

As discussed above, approximately 115 small advisers currently registered with us would be subject to the proposed new solicitation rule. As discussed above in our Paperwork Reduction Act Analysis, we expect these 115 small advisers to spend, on average, an additional total of 1,231 annual hours, or approximately 10.7 hours per adviser,[758] which translates into an approximate monetized cost for the burden hours of $406,123,[759] or $3,531.50 per adviser for the burden hours, attributable to the written agreement, solicitor disclosure, and oversight requirements.[760]

3. Proposed Amendments to Rule 204–2

Proposed amendments to rule 204–2 would require investment advisers to retain copies of advertisements to one or more persons, whereas the current rule requires investment advisers to retain copies of advertisements to 10 or more persons.[761] We are also proposing to require investment advisers that use a third-party rating in a retail advertisement to retain a copy of the questionnaire or survey used to create the third-party rating, as well as a copy of all written approvals of advertisements required under proposed rule 206(4)–1(d).[762] Finally, to correspond to changes we are proposing to make to the solicitation rule, rule 206(4)–3, we are proposing to amend the current books and records rule to require investment advisers to make and keep records of: (i) Copies of the solicitor disclosure delivered to investors pursuant to rule 206(4)–3(a)(1)(iii) (this is also a requirement under the current rule 204–2), and, if the adviser participates in any nonprofit program pursuant to rule 206(4)–3(b)(4), copies of all receipts of reimbursements of payments or other compensation the adviser provides relating to its inclusion in the program; (ii) any communication

[756] 1,557,044 hours/13,463 advisers = 115.7 hours per adviser. 115.7 hours × 575 small advisers = 66,528 hours.

[757] $650,671,048 total cost × (575 small advisers/13,463 advisers) = $27,789,932.

[758] *See supra* section IV.C (Paperwork Reduction Act Analysis discussion of the burden hours per adviser).

[759] 89 percent × ((3 hour × $337) + (3 hours × 307.50) + (6 hours × $337)) + 11 percent × (0.3 hours × $337) = $3,531.50 per adviser for complying with the solicitation rule. This is a blended rate taking into account that we estimate that some smaller advisers that we estimate would be subject to the rule (11 percent) would be subject to only part of this collection of information, and we estimate that 89 percent of smaller advisers that we estimate would be subject to the rule would be subject to the entire collection of information.

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

[761] *See* proposed rule 204–2(a)(11).

[762] *See* proposed rule 204–2 (a)(11)(ii) and (iii).

related to the investment adviser's determination that it has a reasonable basis for believing that any solicitor it compensates under rule 206(4)–3 has complied with the written agreement required by rule 206(4)–3(a)(1); that such solicitor is not an ineligible solicitor, and; that any nonprofit program it participates in pursuant to rule 206(4)–3(b)(4) meets the requirements of rule 206(4)–3(b)(4); and (iii) a record of the names of all solicitors who are an adviser's partners, officers, directors or employees or other affiliates, pursuant to rule 206(4)–3(b)(2).[763] Each of these records would be required to be maintained in the same manner, and for the same period of time, as other books and records required to be maintained under rule 204–2(a).

As discussed above, there are approximately 575 small advisers currently registered with us, and we estimate that 100 percent of advisers registered with us would be subject to amendments to the books and records rule. As discussed above in our Paperwork Reduction Act Analysis in section IV.D above, the proposed amendments to rule 204–2 under the Advisers Act would increase the annual burden by approximately 10.7 hours per adviser, or 6,152.5 hours in aggregate for small advisers.[764] We therefore believe the annual monetized aggregate cost to small advisers associated with our proposed amendments would be $7,056,878.[765]

4. Proposed Amendments to Form ADV

Proposed amendments to Form ADV would impose certain reporting and compliance requirements on certain investment advisers, including those that are small entities, requiring them to provide information about their use in its advertisements of performance results, testimonials, endorsements, third-party ratings and previous investment advice. The proposed requirements and rule amendments, including recordkeeping requirements, are summarized above in this IRFA (section V.A). All of these proposed requirements are also discussed in detail, above, in section II.A.8, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections III and IV (the Economic Analysis and Paperwork Reduction Act Analysis) and below. The professional skills required to meet these specific burdens are also discussed in section IV.

Our Economic Analysis, discussed in section III above, discusses these costs and burdens for respondents, which include small advisers. As discussed above in our Paperwork Reduction Act Analysis in section IV.E above, the proposed amendments to Form ADV would increase the annual burden for advisers (other than exempt reporting advisers, who would not be required to respond to the new Form ADV questions we are proposing) by approximately 0.5 hours per adviser, or 287.5 hours in aggregate for small advisers (other than exempt reporting advisers).[766] We therefore expect the annual monetized aggregate cost to small advisers (other than exempt reporting advisers, for whom there would be no additional cost) associated with our proposed amendments would be $78,487.50.[767]

E. Duplicative, Overlapping, or Conflicting Federal Rules

1. Proposed Rule 206(4)–1

Other than existing rule 206(4)–1 and the prohibitions contained in section 208(a)–(c) of the Act, investment advisers do not have obligations under the Act specifically for adviser advertisements. As discussed above in section II.A, we recognize that advisers to pooled investment vehicles, who would be included in the scope of the proposed rule 206(4)–1, are prohibited from making misstatements or materially misleading statements to investors under rule 206(4)–8.[768] To the extent there is any overlap between the proposed rule and rule 206(4)–8 with respect to advertisements, we believe that any additional costs to advisers to pooled investment vehicles will be minimal, as they can assume that an advertisement that would raise issues under a specific provision of the proposed rule would also be prohibited under rule 206(4)–8. There are no duplicative, overlapping, or conflicting Federal rules with respect to the proposed amendments to rule 204–2.

2. Proposed Amendments to Rule 206(4)–3

Other than existing rule 206(4)–3, investment advisers do not have obligations under the Act to enter into written agreements with solicitors.[769] However, they do have other compliance oversight obligations under the Federal securities laws, including the Act. For example, advisers are subject to the Act's compliance rule, which we adopted in 2003.[770] When an adviser utilizes a solicitor as part of its business, therefore, the adviser must have in place under the Act's compliance rule policies and procedures that address this relationship and are reasonably designed to ensure that the adviser is in compliance with rule 206(4)–3. We believe the proposed solicitation rule's compliance provision would work well with the Act's compliance rule, as both are principles-based and would allow advisers to tailor their compliance with the solicitation rule as appropriate for each adviser.

Our proposed amendments to rule 206(4)–3 would eliminate some regulatory duplication, such as the current rule's duplicative requirement that a solicitor deliver to clients the adviser's Form ADV brochure. As discussed above, advisers are required to deliver their ADV brochures to their clients under rule 204–3. To the extent that both advisers and solicitors currently deliver the adviser's Form ADV brochure, the proposed rule would reduce the redundancy of disclosures. As discussed above, the rule's proposed disqualification provisions for solicitors would newly apply to solicitors of private fund investors. Such solicitors may also be subject to ''bad actor'' disqualification requirements, which disqualify securities offerings from reliance on exemptions if the issuer or other relevant persons (such as underwriters, placement agents and the directors, officers and significant shareholders of the issuer) have been convicted of, or are subject to court or administrative sanctions for, securities fraud or other violations of specified laws.[771] To the extent that a person is subject to both disqualification provisions, there would be some overlapping categories of disqualifying events (*i.e.,* certain bad acts would

[763] *See* proposed rule 204–2(a)(15)(i) through (iii).

[764] 10.7 hour × 575 small advisers = 6,152.5 hours.

[765] 575 registered investment advisers × 193.7 hours = 111,377.5 hours. (17% × 111,377.5 hours × $70) + (83% × 111,377.5 hours × $62) = $7,056,878.

[766] 10.3 hour × 561 small advisers = 5,778.3 hours.

[767] 287.5 hours × $273. *See supra* footnote 740 for a discussion of who we believe would perform this function, and the applicable blended rate.

[768] There may be other legal protections of investors from fraud. *See, e.g.,* section 17(a) of the Securities Act, as well as section 10(b) of the Exchange Act and rule 10b–5 thereunder.

[769] Persons that receive compensation in connection with the purchase or sale of securities may be subject to broker-dealer registration requirements of the Securities Exchange Act of 1934 and any applicable state securities statutes, which may include obligations with respect to agreements with certain finders.

[770] *See supra* footnote 33 and accompanying text. The compliance rule contains principles-based requirements for advisers to adopt compliance policies and procedures that are tailored to their businesses. *Id.*

[771] *See* Bad Actor Disqualification Adopting Release, *supra* footnote 457.

disqualify a person under both provisions). For instance, certain types of final orders of certain state and Federal regulators would be disqualifying events under both provisions. However, some types of bad acts could disqualify a person from engaging in certain capacities in a securities offering under Rule 506 of Regulation D under the Securities Act of 1933, but not from engaging as a solicitor under the solicitation rule, and *vice versa.* Given that the two regimes are separate, we do not believe that any conflicting disqualification provisions between the regimes would be inappropriate. We believe the investor protection benefits of the disqualification provision of the proposed rule justify the additional costs of its application.

3. Proposed Amendments to Form ADV

Our proposed new subsection L (''Advertising Activities'') to Item 5 of Part 1A of Form ADV would require information about an adviser's use in its advertisements of performance results, testimonials, endorsements, third-party ratings and its previous investment advice. These proposed requirements would not be duplicative of, or overlap with, other information advisers are required to provide on Form ADV.

F. Significant Alternatives

1. Proposed Rule 206(4)–1

The RFA directs the Commission to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. We considered the following alternatives for small entities in relation to the proposed amendments to the advertising rule and the corresponding proposed amendments to rule 204–2 under the Advisers Act and to Form ADV: (i) Differing compliance or reporting requirements that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed rule, or any part thereof, for such small entities.

Regarding the first and fourth alternatives, the Commission believes that establishing different compliance or reporting requirements for small advisers, or exempting small advisers from the proposed rule, or any part thereof, would be inappropriate under these circumstances. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small firms, it would be inconsistent with the purposes of the Advisers Act to specify differences for small entities under the proposed advertising rule and corresponding changes to rule 204–2 and Form ADV. As discussed above, we believe that the proposed amendments to the advertising rule would result in multiple benefits to clients. For example, conditions and disclosures on advertisements would provide investors with information they need to assess the adviser's advertising claims (for performance results) and third-party claims about the adviser (for testimonials, endorsements, and third-party ratings). We believe that these benefits should apply to clients of smaller firms as well as larger firms. In addition, as discussed above, our staff would use the corresponding information that advisers would report on the proposed amended Form ADV to help prepare for examinations of investment advisers. Establishing different conditions for large and small advisers that advertise their services to investors would negate these benefits.

Regarding the second alternative, we believe the current proposal is clear and that further clarification, consolidation, or simplification of the compliance requirements is not necessary. As discussed above: The proposed rule would provide general anti-fraud principles applicable to all advertisements under the rule; would provide further restrictions and conditions on certain specific types of presentations, such as testimonials in advertisements; and would provide additional conditions for advertisements containing certain performance information to retail investors. These provisions would address a number of common advertising practices that the current rule either does not explicitly address or broadly restricts (*e.g.,* the current rule prohibits testimonials concerning the investment adviser or its services, and direct or indirect references to specific profitable recommendations that the investment adviser has made in the past). The proposed provisions would clarify the advertising regime, which has come to depend on a large number of no-action letters over the years to fill the gaps.

Regarding the third alternative, we determined to use a combination of performance and design standards. The general prohibition would be principles-based and would give advisers a broad framework within which to determine how best to present advertisements so they are not false or misleading. The proposed rule would also contain design standards, as it would contain additional conditions for certain third-party statements in Retail and Non-Retail advertisements, and certain restrictions and conditions on performance claims, in both Retail and Non-Retail Advertisements. These restrictions and conditions are narrowly tailored to prevent certain types of advertisements that are not a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act from misleading investors. The corresponding changes to rule 204–2 and Form ADV are also narrowly tailored to address the proposed changes to the advertising rule.

We also considered an alternative that would not have included design standards, and that would have relied entirely on performance standards. In this alternative, as discussed in the Economic Analysis at section III above, we would reduce the limitations on investment adviser advertising, and rely on the general prohibitions to achieve the programmatic costs and benefits of the rule. As discussed in the Economic Analysis, we believe that many of the types of advertisements that would be prohibited by the proposed rule's limitations have the potential to be fraudulent or misleading. We do not believe that removal of the limitations on advertisements we are proposing would, in comparison with the proposed rule, permit advertisements that would not be inherently fraudulent or misleading. In addition, we believe that the removal of limitations may create uncertainty about what types of advertisements would fall under the general prohibitions.

On the other hand, we also considered an alternative that would have increased the scope of the proposed rule's design standards. As discussed in the Economic Analysis in section III above, it would have applied the conditions to a greater universe of advertisements, such as advisers to ''accredited investors,'' as defined in rule 501(a) of Regulation D under the Securities Act of 1933 (''Securities Act''), or as ''qualified clients,'' instead of qualified purchaser standard. However, as we describe therein, we believe that the qualified purchaser standard provides a more appropriate standard for determining whether an investor has sufficient knowledge, experience, financial sophistication, and bargaining power to receive different treatment under the proposed rule.

2. Proposed Rule 206(4)–3

The RFA directs the Commission to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. We considered the following alternatives for small entities in relation to the proposed solicitation rule and the corresponding proposed amendments to rule 204–2 under the Advisers Act: (i) Differing compliance or reporting requirements that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed rule, or any part thereof, for such small entities.

Regarding the first and fourth alternatives, the Commission believes that establishing different compliance or reporting requirements for small advisers, or exempting small advisers from the proposed rule, or any part thereof, would be inappropriate under these circumstances. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small firms, it would be inconsistent with the purposes of the Advisers Act to specify differences for small entities under the proposed solicitation rule. However, we are proposing an exception for *de minimis* compensation, which we expect would apply to some small entities that offer *de minimis* compensation to solicitors.[772] Although, as discussed above, we believe heightened safeguards would generally be appropriate for an investor solicitation because a solicitor's incentives to defraud an investor likely would be greater than a promoter's, the solicitor's incentives are significantly reduced when receiving *de minimis* compensation. We believe the need for heightened safeguards for *de minimis* compensation is likewise reduced.

As discussed above, we believe that the solicitation rule and the proposed amendments thereto would result in multiple benefits to investors, including: (i) Helping to ensure that investors are aware that solicitors have a conflict of interest in referring them to advisers that compensate them for the referral; (ii) extending the rule's investor protection to investors whose advisers compensate their solicitors with non-cash compensation; (iii) extending the rule to private fund investors; and (iv) eliminating duplicative disclosures. We believe that these benefits should apply to clients and investors of smaller firms as well as larger firms. In addition, we believe that the proposed rule's solicitor disqualification provisions would result in transparency and consistency for advisory clients, solicitors and advisers, as the provisions would generally eliminate the need for advisers to seek separate relief from the rule. Establishing different solicitor disqualification provisions for large and small advisers would negate this benefit.

Regarding the second alternative, we believe the current proposal is clear and that further clarification, consolidation, or simplification of the compliance requirements is not necessary. Our proposal would streamline the current rule in several ways, including by eliminating the duplicative requirement that solicitors provide the client with the adviser's Form ADV brochure and the rule's reminders of advisers' other requirements under the Act, and by eliminating the requirement that the adviser obtain client acknowledgments of the solicitor disclosure. It would also make clear that certain types of solicitation relationships (*e.g.,* certain affiliated and in-house solicitors) would be exempt from the rule or from certain of the rule's requirements. In addition, as discussed above, we believe that the proposed rule's solicitor disqualification provisions would result in transparency and consistency for advisory clients, solicitors and advisers, as the provisions would eliminate the need for advisers to seek separate relief from the rule. The corresponding changes to rule 204–2 are also narrowly tailored to address the proposed changes to the solicitation rule.

Regarding the third alternative, we are proposing to use performance rather than design standards for all advisers, regardless of size. For example, our proposal would eliminate the current rule's requirement that an adviser obtain a signed and dated acknowledgment from the client that the client has received the solicitor's disclosure, and replace it with the principles-based requirement that an adviser must have a reasonable basis for believing that the solicitor has complied with the written agreement. We believe that providing advisers with the flexibility to determine how to implement the requirements of the rule allows them the opportunity to tailor these obligations to the facts and circumstances of the particular solicitation arrangements.

G. Solicitation of Comments

We encourage written comments on the matters discussed in this IRFA. We solicit comment on the number of small entities subject to the proposed amendments to rules 206(4)–1, 206(4)–3, and 204–2, and Form ADV, as well as the potential impacts discussed in this analysis; and whether the proposal could have an effect on small entities that has not been considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact. In addition, we are including in this proposal a ''Feedback Flyer'' as Appendix C hereto. The ''Feedback Flyer'' solicits feedback from smaller advisers on the effects on small entities subject to our proposal, and the estimated compliance burdens of our proposal and how they would affect small entities.

VI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,''[773] we must advise OMB whether a proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment or innovation. We request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. Statutory Authority

The Commission is proposing amendments to rule 206(4)–1 under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a) and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(d), 10b–6(4) and 80b–11(a) and (h)]. The Commission is proposing amendments to rule 206–4(3) under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a) and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–2(d), 80b–6(4), and 80b–11(a) and (h)]. The Commission is

[772] Specifically, under the proposal the rule would not apply if the solicitor has performed solicitation activities for the investment adviser during the preceding twelve months and the investment adviser's compensation payable to the solicitor for those solicitation activities is $100 or less (or the equivalent value in non-cash compensation).

[773] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

proposing amendments to rule 204–2 under the Advisers Act under the authority set forth in sections 204 and 211 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–4 and 80b–11]. The Commission is proposing amendments to Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 7sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 80a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities.

Text of Proposed Rules

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

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

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

* * * * *

Section 275.204–2 is also issued under 15 U.S.C 80b–6.

* * * * *

■ 2. Amend § 275.204–2 by revising paragraphs (a)(7)(iv), (11) and (15) through (16) to read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

(a) * * *

(7) * * *

(iv) The performance or rate of return of any or all managed accounts, portfolios (as defined in § 206(4)–1(e)(10) of this title), or securities recommendations: *Provided, however:*

(A) That the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser; and

(B) That if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if such notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of such notice, circular or advertisement a memorandum describing the list and the source thereof.

* * * * *

(11)(i) A copy of each advertisement that the investment adviser disseminates, directly or indirectly, to one or more persons (other than persons associated with such investment adviser) and a copy of each notice, circular, newspaper article, investment letter, bulletin or other communication that the investment adviser disseminates, directly or indirectly, to ten or more persons (other than persons associated with such investment adviser); and if such notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication recommends the purchase or sale of a specific security and does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor;

(ii) A copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement; and

(iii) A copy of all written approvals of advertisements as required by § 275.206(4)–1(d) of this title.

* * * * *

(15)(i) Copies of the solicitor disclosure delivered to clients and private fund investors pursuant to § 275.206(4)–3(a)(1)(iii) of this title, and, if the adviser participates in any nonprofit program pursuant to § 275.206(4)–3(b)(4) of this title, copies of all receipts of reimbursements of payments or other compensation the adviser provides relating to its inclusion in the program;

(ii) Any communication or other document related to the investment adviser's determination that it has a reasonable basis for believing that (a) any solicitor it compensates under § 275.206(4)–3 has complied with the written agreement required by § 275.206(4)–3(a)(1), and that such solicitor is not an ineligible solicitor, and (b) any nonprofit program it participates in pursuant to § 275.206(4)–3(b)(4) meets the requirements of § 275.206(4)–3(b)(4); and

(iii) A record of the names of all solicitors who are an adviser's partners, officers, directors or employees or other affiliates, pursuant to § 275.206(4)–3(b)(2).

(16) All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts, portfolios (as defined in § 206(4)–1(e)(10) of this title), or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser disseminates, directly or indirectly, to any person (other than persons associated with such investment adviser), including copies of all information provided or offered pursuant to § 206(4)–1(c)(1)(v) of this title; provided, however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.

* * * * *

■ 3. Revise § 275.206(4)–1 to read as follows:

§ 275.206(4)–1 Advertisements by investment advisers.

As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Act [15 U.S.C. 80b–6(4)], it is unlawful for any investment adviser registered or required to be registered under section 203 of the Act [15 U.S.C. 80b–3], directly or indirectly, to disseminate any *advertisement* that violates any of paragraphs (a) through (d) of this section.

(a) *General prohibitions.* An *advertisement* may not:

(1) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading;

(2) Include a material claim or statement that is unsubstantiated;

(3) Include an untrue or misleading implication about, or reasonably be likely to cause an untrue or misleading inference to be drawn concerning, a material fact relating to the investment adviser;

(4) Discuss or imply any potential benefits to clients or investors connected with or resulting from the

investment adviser's services or methods of operation without clearly and prominently discussing any associated material risks or other limitations associated with the potential benefits;

(5) Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;

(6) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or

(7) Otherwise be materially misleading.

(b) *Testimonials, endorsements, and third-party ratings.* An *advertisement* may not include any *testimonial, endorsement,* or *third-party rating,* unless:

(1) For a *testimonial* or *endorsement,* the investment adviser clearly and prominently discloses, or the investment adviser reasonably believes that the *testimonial* or *endorsement* clearly and prominently discloses, that:

(i) The *testimonial* was given by a client or investor, and the *endorsement* was given by a non-client or non-investor, as applicable; and

(ii) If applicable, cash or non-cash compensation has been provided by or on behalf of the adviser in connection with obtaining or using the *testimonial* or *endorsement;*

(2) For a *third-party rating,* the investment adviser reasonably believes that any questionnaire or survey used in the preparation of the *third-party rating* is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and the investment adviser clearly and prominently discloses, or the investment adviser reasonably believes that the *third-party rating* clearly and prominently discloses:

(i) The date on which the rating was given and the period of time upon which the rating was based;

(ii) The identity of the third party that created and tabulated the rating; and

(iii) If applicable, that cash or non-cash compensation has been provided by or on behalf of the adviser in connection with obtaining or using the *third-party rating.*

(c) *Performance.* An investment adviser may not include:

(1) In any *advertisement:*

(i) Any presentation of *gross performance,* unless the *advertisement* provides or offers to provide promptly a schedule of the specific fees and expenses (presented in percentage terms) deducted to calculate *net performance;*

(ii) Any statement, express or implied, that the calculation or presentation of performance results in the *advertisement* has been approved or reviewed by the Commission;

(iii) Any *related performance,* unless it includes all *related portfolios;* provided that *related performance* may exclude any *related portfolios* if:

(A) The advertised performance results are no higher than if all *related portfolios* had been included; and

(B) The exclusion of any *related portfolio* does not alter the presentation of the time periods prescribed by paragraph (c)(2)(ii) of this section;

(iv) Any *extracted performance,* unless the *advertisement* provides or offers to provide promptly the performance results of all investments in the *portfolio* from which the performance was extracted; or

(v) Any *hypothetical performance* unless the investment adviser:

(A) Adopts and implements policies and procedures reasonably designed to ensure that the *hypothetical performance* is relevant to the financial situation and investment objectives of the person to whom the *advertisement* is disseminated;

(B) Provides sufficient information to enable such person to understand the criteria used and assumptions made in calculating such *hypothetical performance;* and

(C) Provides (or, if such person is a *non-retail person,* provides or offers to provide promptly) sufficient information to enable such person to understand the risks and limitations of using such *hypothetical performance* in making investment decisions.

(2) In any *retail advertisement:*

(i) Any presentation of *gross performance,* unless the *advertisement* also presents *net performance:*

(A) With at least equal prominence to, and in a format designed to facilitate comparison with, the *gross performance;* and

(B) Calculated over the same time period, and using the same type of return and methodology as, the *gross performance;* and

(ii) Any performance results of any *portfolio* or any composite aggregation of *related portfolios,* unless the *advertisement* includes performance results of the same *portfolio* or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on the most recent practicable date; except that if the relevant *portfolio* did not exist for a particular prescribed period, then the life of the *portfolio* must be substituted for that period.

(d) *Review and approval.* An investment adviser may not, directly or indirectly, disseminate an *advertisement* unless the *advertisement* has been previously reviewed and approved as being consistent with the requirements of this section by a designated employee, except for *advertisements* that are:

(1) Communications that are disseminated only to a single person or household or to a single investor in a *pooled investment vehicle;* and

(2) Live oral communications that are broadcast on radio, television, the internet, or any other similar medium.

(e) *Definitions.* For purposes of this section:

(1) *Advertisement* means any communication, disseminated by any means, by or on behalf of an investment adviser, that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients or investors in any *pooled investment vehicle* advised by the investment adviser. *Advertisement* does not include:

(i) Live oral communications that are not broadcast on radio, television, the internet, or any other similar medium;

(ii) A communication by an investment adviser that does no more than respond to an unsolicited request for information specified in such request about the investment adviser or its services, other than:

(A) Any communication to a *retail person* that includes performance results; or

(B) Any communication that includes *hypothetical performance;*

(iii) An advertisement, other sales material, or sales literature that is about an investment company registered under the Investment Company Act of 1940 or about a business development company and that is within the scope of rule 482 or rule 156 under the Securities Act; or

(iv) Any information required to be contained in a statutory or regulatory notice, filing, or other communication.

(2) *Endorsement* means any statement by a person other than a client or investor indicating approval, support, or recommendation of the investment adviser or its *advisory affiliates,* as defined in the Form ADV Glossary of Terms.

(3) *Extracted performance* means the performance results of a subset of investments extracted from a *portfolio.*

(4) *Gross performance* means the performance results of a *portfolio* before the deduction of all fees and expenses

that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant *portfolio.*

(5) *Hypothetical performance* means performance results that were not actually achieved by any *portfolio* of any client of the investment adviser. *Hypothetical performance* includes, but is not limited to:

(i) Performance derived from representative model *portfolios* that are managed contemporaneously alongside *portfolios* managed for actual clients;

(ii) Performance that is backtested by the application of a strategy to market data from prior periods when the strategy was not actually used during those periods; and

(iii) Targeted or projected performance returns with respect to any *portfolio* or to the investment services offered or promoted in the *advertisement.*

(6) *Net performance* means the performance results of a *portfolio* after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant *portfolio,* including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, *net performance* may reflect one or more of the following:

(i) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted;

(ii) The deduction of a model fee that is equal to the highest fee charged to the relevant audience of the *advertisement;* and

(iii) The exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities.

(7) *Non-retail advertisement* means any *advertisement* for which an investment adviser has adopted and implemented policies and procedures reasonably designed to ensure that the *advertisement* is disseminated solely to *non-retail persons.*

(8) *Non-retail person* means one or more of the following:

(i) A ''qualified purchaser,'' as defined in section 2(a)(51) of the Investment Company Act of 1940 and taking into account rule 2a51–1 under the Investment Company Act; and

(ii) A ''knowledgeable employee,'' as defined in rule 3c–5 under the Investment Company Act of 1940, with respect to a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Investment Company Act and that is advised by the investment adviser.

(9) *Pooled investment vehicle* means any pooled investment vehicle as defined in Rule 206(4)–8(b).

(10) *Portfolio* means a group of investments managed by the investment adviser. A *portfolio* may be an account or a *pooled investment vehicle.*

(11) *Related performance* means the performance results of one or more *related portfolios,* either on a *portfolio-by-portfolio* basis or as one or more composite aggregations of all *portfolios* falling within stated criteria.

(12) *Related portfolio* means a *portfolio* with substantially similar investment policies, objectives, and strategies as those of the services being offered or promoted in the *advertisement. Related portfolio* includes, but is not limited to, a *portfolio* for the account of the investment adviser or its *advisory affiliate,* as defined in the Form ADV Glossary of Terms.

(13) *Retail advertisement* means any *advertisement* other than a *non-retail advertisement.*

(14) *Retail person* means any person other than a *non-retail person.*

(15) *Testimonial* means any statement of a client's or investor's experience with the investment adviser or its *advisory affiliates,* as defined in the Form ADV Glossary of Terms.

(16) *Third-party rating* means a rating or ranking of an investment adviser provided by a person who is not a *related person,* as defined in the Form ADV Glossary of Terms, and such person provides such ratings or rankings in the ordinary course of its business.

■ 4. Revise § 275.206(4)–3 to read as follows:

§ 275.206(4)–3 Compensation for solicitations.

(a) As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4), it is unlawful for an investment adviser that is registered or required to be registered under section 203 of the Act to compensate a solicitor, directly or indirectly, for any solicitation activities, unless the investment adviser complies with paragraphs (1) through (3) of this section.

(1) *Written agreement.* The investment adviser's compensation to the solicitor is pursuant to a written agreement with the solicitor that:

(i) Describes with specificity the solicitation activities of the solicitor and the terms of the compensation for the solicitation activities;

(ii) Requires the solicitor to perform its solicitation activities in accordance with sections 206(1), (2), and (4) of the Act; and

(iii) Requires and designates the solicitor or the adviser to provide the client or private fund investor, at the time of any solicitation activities (or in the case of a mass communication, as soon as reasonably practicable thereafter) with a separate disclosure that states the following:

(A) The investment adviser's name;

(B) The solicitor's name;

(C) A description of the investment adviser's relationship with the solicitor;

(D) The terms of any compensation arrangement, including a description of the compensation provided or to be provided to the solicitor;

(E) A description of any potential material conflicts of interest on the part of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement; and

(F) The amount of any additional cost to the client or private fund investor as a result of solicitation.

(2) *Adviser oversight and compliance.* The investment adviser must have a reasonable basis for believing that the solicitor has complied with the written agreement required by paragraph (a)(1) of this section.

(3) *Disqualification.* (i) An investment adviser cannot compensate a solicitor, directly or indirectly, for any solicitation activity if the adviser knows, or, in the exercise of reasonable care, should have known, that the solicitor is an *ineligible solicitor.*

(ii) For purposes of paragraph (a)(3)(i) of this section, *ineligible solicitor* means:

(A) A person who at the time of the solicitation is subject to a *disqualifying Commission action* or is subject to any *disqualifying event;*

(B) Any employee, officer or director of an *ineligible solicitor* and any other individuals with similar status or functions;

(C) If the *ineligible solicitor* is a partnership, all general partners;

(D) If the *ineligible solicitor* is a limited liability company managed by elected managers, all elected managers; and

(E) Any person directly or indirectly controlling or controlled by the *ineligible solicitor* as well as any person listed in paragraphs (a)(3)(ii)(B) through (D) of this section with respect to such person;

(iii) For purposes of paragraph (a)(3)(ii) of this section:

(A) A *disqualifying Commission action* means a Commission opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws, or ordering the person to cease and desist from committing or causing a violation or future violation of:

(*1*) Any scienter-based antifraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b–5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)), or any other rule or regulation thereunder; or

(*2*) Section 5 of the Securities Act of 1933.

(B) A *disqualifying event* is any of the following events:

(*1*) A conviction by court of competent jurisdiction within the United States, within the previous ten years, of any felony or misdemeanor involving conduct described in paragraph (2)(A) through (D) of section 203(e) of the Act;

(*2*) A conviction by a court of competent jurisdiction within the United States, within the previous ten years, of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act;

(*3*) The entry of any final order of the U.S. Commodity Futures Trading Commission, a self-regulatory organization (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(26))), a State securities commission (or any agency or officer performing like functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that:

(*i*) Bars such person from association with an entity regulated by such commission, authority, agency, organization, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(*ii*) Constitutes a final order, entered within the previous ten years, based on violations of any laws, regulations, or rules that prohibit fraudulent, manipulative, or deceptive conduct.

(*4*) The entry of an order, judgment or decree described in paragraph (4) of section 203(e) of the Act, by any court of competent jurisdiction within the United States.

(C) If the same act(s) or omission(s) that are the subject of a *disqualifying event* for a person are also the subject of a *non-disqualifying Commission action* with respect to that person, such *disqualifying event* will be disregarded in determining whether the person is an *ineligible solicitor.* For purposes of paragraph (a)(3)(iii) of this section, *non-disqualifying Commission action* means:

(*1*) An order pursuant to section 9(c) of the Investment Company Act of 1940; or

(*2*) A Commission opinion or order that is not a *disqualifying Commission action,* provided:

(*i*) The person has complied with the terms of the opinion or order, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties and fines;

(*ii*) For a period of 10 years following the date of each opinion or order, the solicitor disclosure required under paragraph (a)(1)(iii) of this section includes a description of the acts or omissions that are the subject of, and the terms of, the opinion or order.

(b) *Exemptions.*

(1) *Impersonal investment advice.* Paragraphs (a)(1) and (a)(2) of this section do not apply to solicitation that is solely for impersonal investment advice, as defined in the Form ADV Glossary of Terms.

(2) *Partners, officers, directors or employees and certain other affiliates.* Paragraphs (a)(1) and (a)(2) of this section do not apply if the solicitor is one of the investment adviser's partners, officers, directors, or employees, or is a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person; provided that:

(i) The affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or private fund investor at the time of the solicitation; and

(ii) The adviser documents such solicitor's status at the time the adviser enters into the solicitation arrangement.

(3) De minimis *compensation.* Paragraph (a) of this section does not apply if the solicitor has performed solicitation activities for the investment adviser during the preceding 12 months and the investment adviser's compensation payable to the solicitor for those solicitation activities is $100 or less (or the equivalent value in non-cash compensation).

(4) *Nonprofit programs.* Paragraph (a) of this section does not apply to an adviser's participation in a program:

(i) When the adviser has a reasonable basis for believing that:

(A) The solicitor is a nonprofit program;

(B) Participating investment advisers compensate the solicitor only for the costs reasonably incurred in operating the program; and

(C) The solicitor provides clients a list of at least two investment advisers the inclusion of which is based on non-qualitative criteria such as, but not limited to, type of advisory services provided, geographic proximity, and lack of disciplinary history; and

(ii) The solicitor or the investment adviser prominently discloses to the client, at the time of any solicitation activities:

(A) The criteria for inclusion on the list of investment advisers; and

(B) That investment advisers reimburse the solicitor for the costs reasonably incurred in operating the program.

(c) Definitions. For purposes of this section,

(1) *Client* includes a prospective client.

(2) *Private fund* has the same meaning as in Section 2(a)(29) of the Act.

(3) *Private fund investor* includes a prospective private fund investor.

(4) *Solicitor* means any person who, directly or indirectly, solicits any client or private fund investor for, or refers any client or private fund investor to, an investment adviser.

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

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

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

[§ 279.1 Amended]

■ 6. Amend § 279.1 by revising Form ADV, Part 1A. The revised section of Form ADV, Part 1A—the addition of Item 5.L—is attached as Appendix A.

Note: The text of Form ADV does not and the amendments will not appear in the Code of Federal Regulations.

By the Commission.

Dated: November 4, 2019.

Vanessa A. Countryman,

Secretary.

IV. Appendix A: Changes to Form ADV

Note: This Appendix will not appear in the Code of Federal Regulations.

Item 5: Information About Your Advisory Business

Advisory Activities

L. Advertising Activities

For Items 5.L.(1)–(5), the terms *advertisement, testimonial, endorsement* and *third-party rating* have the meanings ascribed to them in rule 206(4)–1.

(1) Do any of your *advertisements* contain performance results?

Y N

(2) If you answer ''yes'' to L.(1) above, are all of the performance results verified or reviewed by a person who is not a *related person*?

Y N

(3) Do any of your *advertisements* include testimonials, endorsements, or third-party ratings?

Y N

(4) If you answer ''yes'' to L.(3) above, do you pay or otherwise provide cash or non-cash compensation, directly or indirectly, in connection with the use of *testimonials, endorsements,* or *third-party ratings*?

Y N

(5) Do any of your *advertisements* include a reference to specific investment advice provided by you?

Y N

V. Appendix B: Investor Feedback Flyer

Note: This Appendix will not appear in the Code of Federal Regulations.

Tell Us About Your Experiences With Investment Adviser Marketing

We're asking everyday investors like you what you think about how investment advisers market their services. Your responses will help us update the marketing rules for investment advisers.

It's important to us at the SEC to hear from individual investors so we can make it easier for you to choose an investment adviser that is right for you. Please take a few minutes to answer any or all of these questions. Please provide your comments by February 10, 2020—and thank you for your feedback!

If you are interested in background information on the proposed rule, see *https://www.sec.gov/rules/proposed/2019/ia-5407.pdf.*

All required fields are marked with an asterisk *

Contact Info

* First Name:

* Last Name:

* Email: (Your email address will not be published on the website)

1. Have you ever hired, or considered hiring, an investment adviser? Because investment advisers are the subject of this proposed rulemaking, please focus your responses in this questionnaire on investment advisers rather than brokers. Yes/no/don't know

2. Have you viewed any investment adviser advertisements? For example, have you looked at an adviser's website or a presentation? Yes/no/don't know

3. Have you looked at an adviser's past performance results when considering hiring an investment adviser? Yes/no/don't know

a. If yes, did the performance results affect your decision to hire an investment adviser? Yes/no/don't know

4. Have you ever specifically requested past performance results from the investment adviser? Yes/no/don't know

5. If you have viewed an adviser's past performance results, have you discussed them with the adviser? Yes/no/don't know

6. If you have viewed an adviser's past performance results, did you believe that those past performance results would predict the future performance that the adviser could achieve for you? Yes/no/don't know

7. How important is it to know the following information when reviewing the past performance results of an adviser?

Information	1 (very important)	2	3	4	5 (not important)	Don't know
Performance results *minus* fees and expenses (*i.e., net performance*).						
A schedule of the specific fees and expenses deducted to calculate *net performance*.						
Performance results for one-, five-, and ten-year periods.						
Other information (if any, please describe)	[free text]					

8. Have you reviewed hypothetical performance results that demonstrated how an investment strategy ''could have'' or ''would have'' worked? Yes/no/don't know

a. If yes, did you discuss with the adviser how the adviser calculated those hypothetical performance results? Yes/no/don't know

b. If yes, did you discuss with the adviser that those performance results were not actual results? Yes/no/don't know

c. If yes, how confident are you that you could tell whether the hypothetical performance results were misleading or not? Very confident/somewhat confident/not at all confident/don't know

9. Have you reviewed targeted performance returns or projected performance returns? Yes/no/don't know

a. If yes, did you discuss with the adviser the underlying assumptions on which those targets or projections were based? Yes/no/don't know

10. Would other people's opinions of the adviser (*e.g.,* testimonials by advisory clients, and endorsements by non-clients), or an adviser's rating by a third-party (*e.g.,* ''Rated B+ by Adviser Reports'') help you choose an investment adviser? Yes/no/don't know

11. How important is it to know the following information when considering a testimonial, endorsement, or rating of an adviser?

Information	1 (very important)	2	3	4	5 (not important)	Don't know
Whether the person giving the testimonial or endorsement is a current client.						
Whether the adviser pays the person giving the testimonial, endorsement, or the rating.						

Information	1 (very important)	2	3	4	5 (not important)	Don't know
How recent the rating is, and the period of time it covers.						
Other information (if any, please describe)	[free text]					

12. What other information do you think would make the advertisements not misleading? [free text]

13. Has a paid salesperson (a solicitor) ever referred you to an investment adviser? Yes/no/don't know

14. Would it affect your decision to hire an investment adviser if you knew that the adviser paid a salesperson to refer you to the adviser? Yes/no/don't know

15. How important is it to know the following information about a paid salesperson's referral?

Information	1 (very important)	2	3	4	5 (not important)	Don't know
Amount paid to the solicitor for referring you to the adviser.						
Whether there will be any additional cost to you.						
The solicitor's relationship to the adviser.						
Whether the solicitor has been disciplined for financial-related misconduct.						
Other information (if any, please describe)	[free text]					

Other Ways To Submit Your Feedback

You can also send us feedback in the following ways (include the file number S7–21–19 in your response):

Print Your Responses and Mail: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

Print a PDF of Your Responses and Email: Use the printer friendly page and select a PDF printer to create a file you can email to: *rule-comments@sec.gov*.

Print a Blank Copy of This Flier, Fill It Out, and Mail: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

We will post your feedback on our website. Your submission will be posted without change; we do not redact or edit personal identifying information from submissions. You should only make submissions that you wish to make available publicly.

Thank you!

VI. Appendix C: Smaller Adviser Feedback Flyer

Note: This Appendix will not appear in the Code of Federal Regulations.

Feedback Flier: Proposed Amended Adviser Advertising and Solicitation Rules.

We are proposing reforms of rules under the Advisers Act relating to how advisers advertise to and solicit clients and investors. First, we are proposing a rule addressing advertisements by investment advisers that would replace the rule that we adopted in 1961, rule 206(4)–1. We are also proposing to amend the Advisers Act cash solicitation rule, rule 206(4)–3, to update its coverage to reflect regulatory changes and the evolution of industry practices since we adopted the rule in 1979. We are also proposing related amendments to Form ADV that are designed to provide additional information regarding advisers' advertising practices, and amendments to the Advisers Act books and records rule, rule 204–2, related to the proposed changes to the advertising and solicitation rules. More information about our proposal is available at [URL].

We are interested in learning what smaller investment advisers think about the requirements of proposed new and amended advertising and solicitation rules for investment advisers. Hearing from smaller investment advisers could help us learn how our proposal would affect these entities, and evaluate how we could address any unintended consequences resulting from the cost and effort of regulatory compliance while still promoting investor protection. Please also note the following:

- While some smaller investment advisers may offer both advisory and brokerage services, please focus your responses on investment advisory advertising and referral activities.
- Because the advertising rules for registered investment companies (RICs) and business development companies (BDCs) are not the subject of this proposal, please focus your responses on advertising to non-RIC and non-BDC investors.

We would appreciate your feedback on any or all of the following questions. At your option, you may include general identifying information that would help us contextualize your other feedback on the proposal. This information could include responses to the following questions, as well as any other general identifying information you would like to provide. **All of the following questions are optional, including any questions that ask about identifying information.** Please note that responses to these questions—as well as any other general identifying information you provide—will be made public.

(1) General Information about the adviser:

a. How big is the adviser in terms of assets under management?

b. Approximately how many employees work for the adviser (include independent contractors in your answer)? ____

c. Does the adviser advise a registered investment company (RIC) or a business development company (BDC)? [Y/N]

d. Does the adviser advise a private fund or a pooled investment vehicle other than a RIC or BDC? [Y/N]

e. Does the adviser advise non-retail investors (qualified purchasers—*e.g.,* entities with $25 million in investments; natural persons with $5 million in investments; the adviser's knowledgeable employees)? [Y/N] Please exclude from your answer investors in any RIC, BDC, private fund or other pooled investment vehicle.

f. Does the adviser advise retail investors (all investors other than investors listed in c–e)? [Y/N] Please exclude from your answer investors in any RIC, BDC, private fund or other pooled investment vehicle.

g. Does the adviser advertise its advisory business? [Y/N]

(2) Questions about presentation of performance results in advertisements.

Our proposed advertising rule would generally treat performance advertising as follows:

Performance results in retail advertisements	Performance results in both retail and non-retail advertisements
• *Performance results generally.* If presenting performance results, the advertisement must include results of the same portfolio for one-, five-, and ten-year periods, each presented with equal prominence and ending on the most recent practicable date (except for portfolios not in existence during a particular prescribed period in which case the life of the *portfolio* must be substituted for that period). • *Gross performance.* Can present it only if the advertisement also presents net performance with at least equal prominence and in a format designed to facilitate comparison with gross performance. *See also schedule of fees.*	• *Schedule of fees.* If *any* advertisement presents gross performance, it must also provide or include an offer to provide, a schedule of the specific fees and expenses deducted to calculate net performance. In addition: • Any such schedule of fees must itemize the specific fees and expenses that were incurred in generating the performance of the specific portfolio being advertised. • Where an adviser does not otherwise present or calculate net performance, such schedule should show the fees and expenses that the adviser would apply in calculating net performance as though such adviser were presenting net performance.

a. As noted above, the proposed advertising rule would distinguish between advertisements to qualified purchasers and certain knowledgeable employees (defined as ''Non-Retail Advertisements'' in the proposed rule) and all other advertisements (defined as ''Retail Advertisements'' in the proposed rule).

1. Does the adviser currently have policies and procedures that help track which communications are given to qualified purchasers and knowledgeable employees, and which are given to retail investors? [Y/N]

2. If the adviser answered ''yes'' to question 1, do its policies and procedures help track the distribution of advertisements by third parties such as fund placement agents, capital introduction programs and third-party broker-dealers? [Y/N]

b. Presentation of gross and net performance, time period requirement, and schedule of fees.

1. In the past, has the adviser provided investors with information about fees and expenses that were deducted to calculate net performance? Check all that apply.

Provided fee schedule within advertisements	Offered to provide separate fee schedule	Did not advertise performance results	Don't know
[ ]	[ ]	[ ]	[ ]

2. Has the adviser calculated net performance by deducting ''model'' fees or expenses (instead of fees and expenses actually incurred)? [Y/N/Don't know]

3. If the adviser answered ''yes'' to questions 1 or 2, please provide any details you believe could provide helpful context for our rulemaking (*e.g.,* what categories of fees has the adviser typically deducted, or under what circumstances has the adviser deducted ''model'' fees?). [free text]

4. Are there types of fees and expenses for which providing a schedule would be particularly difficult and/or present compliance challenges? If so, what are they?

5. Approximately how much do you think it would cost the adviser, on an initial and ongoing basis, to comply with the proposed requirements for the presentation of certain time periods (one-, five-, and ten-year periods), the presentation of gross and net performance and the presentation or offer of schedule of fees, as applicable?

ESTIMATED INITIAL COST ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

ESTIMATED ONGOING COST PER YEAR ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

6. Would there be circumstances in which the adviser might have to provide proprietary or sensitive information to comply with these proposed requirements? Should we take those circumstances into account? If so, how? [free text]

c. Presentation of hypothetical performance.

Under our proposal, hypothetical performance generally is performance results that were not actually achieved by any portfolio of any client of the investment adviser.

The proposed advertising rule would allow an adviser to provide hypothetical performance in an advertisement only if:

- The adviser adopts and implements policies and procedures reasonably designed to ensure that hypothetical performance is given only to persons for which it is relevant to their financial situation and investment objectives;
- The adviser provides in the advertisement additional information that is tailored to the audience receiving it, that provides sufficient information to understand the criteria used and assumptions made in calculating the hypothetical performance; and

- The adviser provides in the advertisement additional information tailored to the audience receiving it that provides sufficient information to understand the risks and limitations of using hypothetical performance. For ''qualified purchasers'' and ''knowledgeable employees,'' an adviser could provide this information promptly upon request rather than providing it in the advertisement.

1. In the past, has the investment adviser presented in an advertisement any of the following types of hypothetical performance? Check all that apply.

Performance derived from representative model portfolios that are managed contemporaneously alongside portfolios managed for actual clients	Performance that is backtested by the application of a strategy to market data from prior periods when the strategy was not actually used during those periods	Targeted or projected performance returns with respect to any portfolio or to the investment services offered or promoted in the advertisement	Did not advertise hypothetical performance	Other (please explain)
[ ]	[ ]	[ ]	[ ]	[free text]

2. Does the adviser believe that, if the proposed advertising rule is adopted, the adviser would present hypothetical performance results in advertisements? [Y/N]

3. If the adviser answered ''yes'' to question 2, how much do you think it would cost the adviser, on an initial and ongoing basis, to comply with the proposed requirements for advertisements presenting hypothetical performance (*e.g.,* preparing and adopting policies and procedures that address the distribution of advertisements containing hypothetical performance)?

ESTIMATED INITIAL COST ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise hypothetical performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

ESTIMATED ONGOING COST PER YEAR ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise hypothetical performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

d. Presentation of related and extracted performance.

Presentation of related performance	Presentation of extracted performance
• Under the proposed rule, related performance is generally performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as one or more composite aggregations of all portfolios falling within stated criteria • The proposed rule would allow the presentation in any advertisement of related performance, if the performance generally includes all related portfolios, which would generally be portfolios managed by the investment adviser, with substantially similar investment policies, objectives, and strategies as those of the services being offered or promoted in the advertisement	• Under the proposed rule, ''extracted performance'' is generally the performance results of a subset of investments extracted from a portfolio. • The proposed rule would allow the presentation in any advertisement of extracted performance if the advertisement provides or offers to provide promptly the performance results of all investments in the portfolio from which the performance was extracted.

1. In the past, has the investment adviser presented in an advertisement any related or extracted performance? Check all that apply.

Related performance	Extracted performance	Did not advertise performance	Don't know
[ ]	[ ]	[ ]	[ ]

2. Does the adviser believe that, if the proposed advertising rule is adopted, the adviser would present related or extracted performance in advertisements? [Y/N]

3. If the adviser answered ''yes'' to question 2, how much do you think it would cost the adviser, on an initial and ongoing basis, to comply with the proposed requirements for advertisements presenting related or extracted performance?

ESTIMATED INITIAL COST ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

ESTIMATED ONGOING COST PER YEAR ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

e. Additional performance advertising question.

1. If the adviser disseminates advertisements by or through third parties, what steps would the adviser expect to take in order to comply with the proposed requirements for performance advertising? [free text]

(3) Use of testimonials, endorsements, and third-party ratings in adviser advertisements.

Under our proposal:

- A testimonial generally means a statement of a client or investor's experience with the adviser.
- An endorsement generally means a statement by a person other than a client or investor indicating approval, support, or recommendation of the investment adviser.
- A third-party rating generally means a rating of an investment adviser provided by a third-party that provides such ratings in the ordinary course of its business.

In addition to the conditions described below, under our proposal an adviser could not use a testimonial, endorsement, or third-party rating in an advertisement if it violates the proposed advertising rule's general prohibitions of certain advertising practices (*e.g.,* it could not include an untrue or misleading implication about a material fact relating to the investment adviser).

Our proposed advertising rule would permit investment advisers to use testimonials and endorsements only if:	Our proposed advertising rule would permit investment advisers to use third-party ratings in adviser advertisements, only if:
• They clearly and prominently disclose: ▪ That the statement was given by an investor (if a testimonial) or a non-investor (if an endorsement); and ▪ That cash or non-cash compensation has been provided by or on behalf of the adviser in connection with the testimonial or endorsement, if applicable.	• They contains disclosures similar to, and in addition to, those required for testimonials and endorsements; and • The adviser reasonably believes that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any pre-determined results.

1. Does the adviser currently use endorsements and/or third-party ratings in adviser advertisements? [Y/N]

2. Do you anticipate that, if the proposed advertising rule is adopted, the adviser would use testimonials, endorsements, or third-party ratings in adviser advertisements? [Y/N]

3. If an adviser advertises a testimonial, endorsement, or third-party rating that is made available by a third-party (such as on a third-party hosted website), what procedures would the adviser implement to form a reasonable belief that the third-party includes the required disclosures in the testimonials, endorsements, or third-party ratings?

4. If the adviser answered ''yes'' to either question 1 or 2, approximately how much do you think it would cost the adviser, per year on an initial and ongoing basis, to implement the proposed requirements for testimonials, endorsements, and third-party ratings (*e.g.,* the required disclosures and the additional conditions for using third-party ratings)? If applicable, include in your answer the costs of forming a reasonable belief that any testimonial, endorsement, or third-party rating in an adviser advertisement that is made available by a third-party contains the required disclosures.

ESTIMATED INITIAL COST ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

ESTIMATED ONGOING COST PER YEAR ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	$50,001–$100,000	>$100,001	Does not expect to advertise performance results	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

(4) Review and approval of advertisements.

The proposed advertising rule would generally require an adviser to designate an employee that would be required to review the adviser's advertisements before each advertisement is given to any client or investor. The following are exceptions to this requirement:

- Communications that are disseminated only to a single person or household or to a single investor in a pooled investment vehicle; or
- Live oral communications that are broadcast on radio, television, the internet, or any other similar medium.

1. Does the adviser already have internal policies and procedures that require reviews of adviser advertisements? [Y/N]

2. If so, who reviews the adviser's advertisements? (check all that apply)

PERSONNEL WHO HAVE REVIEWED ADVISER ADVERTISEMENTS

In-house compliance employee(s)	Chief compliance officer	In-house attorney(s)	In-house paralegal	In-house business analyst and/or portfolio manager	In-house marketing personnel	Outside consultant or outside attorney	Other (please describe)
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[free text]

3. If the adviser answered ''yes'' to question 1, would the adviser need to expand the scope of existing reviews as a result of the proposed rule (*e.g.,* so that the employee review process would apply to advertisements emailed to more than 1 person)? [Y/N]

4. Approximately how much do you think it would cost the adviser, per year on an initial and ongoing basis, to comply with the proposed employee review requirements (*e.g.,* preparing, adopting, implementing and overseeing any new or revised policies and procedures for review of advertisements)?

ESTIMATED INITIAL COST ($)

$0–$25,000	$25,000–$50,000	$50,000–$100,000	$100,000–$500,000	>$500,000	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

ESTIMATED ONGOING COST PER YEAR ($)

$0–$25,000	$25,000–$50,000	$50,000–$100,000	$100,000–$500,000	>$500,000	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

5. If the adviser already has policies and procedures that require reviews of adviser advertisements, would the adviser designate a different employee or employees to review advertisements under the proposed advertising rule? [Y/N]

6. If the proposed advertising rule is adopted, which employee or employees would the adviser designate to review the advertisements?

PERSONNEL WHO WOULD REVIEW ADVISER ADVERTISEMENTS

Same personnel who currently review advertisement (see above)	Compliance employee(s)	Chief compliance officer	Attorney(s) (legal and/or compliance attorney)	Paralegal	Business analyst and/or portfolio manager	Marketing personnel	Other (please describe)
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[free text]

7. If we were to require that the employee who reviews a firm's advertisements be someone other than the employee who created the advertisements, would the adviser be able to comply with the rule? [Y/N]

(5) Overall effect of proposed advertising rule on smaller advisers.

1. If the proposed advertising rule is adopted, which of the following impacts do you think the amended rule would have on

your firm's advertising and related compliance budget?

____ No impact (budget would be unchanged)
____ Budget would be the same overall amount but allocated differently
____ Budget would be increased
____ Budget would be decreased
____ Don't know

(6) General Information about the adviser's referral activities.

1. Does the adviser, directly or indirectly, provide any person compensation that is specifically related to obtaining advisory clients? Do not include regular salaries paid to your employees. [Y/N]

2. If the adviser advises any private funds, does the adviser, directly or indirectly, provide any person compensation that is specifically related to obtaining investors in the firm's private funds? Do not include regular salaries paid to your employees. [Y/N/Adviser does not advise any private funds]

3. If you answered ''yes'' to questions (1) or (2), who does the adviser compensate for referrals (other than regular salary)? (Check either or both)

____ The adviser compensates its own personnel
____ The adviser compensates a third-party

4. If you answered ''yes'' to questions (1) or (2), does the adviser pay cash compensation, non-cash compensation, or both? Non-cash compensation can be, for example, gifts and sending business to the adviser's solicitors (*e.g.,* directing brokerage to brokers who solicit for the adviser).

____ Cash compensation
____ Non-cash compensation

5. If the adviser pays solicitors non-cash compensation, can the adviser briefly describe the type of non-cash compensation? [free text]

6. If applicable, which of the below options best represents the typical dollar amount or value of compensation paid per referral (in cash or converted to cash equivalent)?

ESTIMATED COST

[In dollar or equivalent amount]

$1–$20	$21–$100	$101–$1,000	>$1,001	A percentage of assets under management	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

(7) Questions about the proposed solicitation rule.

Under the proposed solicitation rule, an adviser that pays cash or non-cash compensation to a solicitor for investor referrals would be subject to the proposed rule's requirements, generally as follows:

- The adviser and solicitor must enter into a written agreement that describes the solicitation activities to be performed along with the terms of the compensation for the solicitation activities, and contains an undertaking by the solicitor to perform its duties under the agreement in a manner consistent with certain Advisers Act rules.
- The solicitor or the adviser must provide the client with a separate solicitor disclosure describing the solicitation arrangement and the solicitor's compensation.
- The adviser must oversee the solicitor's solicitation activities.
- The adviser may not hire a disqualified solicitor (a list of disqualifying misconduct is enumerated in the rule).

The proposed solicitation rule would contain certain exemptions from most or all of the above for:

- An adviser's employees and other affiliates.
- Solicitors that refer client solely for impersonal investment advice.
- Solicitors that are provided *de minimis* compensation of $100 or less during a 12-month period.
- Solicitors that are nonprofit programs that satisfy certain conditions and disclosures under the proposed rule.

1. If the proposed solicitation rule were adopted, would the adviser be required to enter into additional written agreements with solicitors, given the proposed rule's expanded application to non-cash compensation and compensated solicitations for private fund investors?

____ The adviser would be required to enter into additional written agreements with solicitors because of the proposed rule's new inclusion of non-cash compensation
____ The adviser would be required to enter into additional written agreements with solicitors because of the proposed rule's new inclusion of compensation to solicitors of private fund investors
____ Both of the above
____ The adviser does not expect enter into any solicitation arrangements that would be subject to the proposed rule

2. If the proposed rule is adopted, does the adviser think that it would use any of the proposed rule's exemptions? [Y/N]

3. If yes, please check all that apply:

____ Exemption for compensation to an adviser's employees or other affiliates
____ Exemption for compensation to solicitors that refer clients solely for impersonal investment advice
____ Exemption for *de minimis* compensation to solicitors ($100 or less during a 12-month period)
____ Exemption for compensation to solicitors that are nonprofit programs

4. Does the adviser currently have policies and procedures to determine that a solicitor is not disqualified under the rule (*e.g.,* the solicitor did not engage in the rule's enumerated misconduct), and that the solicitor complies with the proposed rule's written agreement requirements (including delivering the solicitor disclosure)?

5. If the adviser answered ''yes'' to question 4, what steps does the adviser take to oversee its solicitors? (free text)

6. What does the adviser expect the cost would be, per year on an initial and ongoing basis, in order to comply with the proposed solicitation rule's requirements (*e.g.,* overseeing its solicitors, overseeing any policies and procedures around solicitor disqualification, entering into required written solicitation agreements, preparing and delivering solicitor disclosures or overseeing the solicitor's delivery of the disclosures, and tracking the firm's use of any applicable exemptions)?

ESTIMATED INITIAL COST ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	>$50,001	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]

ESTIMATED ONGOING COST PER YEAR ($)

$0–$5,000	$5,001–$10,000	$10,001–$50,000	>$50,001	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]

7. If the adviser anticipates that it would use employees or other affiliates as compensated solicitors under the proposed rule, does the adviser believe that the affiliation between the employee/affiliate, on the one hand, and the adviser, on the other hand, would be readily apparent to the solicited client or investor? [Y/N/not applicable]

8. If the adviser answered ''no'' to the previous question, would it be impractical or difficult for the employee or affiliate to disclose its affiliation with the adviser at the time of solicitation? [Y/N/don't know] If yes, what practical difficulties would arise? [free text]

9. If the proposed amendments to the solicitation rule are adopted, do you think your firm's solicitation or referral and related compliance budget would be:

____ No impact (budget would be unchanged)
____ Budget would be the same overall amount but allocated differently
____ Budget would be increased
____ Budget would decreased
____ Don't know

(8) Questions about the proposed amendments to the books and records rule.

Advisers are currently required to make and keep certain books and records relating to their investment advisory businesses. Our proposal would update the recordkeeping rule to conform to the proposed changes to the advertising and solicitation rules, as follows:

- An adviser would be newly required to keep copies of advertisements to one or more persons (rather than to ten or more persons, as is generally required now).
- An adviser would be newly required to keep copies of written approvals of advertisements required under proposed advertising rule's employee review.
- An adviser that uses a third-party rating in any advertisement under the proposed rule would be newly required to retain copies of questionnaires or surveys used in preparation of the third-party rating.
- An adviser that compensates a solicitor under the proposed solicitation rule would no longer be required to keep written acknowledgments of each client's receipt of the solicitor disclosure, but would be newly required to keep certain records related to its belief that each solicitor has complied with the required written agreement.
- An adviser that compensates a nonprofit program under the proposed solicitation rule would be newly required to keep certain records relating to the nonprofit program.
- An adviser that compensates a solicitor under the proposed solicitation rule would be newly required to keep certain records related to its belief that any such solicitor is not disqualified under the proposed solicitation rule.
- An adviser that compensates a solicitor under the proposed solicitation rule would be newly required to keep records of the names of all solicitors that are employees or other affiliates.

1. Approximately how much do you think it would cost the adviser, on an initial and ongoing basis, to comply with the proposed amendments to the books and records rule?

ESTIMATED INITIAL COST ($)

$0–$1,000	$1,001–$5,000	$5,001–$10,000	$10,001–$15,000	>$15,001	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

ESTIMATED ONGOING COST PER YEAR ($)

$0–$1,000	$1,001–$5,000	$5,001–$10,000	$10,001–$15,000	>$15,001	Does not know
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

2. Would complying with these proposed amendments to the books and records rule be particularly difficult and/or present compliance challenges? Please explain.

(9) Additional overall feedback.

1. Are there any less expensive alternatives to any of these proposed requirements you can suggest that would still preserve the proposed amendments' intended investor protection safeguards? [free text]

How to Submit Your Feedback:

You can also send us feedback in the following ways (include the file number S7–21–19 in your response):

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Submit a PDF of Your Responses and Email: Use this fillable PDF form to fill out and click ''Submit Form'' when finished to email a file to: *rule-comments@sec.gov*.

Print a Blank Copy of this Flier, Fill it Out, and Mail: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

We will post your feedback on our website. Your submission will be posted without change; we do not redact or edit personal identifying information from submissions. You should only make submissions that you wish to make available publicly.

Thank you!

[FR Doc. 2019–24651 Filed 12–9–19; 8:45 am]
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Federal Register

Vol. 84, No. 237

Tuesday, December 10, 2019

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CFR PARTS AFFECTED DURING DECEMBER

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *http://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

H.R. 5277/P.L. 116–78
To amend section 442 of title 18, United States Code, to exempt certain interests in mutual funds, unit investment trusts, employee benefit plans, and retirement plans from conflict of interest limitations for the Government Publishing Office. (Dec. 5, 2019; 133 Stat. 1175)

Last List December 4, 2019

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